

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

B E T W E E N:

**INVESCO CANADA LTD. NORTHWEST & ETHICAL INVESTMENTS
L.P., Comité syndical national de retraite Bâtirente inc., MATRIX ASSET
MANAGEMENT INC., GESTION FÉRIQUE, AND MONTRUSCO
BOLTON INVESTMENTS INC.**

Applicants
(Moving Parties/Appellants)

and

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

Respondents
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

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(Pursuant to Section 44 of the *Rules of the Supreme Court of Canada*)

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INDEX

Tab	Cases
1.	<i>ATB Financial v. Metcalf and Mansfield Alternative Investments Corp.</i> , [2008] O.J. No. 2265 (S.C.J.)
2.	<i>ATB Financial v. Metcalf and Mansfield Alternative Investments Corp.</i> , 2008 ONCA 587
3.	<i>Jean Coutu Group (PJC) Inc. v. Metcalfe & Mansfield Alternative Investments II Corp.</i> , [2008] S.C.C.A. No. 337
4.	<i>Century Services Inc. v. Canada (Attorney General)</i> , 2010 SCC 60
5.	<i>Elan Corp. v. Comiskey</i> , [1990] O.J. 2180, 1 O.R. (3d) 289 (C.A.)
6.	<i>Kourtesis v. Canada (Minister of National Revenue-M.N.R.)</i> , [1993] 2 S.C.R. 53
7.	<i>MacDonald v. Montreal (City)</i> , [1986] 1 S.C.R. 460
8.	<i>Re 1078385 Ontario Ltd.</i> , [2004] O.J. No. 6050 (C.A.)
9.	<i>Re Allen-Vanguard Corporation</i> , 2011 ONSC 5017
10.	<i>Re Canadian Red Cross Society</i> [1998], O.J. No. 3306 (Ct. of J.)
11.	<i>Re Crystallex International Corp.</i> , [2012] O.J. No. 2651 (C.A.)
12.	<i>Re Grace Canada Inc.</i> , [2008] O.J. No. 4208 (S.C.J.)
13.	<i>Re Muscle Tech Research and Development Inc.</i> , [2007] O.J. No. 695 (S.C.J.)
14.	<i>Re Nortel Networks Corp.</i> , [2010] O.J. No. 1232 (S.C.J.)
15.	<i>Re Pacific National Lease Holding Corp.</i> , [1992] B.C.J. No. 2309 (C.A.)
16.	<i>Re Stelco Inc.</i> , [2005] O.J. No. 4883 (C.A.)
17.	<i>Re Timminco Ltd.</i> , 2012 ONCA 552
18.	<i>Resurgence Asset Management LLC v. Canadian Airlines Corp.</i> , 2000 ABCA 238
19.	<i>Resurgence Asset Management LLC v. Canadian Airlines Corp.</i> , [2001] S.C.C.A. No. 60
20.	<i>Robertson v. ProQuest Information and Learning Co.</i> , 2011 ONSC 1647

21.

Statoil Canada Ltd. (Arrangement relatif à), 2012 QCCA 665

Case Name:

**ATB Financial v. Metcalfe & Mansfield Alternative
Investments II Corp.**

IN THE MATTER OF the Companies' Creditors Arrangement

Act, R.S.C. 1985, c. C-36, as amended

**AND IN THE MATTER OF a Plan of Compromise and
Arrangement involving Metcalfe & Mansfield Alternative
Investments II Corp., Metcalfe & Mansfield Alternative
Investments III Corp., Metcalfe & Mansfield Alternative
Investments V Corp., Metcalfe & Mansfield Alternative
Investments XI Corp., Metcalfe & Mansfield Alternative
Investments XII Corp., 6932819 Canada Inc. and 4446372
Canada Inc., Trustees of the Conduits Listed In
Schedule "A" Hereto**

Between

**The Investors represented on the Pan-Canadian Investors
Committee for Third-Party Structured Asset-Backed
Commercial Paper listed in Schedule "B" hereto,**

Applicants, and

**Metcalfe & Mansfield Alternative Investments II Corp.,
Metcalfe & Mansfield Alternative Investments III Corp.,
Metcalfe & Mansfield Alternative Investments V Corp.,
Metcalfe & Mansfield Alternative Investments XI Corp.,
Metcalfe & Mansfield Alternative Investments XII Corp.,
6932819 Canada Inc. and 4446372 Canada Inc., Trustees
of the Conduits listed in Schedule "A" hereto,**

Respondents

[2008] O.J. No. 2265

43 C.B.R. (5th) 269

2008 CarswellOnt 3523

168 A.C.W.S. (3d) 244

47 B.L.R. (4th) 74

2008 CanLII 27820

Court File No. 08-CL-7440

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: May 12-13 and June 3, 2008.
Judgment: June 5, 2008.

(158 paras.)

Insolvency law -- Proposals -- Court approval -- Effect of proposal -- Voting by creditors -- Application by the investors represented by the Pan-Canadian Investors Committee for approval of a Plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders -- Plan was opposed by a number of corporate and individual noteholders on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases -- Application allowed -- Releases sought as part of the plan, including the language exempting fraud, were permissible under the Companies' Creditors Arrangement Act and were fair and reasonable -- Companies' Creditors Arrangement Act.

Application by the investors represented by the Pan-Canadian Investors Committee for third-party structured asset-backed commercial paper for approval of a plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders. Plan was opposed by a number of corporate and individual noteholders, primarily on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases. Between mid-2007 and the filing of the plan, the applicant Committee had diligently pursued the object of restructuring not just the specific trusts that were part of the plan, but faith in a market structure that had been a significant part of the Canadian financial market. Claims for damages included the face value of notes plus interest and additional penalties and damages that might be allowable at law. Information provided by the potential defendants indicated the likelihood of claims over and against parties such that no entity, institution or party involved in the restructuring plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

HELD: The releases sought as part of the plan, including the language exempting fraud, were permissible under the CCAA and were fair and reasonable. The motion to approve the plan of arrangement sought by the application was allowed on the terms of the draft order. The plan was a business proposal and that included the releases. The plan had received overwhelming creditor support. The situation in this case was a unique one in which it was necessary to look at larger issues than those affecting those who felt strongly that personal redress should predominate.

Statutes, Regulations and Rules Cited:

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

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For parties and their counsel see Appendix 1.

REASONS FOR DECISION

1 C.L. CAMPBELL J.:-- This decision follows a sanction hearing in parts in which applicants sought approval of a Plan under the *Companies Creditors Arrangement Act* ("CCAA.") Approval of the Plan as filed and voted on by Noteholders was opposed by a number of corporate and individual Noteholders, principally on the basis that this Court does not have the jurisdiction under the CCAA or if it does should not exercise discretion to approve third party releases.

...

38 I have carefully considered the submissions of all parties with respect to the issue of releases. I recognize that to a certain extent the issues raised chart new territory. I also recognize that there are legitimate principle-based arguments on both sides.

39 As noted in the Reasons of April 8, 2008 and as reflected in the March 17, 2008 Order and May 16 Endorsement, the Plan represents a highly complex unique situation.

40 The vehicles for the Initial Order are corporations acting in the place of trusts that are insolvent. The trusts and the respondent corporations are not directly related except in the sense that they are all participants in the Canadian market for ABCP. They are each what have been referred to as issuer trustees.

41 There are a great number of other participants in the ABCP market in Canada who are themselves intimately connected with the Plan, either as Sponsors, Asset Providers, Liquidity Providers, participating banks or dealers.

42 I am satisfied that what is sought in this Plan is the restructuring of the ABCP market in Canada and not just the insolvent corporations that are issuer trustees.

43 The impetus for this market restructuring is the Investors Committee chaired by Mr. Crawford. It is important to note that all of the members of the Investors Committee, which comprise 17 financial and investment institutions (see Schedule B, attached), are themselves Noteholders with no other involvement. Three of the members of that Committee act as participants in other capacities.

44 The Initial Order, which no party has appealed or sought to vary or set aside, accepts for the purpose of placing before all Noteholders the revised Plan that is currently before the Court.

45 Those parties who now seek to exclude only some of the Release portions of the Plan do not take issue with the legal or practical basis for the goal of the Plan. Indeed, the statement in the Information to Noteholders, which states that

... as of August 31, 2007, of the total amount of Canadian ABCP outstanding of approximately \$116.8 billion (excluding medium-term and floating rate notes), approximately \$83.8 billion was issued by Canadian Schedule I bank-administered Conduits and approximately \$33 billion was issued by non-bank administered conduits)¹

is unchallenged.

...

51 The Plan, including all of its constituent parts, has been overwhelmingly accepted by Noteholders no matter how they are classified. In the sense of their involvement I do not think it appropriate to label any of the participants as Third Parties. Indeed, as this matter has progressed, additions to the supporter side have included for the proposed releases the members of the Ad Hoc Investors' Committee. The Ad Hoc group had initially opposed the release provisions. The Committee members account for some two billion dollars' worth of Notes.

52 It is more appropriate to consider all participants part of the market for the restructuring of ABCP and therefore not merely third parties to those Noteholders who may wish to sue some or all of them.

53 The benefit of the restructuring is only available to the debtor corporations with the input, contribution and direct assistance of the Applicant Noteholders and those associated with them who similarly contribute. Restructuring of the ABCP market cannot take place without restructuring of the Notes themselves. Restructuring of the Notes cannot take place without the input and capital to the insolvent corporations that replace the trusts.

54 A hearing was held on May 12 and 13 to hear the objections of various Noteholders to approval of the Plan insofar as it provided for comprehensive releases.

55 On May 16, 2008, by way of endorsement the issue of scope of the proposed releases was addressed. The following paragraphs from the endorsement capsulize the adjournment that was granted on the issue of releases:

[10] I am not satisfied that the release proposed as part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or another.

[11] I have also reached the conclusion that in the circumstances of this Plan, at this time, it may well be appropriate to approve releases that would circumscribe claims for negligence. I recognize the different legal positions but am satisfied that this Plan will not proceed unless negligence claims are released.

56 The endorsement went on to elaborate on the particular concerns that I had with releases sought by the Applicants that could in effect exonerate fraud. As well, concern was expressed that the Plan might unduly bring hardship to some Noteholders over others.

57 I am satisfied that based on Mr. Crawford's affidavit and the statements commencing at p. 126 of the Information to Noteholders, a compelling case for the need for comprehensive releases, with the exception of certain fraud claims, has been made out.

The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forbearing from making collateral calls since August 15, 2007, participating in the MAV2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at par with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, co-operated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. The Original Issuer Trustees, the Issuer Trustees, the Existing Note Indenture Trustees and the Rating Agency have assisted in the restructuring process as needed and have co-operated with the Investors Committee in facilitating an essential aspect of the court proceedings required to complete the restructuring of the ABCP Conduits through the replacement of the Original Issuer Trustees where required.

In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impracticable to identify and/or quantify any individual Released Party's contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not released by the Noteholders is unable to make a claim-over for contribution from a Released Party and thereby defeat the effectiveness of the releases. Certain entities represented on the Investors Committee have also participated in the Third-Party ABCP market in a variety of capacities other than as Noteholders and, accordingly, are also expected to benefit from these releases.

The evidence is unchallenged.

58 The questions raised by moving parties are (a) does the Court have jurisdiction to approve a Plan under the CCAA that provides for the releases in question?; and if so, (b) is it fair and reasonable that certain identified dealers and others be released?

59 I am also satisfied that those parties and institutions who were involved in the ABCP market directly at issue and those additional parties who have agreed solely to assist in the restructuring have valid and legitimate reasons for seeking such releases. To exempt some Noteholders from release provisions not only leads to the failure of the Plan, it does likely result in many Noteholders having to pursue fraud or negligence claims to obtain any redress, since the value of the assets underlying the Notes may, after first security interests be negligible.

Restructuring under the CCAA

60 This Application has brought into sharp focus the purpose and scope of the CCAA. It has been accepted for the last 15 years that the issue of releases beyond directors of insolvent corporations dates from the decision in *Canadian Airlines Corp. (Re)*,³ where Paperny J. said:

[87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 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 relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that:

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

61 The following paragraphs from that decision are reproduced at some length, since, in the submission principally of Mr. Woods, the releases represent an illegal or improper extension of the

wording of the CCAA. Mr. Woods takes issue with the reasoning in the *Canadian Airlines* decision, which has been widely referred to in many cases since. Mme Justice Paperny continued:

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly.

...

[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception. [Emphasis added.]

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.*^[4] at page 9:

"Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction -- although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

- a. The composition of the unsecured vote;
- b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
- c. Alternatives available to the Plan and bankruptcy;
- d. Oppression;
- e. Unfairness to Shareholders of CAC; and
- f. The public interest.

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable

because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position than the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or 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.

62 The liberal interpretation to be given to the CCAA was and has been accepted in Ontario. In *Canadian Red Cross Society (Re)*^s, Blair J. (as he then was) has been referred to with approval in later cases:

[45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.*, [1995] O.J. No. 595, *supra* (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for

the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[Emphasis added]

63 In a 2006 decision in *MuscleTech Research and Development Inc. (Re)*⁶, which adopted the *Canadian Airlines* test, Ground J. said:

[7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

"the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."

64 This decision is also said to be beyond the Court's jurisdiction to follow.

65 In a later decision⁷ in the same matter, Ground J. said in 2007:

[18] It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the

plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

[19] In the case at bar, all of such considerations, in my view must lead to the conclusion that the Plan is fair and reasonable. On the evidence before this court, the Applicants have no assets and no funds with which to fund a distribution to creditors. Without the Contributed Funds there would be no distribution made and no Plan to be sanctioned by this court. Without the Contributed Funds, the only alternative for the Applicants is bankruptcy and it is clear from the evidence before this court that the unsecured creditors would receive nothing in the event of bankruptcy.

[20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

[21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

66 I recognize that in *Muscletech*, as in other cases such as *Vicwest Corp. (Re)*,⁸ there has been no direct opposition to the releases in those cases. The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.⁹

67 The moving parties rely on the decision of the Ontario Court of Appeal in *NBD Bank, Canada v. Dofasco Inc.*¹⁰ for the proposition that compromise of claims in negligence against those associated with a debtor corporation within a CCAA context is not permitted.

68 The claim in that case was by NBD as a creditor of Algoma Steel, then under CCAA protection against its parent Dofasco and an officer of both Algoma and Dofasco. The claim was for negligent misrepresentation by which NBD was induced to advance funds to Algoma shortly before the CCAA filing.

69 In the approved CCAA order only the debtor Algoma was released. The Court of Appeal held that the benefit of the release did not extend to officers of Algoma or to the parent corporation Dofasco or its officers.

70 Rosenberg J.A. writing for the Court said:

[51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the Plan of Arrangement was approved by Farley J. in April 1992. The Plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The Plan of Arrangement included the following term:

6.03 Releases

From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors. [Emphasis added.]

...

[54] In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by direc-

tors". L. W. Houlden and C. H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Reference omitted]

71 In my view, there is little factual similarity in *NBD* to the facts now before the Court. In this case, I am not aware of any claims sought to be advanced against directors of Issuer Trustees. The release of Algoma in the *NBD* case did not on its face extend to Dofasco, the third party. Accordingly, I do not find the decision helpful to the issue now before the Court. The moving parties also rely on decisions involving another steel company, Stelco, in support of the proposition that a CCAA Plan cannot be used to compromise claims as between creditors of the debtor company.

72 In *Stelco Inc. (Re)*,¹¹ Farley J., dealing with classification, said in November 2005:

[7] The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

73 The Ontario Court of Appeal dismissed the appeal from that decision.¹² Blair J.A., quoting Paperny J. in *Re Canadian Airlines Corp.*, *supra*, said:

[23] In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.),

Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, 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 company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the C.C.C.A., 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.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S.T.D.); *Re Woodward's Ltd.* 1993 CanLII 870 (BC S.C.), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, (*sub nom. Amoco Acquisition Co. v. Savage*) (Alta. C.A.); *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines* decision: *Re Canadian Airlines Corp.* 2000 ABCA 149 (CanLII), (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 27.

...

[32] First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada* [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24 (after referring to the full style of the legislation):

[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.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

[35] Finally, 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 sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association -- Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, *supra*; *Sklar-Peppler*, *supra*;

Re Woodward Ltd., supra.

[36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Re Canadian Airlines*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

74 In 2007, in *Stelco Inc. (Re)*¹³, the Ontario Court of Appeal dismissed a further appeal and held:

[44] We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the CCAA. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at 15 C.B.R. (5th) 297, Farley J. expressed this point (at para. 7) as follows:

The CCAA is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.

[45] Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

75 I have quoted from the above decisions at length since they support rather than detract from the basic principle that in my view is operative in this instance.

76 I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets

and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

77 This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes. The only contract between creditors in this case relates directly to the Notes.

...

Steinberg Decision

83 Against the authorities referred to above, those opposed to the Plan releases rely on the June 16, 1993 decision of the Quebec Court of Appeal in *Michaud v. Steinberg Inc.*¹⁵

84 Mr. Woods for some of the moving parties urges that the decision, which he asserts makes third party releases illegal, is still good law and binding on this Court, since no other Court of Appeal in Canada has directly considered or derogated from the result. (It appears that the decision has not been reported in English, which may explain some of the absence of comment.)

85 The Applicants not surprisingly take an opposite view. Counsel submits that undoubtedly in direct response to the *Steinberg* decision, Parliament added s. 5.1 (see above paragraph [60]) thereby opening the door for the analysis that has followed with the decisions of *Canadian Airlines*, *Muscletech* and others. In other words, it is urged the caselaw that has developed in the 15 years since *Steinberg* now provide a basis for recognition of third party releases in appropriate circumstances.

86 The *Steinberg* decision dealt directly with releases proposed for acts of directors. The decision appears to have focused on the nature of the contract created and binding between creditors and the company when the plan is approved. I accept that the effect of a Court-approved CCAA Plan is to impose a contract on creditors.

87 Reliance is placed on the decision of Deschamps J.A. (as she then was) at the following paragraphs of the *Steinberg* decision:

[54] 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.

[57] If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corre-

sponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.

[59] Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.

[68] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

[74] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

88 If it were necessary to do so, I would accept the position of the Applicants that the history of judicial interpretation of the CCAA at both the appellate and trial levels in Canada, along with the change to s. 5.1, leaves the decision in *Steinberg* applicable to a prior era only.

89 I do not think it necessary to go that far, however. One must remember that *Steinberg* dealt with release of claims against directors. As Mme. Justice Deschamps said at paragraph 54, "[A] plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement."

90 In this case, all the Noteholders have a common claim, namely to maximize the value obtainable under their notes. The anticipated increase in the value of the notes is directly affected by the risk and contribution that will be made by asset and liquidity providers.

91 In my view, depriving all Noteholders from achieving enhanced value of their notes to permit a few to pursue negligence claims that do not affect note value is quite a different set of circumstances from what was before the Court in *Steinberg*. Different in kind and quality.

92 The sponsoring parties have accepted the policy concern that exempting serious claims such as some frauds could not be regarded as fair and reasonable within the context of the spirit and purpose of the CCAA.

93 The sponsoring parties have worked diligently to respond to that concern and have developed an exemption to the release that in my view fairly balances the rights of Noteholders with serious claims, with the risk to the Plan as a whole.

Statutory Interpretation of the CCAA

94 Reference was made during argument by counsel to some of the moving parties to rules of statutory interpretation that would suggest that the Court should not go beyond the plain and ordinary words used in the statute.

95 Various of the authorities referred to above emphasize the remedial nature of the legislation, which leaves to the greatest extent possible the stakeholders of the debtor corporation to decide what Plan will or will not be accepted with the scope of the statute.

...

99 The modern purposive approach is now well established in interpreting CCAA provisions, as the authors note. The phrase more than any other with which issue is taken by the moving parties is that of Paperny J. that s. 5 of the CCAA does not preclude releases other than those specified in s. 5.1.

100 In this analysis, I adopt the purposive language of the authors at pp. 55-56:

It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.

The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights-based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress.

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 *Quebec* 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.

101 I accept the hierarchy suggested by the authors, namely statutory interpretation (which in the case of the CCAA has inherent in it "gap filling"), judicial discretion and thirdly inherent jurisdiction.

102 It simply does not make either commercial, business or practical common sense to say a CCAA plan must inevitably fail because one creditor cannot sue another for a claim that is over and above entitlement in the security that is the subject of the restructuring, and which becomes significantly greater than the value of the security (in this case the Notes) that would be available in bankruptcy. In CCAA situations, factual context is everything. Here, if the moving parties are correct, some creditors would recover much more than others on their security.

103 There may well be many situations in which compromise of some tort claims as between creditors is not directly related to success of the Plan and therefore should not be released; that is not the case here.

104 I have been satisfied the Plan cannot succeed without the compromise. In my view, given the purpose of the statute and the fact that this Plan is accepted by all appearing parties in principle, it is a reasonable gap-filling function to compromise certain claims necessary to complete restructuring by the parties. Those contributing to the Plan are directly related to the value of the notes themselves within the Plan.

105 I adopt the authors' conclusion at p. 94:

On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act 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, and a consideration of the gap-filling power, where applicable. It may very well

be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

...

119 The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

120 That may well be the result of the effect of the Releases as drafted. Assuming that to be the case, I am not satisfied that the Plan should be rejected on the basis that the release covenant for fraud is not as broad as it could be.

121 The Applicants and supporters have responded to the Court's concern that as initially drafted, the initial release provisions would have compromised all fraud claims. I was aware when the further request for release consideration was made that any "carve out" would unlikely be sufficiently broad to include any possibility of all deceit or fraud claims being made in the future.

122 The particular concern was to allow for those claims that might arise from knowingly false representations being made directly to Noteholders, who relied on the fraudulent misrepresentation and suffered damage as a result.

123 The Release as drafted accomplishes that purpose. It does not go as far as to permit all possible fraud claims. I accept the position of the Applicants and supporters that as drafted, the Releases are in the circumstances of this Plan fair and reasonable. I reach this conclusion for the following reasons:

1. I am satisfied that the Applicants and supporters will not bring forward a Plan that is as broad in permitting fraud claims as those opposing urge should be permitted.
2. None of the Plan opponents have brought forward particulars of claims against persons or parties that would fall outside those envisaged within the carve out. Without at least some particulars, expanded fraud claims can only be regarded as hypothetical or speculative.
3. I understand and accept the position of the Plan supporters that to broaden fraud claim relief does risk extensive complex litigation, the prevention of which is at the heart of the Plan. The likelihood of expanded claims against many parties is most likely if the fraud issue were open-ended.
4. Those who wish to claim fraud within the Plan can do so in addition to the remedies on the Notes that are available to them and to all other Noteholders. In other words, those Noteholders claiming fraud also obtain the other Plan benefits.

...

126 The Plan does in my view represent a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud.

...

Conclusion

136 I noted in the endorsement of May 16, 2008 my acceptance and understanding of why the Plan Applicants and sponsors required comprehensive releases of negligence. I was and am satisfied that there would be the third and fourth claims they anticipated if the Plan fails. If negligence claims were not released, any Noteholder who believed that there was value to a tort claim would be entitled to pursue the same. There is no way to anticipate the impact on those who support the Plan. As a result, I accept the Applicants' position that the Plan would be withdrawn if this were to occur.

137 The CCAA has now been accepted as a statute that allows for judicial flexibility to enable business people by the exercise of majority vote to restructure insolvent entities.

138 It would defeat the purpose of the statute if a single creditor could hold a restructuring Plan hostage by insisting on the ability to sue another creditor whose participation in and contribution to the restructuring was essential to its success. Tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA.

139 One can only speculate on what response might be made by any one of the significant corporations that are moving parties and now oppose confirmation of this Plan, if any of those entities were undergoing restructuring and had their Plans in jeopardy because a single creditor sought to sue a financing creditor, which required a release as part of its participation.

140 There are a variety of underlying causes for the liquidity crisis that has given rise to this restructuring.

141 The following quotation from the May 23, 2008 issue of The Economist magazine succinctly describes the problem:

If the crisis were simply about the creditworthiness of underlying assets, that question would be simpler to answer. The problem has been as much about confidence as about money. Modern financial systems contain a mass of amplifiers that multiply the impact of both losses and gains, creating huge uncertainty.

142 The above quote is not directly about the ABCP market in Canada, but about the potential crisis to the worldwide banking system at this time. In my view it is applicable to the ABCP situation at this time. 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.

143 I have as a result addressed a number of questions in order to be satisfied that in the specific context of this case, a Plan that includes third party releases is justified within CCAA jurisdiction. I have concluded that all of the following questions can be answered in the affirmative.

1. Are the parties to be released necessary and essential to the restructuring of the debtor?
2. Are the claims to be released rationally related to the purpose of the Plan and necessary for it?

3. Can the Court be satisfied that without the releases the Plan cannot succeed?
4. Are the parties who will have claims against them released contributing in a tangible and realistic way to the Plan?
5. Is the Plan one that will benefit not only the debtor but creditor Noteholders generally?
6. Have the voting creditors approved the Plan with knowledge of the nature and effect of the releases?
7. Is the Court satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy?

144 I have concluded on the facts of this Application that the releases sought as part of the Plan, including the language exempting fraud, to be permissible under the CCAA and are fair and reasonable.

145 The motion to approve the Plan of Arrangement sought by the Application is hereby granted on the terms of the draft Order filed and signed.

146 One of the unfortunate aspects of CCAA real time litigation is that it produces a tension between well-represented parties who would not be present if time were not of the essence.

147 Counsel for some of those opposing the Plan complain that they were not consulted by Plan supporters to "negotiate" the release terms. On the other side, Plan supporters note that with the exception of general assertions in the action on behalf of Hy Bloom (who claims negligence as well), there is no articulation by those opposing of against whom claims would be made and the particulars of those claims.

148 It was submitted on behalf of one Plan opponent that the limitation provisions are unduly restrictive and should extend to at least two years from the date a potential plaintiff becomes aware of an Expected Claim.

149 The open-ended claim potential is rejected by the Plan supporters on the basis that what is needed now, since Notes have been frozen for almost one year, is certainty of claims and that those who allege fraud surely have had plenty of opportunity to know the basis of their evidence.

150 Other opponents seek to continue a negotiation with Plan supporters to achieve a resolution with respect to releases satisfactory to each opponent.

151 I recognize that the time for negotiation has been short. The opponents' main opposition to the Plan has been the elimination of negligence claims and the Court has been advised that an appeal on that issue will proceed.

152 I can appreciate the desire for opponents to negotiate for any advantage possible. I can also understand the limitation on the patience of the variety of parties who are Plan supporters, to get on with the Plan or abandon it.

153 I am satisfied that the Plan supporters have listened to some of the concerns of the opponents and have incorporated those concerns to the extent they are willing in the revised release form. I agreed that it is time to move on.

154 I wish to thank all counsel for their cooperation and assistance. There would be no Plan except for the sustained and significant effort of Mr. Crawford and the committee he chairs.

155 This is indeed hopefully a unique situation in which it is necessary to look at larger issues than those affecting those who feel strongly that personal redress should predominate.

156 If I am correct, the CCAA is indeed a vehicle that can adequately balance the issues of all those concerned.

157 The Plan is a business proposal and that includes the releases. The Plan has received overwhelming creditor support. I have concluded that the releases that are part of the Plan are fair and reasonable in all the circumstances.

158 The form of Order that was circulated to the Service List for comment will issue as signed with the release of this decision.

C.L. CAMPBELL J.

...

Case Name:

**ATB Financial v. Metcalfe & Mansfield Alternative
Investments II Corp.**

**IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise and
Arrangement involving Metcalfe & Mansfield Alternative
Investments II Corp., Metcalfe & Mansfield Alternative
Investments III Corp., Metcalfe & Mansfield
Alternative Investments V Corp., Metcalfe & Mansfield
Alternative Investments XI Corp., Metcalfe & Mansfield
Alternative Investments XII Corp., 4446372 Canada Inc.
and 6932819 Canada Inc., Trustees of the Conduits
Listed In Schedule "A" Hereto**

Between

**The Investors represented on the Pan-Canadian
Investors Committee for Third-Party Structured
Asset-Backed Commercial Paper listed in Schedule "B"
hereto, Applicants (Respondents in Appeal), and
Metcalfe & Mansfield Alternative Investments II Corp.,
Metcalfe & Mansfield Alternative Investments III
Corp., Metcalfe & Mansfield Alternative Investments V
Corp., Metcalfe & Mansfield Alternative Investments XI
Corp., Metcalfe & Mansfield Alternative Investments
XII Corp., 6932819 Canada Inc. and 4446372 Canada
Inc., Trustees of the Conduits listed in Schedule "A"
hereto, Respondents (Respondents in Appeal), and
Air Transat A.T. Inc., Transat Tours Canada Inc., The
Jean Coutu Group (PJC) Inc., Aéroports de Montréal
Inc., Aéroports de Montréal Capital Inc., Pomerleau
Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar
Inc., Domtar Pulp and Paper Products Inc., GIRO Inc.,
Vêtements de sports R.G.R. Inc., 131519 Canada Inc.,
Air Jazz LP, Petrifond Foundation Company Limited,
Petrifond Foundation Midwest Limited, Services
hypothécaires la patrimoniale Inc., TECSYS Inc.,
Société générale de financement du Québec, VibroSystM
Inc., Interquisa Canada L.P., Redcorp Ventures Ltd.,
Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech
Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom**

**Inc., Cardacian Mortgage Services, Inc., West Energy
Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd.,
Vaquero Resources Ltd. and Standard Energy Inc.,
Respondents (Appellants)**

[2008] O.J. No. 3164

2008 ONCA 587

45 C.B.R. (5th) 163

296 D.L.R. (4th) 135

2008 CarswellOnt 4811

168 A.C.W.S. (3d) 698

240 O.A.C. 245

47 B.L.R. (4th) 123

92 O.R. (3d) 513

Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, E.A. Cronk and R.A. Blair J.J.A.

Heard: June 25-26, 2008.

Judgment: August 18, 2008.

(121 paras.)

Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis 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 US sub-prime mortgages. 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 was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

Appeal From:

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

Counsel:

See Schedule "A" for the list of counsel.

The judgment of the Court was delivered by

R.A. BLAIR J.A.:-

A. INTRODUCTION

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

2 By agreement amongst the major Canadian participants, the \$32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

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

Leave to Appeal

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

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited time-table -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

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

B. FACTS

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

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

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

The ABCP Market

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

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

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

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

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

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

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

The Liquidity Crisis

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

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

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

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

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

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

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the

other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

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

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

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

b) The Releases

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

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

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

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

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

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

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

The CCAA Proceedings to Date

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

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

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

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

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

38 The appellants attack both of these determinations.

C. LAW AND ANALYSIS

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

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

(1) Legal Authority for the Releases

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

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

- a) on a proper interpretation, the CCAA does not permit such releases;
- b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
- c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act, 1867*;
- d) the releases are invalid under Quebec rules of public order; and because
- e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

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

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

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

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

47 The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor

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

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

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

49 I adopt these principles.

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

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary -- as the then Secretary of State noted in introducing the Bill on First Reading -- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the

statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div.).

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

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

Application of the Principles of Interpretation

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

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

quidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

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

The Statutory Wording

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

- a) the skeletal nature of the CCAA;
- b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
- c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

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

59 Sections 4 and 6 of the CCAA state:

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

of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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

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

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

Compromise or Arrangement

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

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

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

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

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

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

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

In my judgment it is not a necessary element of an arrangement for the purposes of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach

over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes⁶ 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;
- b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it;*
- c) The Plan cannot succeed without the releases;
- d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;* and

- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

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

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

[77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

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

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, (2001) 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

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

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

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

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

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

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

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

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

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action

dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

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

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

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

53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to

the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

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

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

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

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

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

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the

reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

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

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

90 Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

[42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

...

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

...

[58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

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

In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and

through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

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

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

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

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

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

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

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

Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it 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, Es.11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

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

The Deprivation of Proprietary Rights

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

The Division of Powers and Paramountcy

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

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing

Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

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

Conclusion With Respect to Legal Authority

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

(2) The Plan is "Fair and Reasonable"

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

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

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

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

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

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

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

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

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
- c) The Plan cannot succeed without the releases;
- d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
- f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- g) The releases are fair and reasonable and not overly broad or offensive to public policy.

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

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

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

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

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

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

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

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

D. DISPOSITION

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

R.A. BLAIR J.A.

J.I. LASKIN J.A.:-- I agree.

E.A. CRONK J.A.:-- I agree.

* * * * *

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

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SCHEDULE "B" - APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited
Credit Union Central of British Columbia
Credit Union Central of Canada
Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank Financial Inc./National Bank of Canada
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

* * * * *

SCHEDULE "A" - COUNSEL

- 1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee.
- 2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
- 3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG.
- 4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
- 5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals).
- 6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor.
- 7) Mario J. Forte for Caisse de Dépôt et Placement du Québec.
- 8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada.
- 9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al).
- 10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
- 11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank.

- 12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees.
- 13) Usman Sheikh for Coventree Capital Inc.
- 14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
- 15) Neil C. Saxe for Dominion Bond Rating Service.
- 16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP.
- 17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
- 18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

cp/e/ln/qlkxl/qlkbb/qltll/qlrxg/qlhcs/qlcas/qlhcs/qlhcs

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

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

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

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*.

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.

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

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

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

Intitulé de la cause :
**Jean Coutu Group (PJC) Inc. c. Metcalfe & Mansfield
Alternative Investments II Corp.**

**Groupe Jean Coutu (PJC) Inc. et autres
c.
Metcalfe & Mansfield Alternative Investments II Corp. et
autres fiduciaires de fonds multicédants figurant sur la liste
constituant l'annexe A de la demande et autres**

[2008] C.S.C.R. no 337

[2008] S.C.C.A. No. 337

No du greffe : 32765

Cour suprême du Canada

Création du relevé : le 2 septembre 2008.
Mise à jour du relevé : le 19 septembre 2008.

En appel de :

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

Status :

Demande d'autorisation d'appel rejetée sans dépens (sans motifs) le 19 septembre 2008.

Indexation :

Faillite et insolvabilité -- Législation -- Interprétation -- Inclusion de quittances de tiers au plan de transaction et d'arrangement -- Plan traitant de la crise de liquidité menaçant le marché canadien du papier commercial adossé à des actifs -- Plan homologué par le tribunal -- L'homologation du plan aurait-elle dû être refusée? -- Loi sur les arrangements avec les créanciers des compagnies, art. 4, 6.

Résumé de l'affaire :

Au mois d'août 2007, une crise de liquidité a menacé le marché canadien du papier commercial adossé à des actifs ("PCAA"). La crise a été déclenchée par une perte de confiance des investisseurs

résultant de l'annonce du défaut de paiement généralisé sur les prêts hypothécaires à risque aux États-Unis. Les principaux acteurs canadiens se sont entendus pour geler, le 13 août 2007, le marché canadien de 32 milliards de dollars du papier commercial adossé à des actifs de tiers, en attendant une réorganisation de ce marché en vue de résoudre la crise. Le Pan-Canadian Investors Committee, intimé, a été créé et a finalement présenté le plan de transaction et d'arrangement proposé par les créanciers dont il est question en l'espèce.

Le juge Campbell a homologué le plan le 5 juin 2008.

Certains créanciers s'opposant au plan ont fait appel de l'ordonnance d'homologation du juge Campbell. Ils ont posé la question de savoir si le tribunal homologue un plan obligeant les créanciers à donner une quittance à des tiers qui sont eux-mêmes solvables et qui ne sont pas créanciers de la compagnie débitrice. Ces créanciers ont également soutenu que si la réponse à cette question est affirmative, le juge qui a entendu la demande a commis une erreur en affirmant que ce plan, et les quittances particulières qui y sont incluses, était juste et raisonnable et qu'il a eu tort de l'homologuer aux termes de la Loi sur les arrangements avec les créanciers des compagnies (la "LACC").

La Cour d'appel a cependant conclu que la LACC permettait l'inclusion des quittances des tiers dans un plan de transaction et d'arrangement que le tribunal doit homologuer si les quittances avaient un lien raisonnable avec la réorganisation proposée. Le libellé de la LACC, interprété en fonction du but, des objets et du régime de la loi, appuyait la compétence et le pouvoir du juge qui a entendu la demande d'homologuer le plan en l'espèce, y compris les quittances des tiers incluses dans ce plan. Compte tenu de l'ensemble des circonstances, le plan était juste et raisonnable.

Avocats :

James A. Woods (Woods & Partners), for Jean Coutu Group (PJC) Inc., Services hypothécaires La Patrimoniale inc., Tecsys Inc., Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited and VibroSystM Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., Société générale de financement du Québec, Jazz Air LP, Giro Inc./Le Groupe en informatique et recherche opérationnelle, R.G.R. Sportswear Inc., 131519 Canada Inc.

Kenneth Rosenberg (Paliare, Roland, Rosenberg, Rothstein, LLP), for Jura Energy Corporation.

Howard Shapray, Q.C. (Shapray, Cramer & Associates), for Ivanhoe Mines Ltd.

Scott A. Turner (Burns, Fitzpatrick, Rogers & Schwartz LLP), for Webtech Wireless Inc. and Wynn Capital Corporation Inc.

Allan Sternberg (Ricketts, Harris LLP), for Hy Bloom Inc. and Cardacian Mortgage Services, Inc.

Peter T. Linder, Q.C. (Peacock Linder & Halt), for Sabre Energy Ltd.

Benjamin Zarnett (Goodmans LLP), for Investors Represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper Listed in Schedule "B" hereto.

Graham Phoenix (Fasken Martineau DuMoulin LLP), for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Metcalfe & Mansfield Alternative Investments II

Corp. and Other Trustees of Asset Backed Commercial Paper Conduits Listed in Schedule "A" hereto.

Aubrey E. Kauffman (Fasken Martineau DuMoulin LLP), for 4446372 Canada Inc., 6932819 Canada Inc., Trustees of the Conduits listed in Schedule "A" Hereto.

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

Craig J. Hill (orden Ladner Gervais LLP), for Ernst & Young Inc. in its capacity as Monitor pursuant to the Initial Order.

Jeffrey C. Carhart (Miller Thomson LLP), for Ad Hoc Committee of Noteholders.

Arthur O. Jacques (Sibley Righton LLP), for Ad Hoc Committee of Retail Noteholders.

Kevin McElcheran (McCarthy Tétrault LLP), for Bank of Montreal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, Bank of Nova Scotia, Toronto-Dominion Bank.

Jeffrey S. Leon (Bennett Jones LLP), for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada.

Chronologie :

1. Première demande d'autorisation d'appel [par Jean Coutu Group (PJC) Inc.];
Seconde demande d'autorisation d'appel [par Hy Bloom Inc. and Cardacian Mortgage Services, Inc.];
Troisième demande d'autorisation d'appel [par Sabre Energy Ltd.];
Quatrième demande d'autorisation d'appel [par Ivanhoe Mines Ltd.];
Cinquième demande d'autorisation d'appel [par Jura Energy Corporation];
Sixième demande d'autorisation d'appel [par Webtech Wireless Inc. and Wynn Capital Corporation Inc.];

PRODUITES : le 2 septembre 2008. C.S.C. Bulletin, 2008, p. 1260.

SOUMISE À LA COUR : le 8 septembre 2008. C.S.C. Bulletin, 2008, p. 1285.

REJETÉE SANS DÉPENS : le 19 septembre 2008 (sans motifs). C.S.C. Bulletin, 2008, p. 1330.

Présents : les juges LeBel, Fish et Charron.

La requête présentée par les intimés le 27 août 2008 en vue d'accélérer le traitement des demandes d'autorisation d'appel est accordée. Les demandes d'autorisation d'appel et d'autres redressements relativement à l'arrêt de la Cour d'appel de l'Ontario, numéro C48969 (M36489), 2008 ONCA 587, daté du 18 août 2008, sont rejetées sans dépens.

Historique procédural :

Jugement en première instance : Plan homologué.
Cour supérieure de Justice de l'Ontario, juge Campbell, 5
juin 2008.

Jugement dont appel : Appel rejeté.
Cour d'appel de l'Ontario, juges Laskin, Cronk et Blair,
18 août 2008.

Référence neutre : 2008 ONCA 587; [2008] O.J. No. 3164.

e/qlhbb

**** Preliminary Version ****

Case Name:

Century Services Inc. v. Canada (Attorney General)

**Century Services Inc., Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen
in Right of Canada, Respondent.**

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

12 B.C.L.R. (5th) 1

2010 CarswellBC 3419

326 D.L.R. (4th) 577

EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

72 C.B.R. (5th) 170

[2010] G.S.T.C. 186

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

**Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish,
Abella, Charron, Rothstein and Cromwell JJ.**

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Where Crown affected -- Effect of related legislation -- Bankruptcy and Insolvency Act -- Appeal by Century Services Inc. from judgment of British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies allowed -- Section 222(3) of the Excise Tax Act evinced no explicit intention of Parliament to repeal s. 18.3 of CCAA -- Parliament's intent with respect to GST deemed trusts was to be found in the CCAA -- Judge 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 debtor company to make an assignment in bankruptcy.

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the CCAA proceedings, a chambers judge approved a payment not exceeding \$5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's

proposal 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. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. 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 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. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, 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.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge'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. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferable from his order. Further, no deemed trust was created.

...

Court Summary:

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., 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 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, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, mak-

ing 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.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable 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.

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 Act* 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 unmistakable 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 op-

eration 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.

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) 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.

...

History and Disposition:

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. (4) 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.

...

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 Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

...

3.1 Purpose and Scope of Insolvency Law

...

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 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 em-

ployees. 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 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, October 3, 1991, at pp. 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 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).

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]

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, 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.

...

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 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.

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.

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?

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 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.), 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 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 stakeholders are treated as advantageously and fairly as the circumstances permit.

...

Indexed as:
Elan Corp. v. Comiskey

**Elan Corp. and Nova Metal Products Inc.
v. Michael Comiskey, trustee of a debenture issued
to Joseph Comiskey and all secured creditors of Elan Corp.
and Nova Metal Products Inc.**

[1990] O.J. No. 2180

1 O.R. (3d) 289

41 O.A.C. 282

1 C.B.R. (3d) 101

23 A.C.W.S. (3d) 1192

Action Nos. 684/90 and 685/90

Court of Appeal for Ontario

Finlayson, Krever and Doherty JJ.A.

November 2, 1990*

*Released November 23, 1990

Counsel:

F.J.C. Newbould, Q.C., and G.B. Morawetz, for Bank of Nova Scotia.

John Little, for Elan Corp. and Nova Metal Products Inc.

Michael B. Rotsztain, for RoyNat Inc.

Kim Twohig and M. Olanow, for Ontario Development Corp.

K.P. McElcheran, for monitor Ernst & Young.

1 **FINLAYSON J.A.** (KREVER J.A. concurring) (orally):-- This is an appeal by the Bank of Nova Scotia (the Bank) from orders made by Mr. Justice Hoolihan as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation (Elan) and Nova Metal Products Inc. (Nova), which commenced proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the CCAA) for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

...

III. THE PURPOSE AND SCHEME OF THE ACT

56 Before turning to these issues, it is necessary to understand the purpose of the Act and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the co-operation of the debtor companies' creditors and shareholders: *Re Avery Construction Co.* (1942), 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. H.C.J.), Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at pp. 592-93; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985), 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 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.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal (Carrothers, Cumming and Gibbs JJ.A.) in *Chef Ready Foods Ltd. v. HongKong Bank of Canada*, an unreported judgment released October 29, 1990 [summarized 23 A.C.W.S. (3d) Paragraph976], at pp. 11 and 6 of the reasons. In referring to the purpose for which the Act was initially proclaimed, he said:

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. (the Act), 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 ...

In an earlier passage His Lordship had said:

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

59 Gibbs J.A. also observed (at p. 13 of the reasons) that the Act was designed to serve a "broad constituency of investors, creditors and employees". 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. That interest is generally, but not always, served by permitting an attempt at reorganization: see Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", supra, at p. 593.

60 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: Interpretation Act, R.S.C. 1985, c. I-21, s. 12; *Chef Ready Foods Ltd. v. HongKong Bank of Canada*, supra, at p. 14 of the reasons.

61 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

3. This Act does not apply in respect of a debtor company unless

(a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and

(b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

62 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

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

63 Section 5 does not require that the court direct a meeting of creditors to consider a proposed plan. The court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

64 If the court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act.

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

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

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

65 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the court. Once again, the court must exercise a discretion and determine whether it will approve the plan of reorganization. In exercising that discretion, the court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) [aff'd sub nom *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (C.A.)], at pp. 182-85 C.B.R.

66 If the court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the court.

...

Indexed as:
**Kourtessis v. Canada (Minister of National Revenue -
M.N.R.)**

**Constantine Kourtessis and Hellenic Import-Export Co.
Ltd., appellants;**
v.
**Minister of National Revenue, respondent, and
The Attorney General for Ontario and the Attorney
General of Quebec, interveners.**

[1993] 2 S.C.R. 53

[1993] S.C.J. No. 45

File No.: 21645.

Supreme Court of Canada

1992: February 6 / 1993: April 22.

**Present: La Forest, L'Heureux-Dubé, Sopinka, Cory,
McLachlin, Stevenson* and Iacobucci JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (100 paras.)

* Stevenson J. took no part in the judgment.

Income tax -- Enforcement -- Search and seizure -- Warrant authorizing search and seizure quashed but material seized not returned -- Second warrant issued with respect to retained material but subject to right to challenge -- Appellants challenging warrant by bringing application for declaration that search warrant and enabling legislation unconstitutional and for order quashing warrant -- Application dismissed -- Court of Appeal finding no right to appeal because search and seizure effected under federal criminal law power and no right to appeal existing in Criminal Code or Income Tax Act -- Whether or not appeal could be effected under provincial procedures -- Whether or not search and seizure unreasonable contrary to s. 8 of Charter -- Income Tax Act, S.C. 1970-71-72, c. 63, as amended by S.C. 1986, c. 6, ss. 231.3, 231.3(7), 239 -- Canadian Charter of Rights and Freedoms, s. 8.

Courts -- Jurisdiction -- Right of appeal -- Income tax -- Enforcement -- Search and seizure -- Warrant authorizing search and seizure quashed but material seized not returned -- Second warrant issued with respect to retained material but subject to right to challenge -- Appellants challenging warrant by bringing application for declaration that search warrant and enabling legislation unconstitutional and for order quashing warrant -- Application dismissed -- Court of Appeal finding no right to appeal because search and seizure effected under federal criminal law power and no right to appeal existing in Criminal Code or Income Tax Act -- Whether or not appeal could be effected under provincial procedures.

Courts -- Procedure -- Income tax -- Enforcement -- Search and seizure -- Warrant authorizing search and seizure quashed but material seized not returned -- Second warrant issued with respect to retained material but subject to right to challenge -- Appellants challenging warrant by bringing application for declaration that search warrant and enabling legislation unconstitutional and for order quashing warrant -- Application dismissed -- Court of Appeal finding no right to appeal because search and seizure effected under federal criminal law power and no right to appeal existing in Criminal Code or Income Tax Act -- Whether or not appeal could be effected under provincial procedures.

Officers of Revenue Canada believed that appellants were evading or attempting to evade tax by making false and deceptive statements in income tax returns contrary to s. 239 of the Income Tax Act (ITA). The British Columbia Supreme Court issued warrants to search for and seize documents which could afford evidence of the alleged violations. These warrants were subsequently quashed by another judge of that court. The items that had been seized, however, were not returned and McEachern C.J.S.C. issued a search warrant for the seizure of relevant documents located at the Department's premises, provided that everything seized be sealed and that appellants have thirty days to challenge the warrant.

Appellants instituted proceedings in the B.C. Supreme Court by way of originating petition challenging the warrant under s. 231.3(7) of the ITA, s. 24(1) of the Canadian Charter of Rights and Freedoms, and the inherent jurisdiction of the court. The relief sought was an order quashing the warrant and the search and seizure executed under it, ordering the return of the material seized, prohibiting its use and ordering its destruction and declaring s. 231.3 of the ITA to be contrary to ss. 7, 8 and 15 of the Charter.

The entire application was dismissed by the B.C. Supreme Court in two judgments -- one dealing with non-constitutional issues and one with constitutional issues. On appeal to the Court of Appeal, appellants, unsure whether leave was required, gave both notice of appeal and notice of application for leave to appeal. The Minister brought a motion to quash on the ground that no appeal lay from the B.C. Supreme Court's judgment. The Court of Appeal allowed the motion to quash, holding that it had no jurisdiction to hear the appeal. It reasoned that the litigation in question was a criminal proceeding subject to Parliament's exclusive jurisdiction to prescribe criminal procedure and no right of appeal could be found in the ITA or the Criminal Code. The Court of Appeal would in any event have dismissed the appeal on the merits.

The preliminary issue to be decided here was whether the British Columbia Court of Appeal had jurisdiction to entertain the appellants' appeal. The constitutional question before the Court queried whether s. 231.3 of the ITA infringed ss. 7 and 8 of the Charter.

Held: The appeal should be allowed. Section 231.3 of the Income Tax Act infringes s. 8 of the Charter.

Per La Forest, L'Heureux-Dubé and Cory JJ.: Section 231.3 was held to violate s. 8 of the Charter in *Baron v. Canada*, [1993] 1 S.C.R. 416. The procedural issues, nevertheless, have very important implications for the working of the enforcement provisions of the ITA and other federal statutes to which federal criminal procedures apply.

An appeal is not available because no appeal has been provided by the relevant legislative body and courts of appeal have no inherent rights to create appeals. Only superior court judges appointed under s. 96 of the Constitution Act, 1867 have inherent jurisdiction. The appellants, however, may pursue an action for a declaration, to which the ordinary rules of procedure in civil actions apply, including provisions for appeal.

Various policy reasons underlie enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice. There should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character. This is especially applicable to interlocutory matters which can ultimately be decided at trial. As well, there is the simple value of a final decision to resolve a dispute without the costs, in time, effort and money, of further hearings.

The offence created by s. 239 of the ITA is constitutionally supportable under both Parliament's criminal law power and its taxing power. The procedure to secure its enforcement is that set forth in the Criminal Code which notably provides only limited rights of appeal. Section 34(2) of the Interpretation Act provides that the provisions of the Criminal Code are to apply to offences created by Parliament unless the statute creating the offence provides otherwise. No right of appeal from an order issuing a search warrant is provided in the Criminal Code. Section 231.3 of the ITA was enacted for search warrants as contemplated by s. 34(2) of the Interpretation Act. It also makes no provision for appeal other than the review process set forth in s. 231.3(7).

Parliament, in the exercise of a federal head of power, may provide procedures for the enforcement of the measures it has enacted. That is a matter within its exclusive competence. Parliament can adopt provincial procedures for that purpose, and such an adoption will be assumed where it is necessary to give effect to a right. When Parliament selects a specific and integrated procedure, however, there is no room for the operation of provincial law. The enforcement provisions of the ITA form part of the uniform and integrated procedure for the investigation and prosecution of offences under the Act. No federal adoption was made or can be assumed here. Barring such adoption it is constitutionally unacceptable to read in appeals for other interlocutory proceedings or to adopt other provincial rules of procedure.

The admixture of provincial civil procedure with criminal procedure could result in an unpredictable mish-mash. In dealing with procedure, and particularly criminal procedure, it is important to know the precise steps to be pursued. Parliament accordingly adopted a comprehensive procedure under the Criminal Code and adopted that procedure for the enforcement of penal provisions in other statutes, including the ITA.

A number of pre-trial remedies are available to a person who has been the subject of a search. Section 231.3(7) provides for review and the Criminal Code makes provision for a speedy application for the return of seized goods. If the matter should proceed to trial, the accused may attack the search warrant in any way he considers appropriate, including the allegation that it infringes the

provisions of s. 8 of the Charter. If the matter should not go to trial, a party may still seek civil damages for compensation.

The general right of appeal set forth in the Federal Court Act should not be assumed to apply to a proceeding provided in a separate statute that is a mere adjunct to a general system of criminal procedure where appeals of this nature are not provided. Parliament arguably did not intend by this minor grant of jurisdiction to the Federal Court (in what is for it an untypical jurisdiction) to have had in contemplation the general right of appeal devised for quite different types of proceedings. There may, in other words, be no anomaly at all.

The declaration does not constitute a review of a decision taken in a criminal proceeding because it merely states the law without changing anything. It should not be widely used as a separate collateral procedure to, in effect, create an automatic right of appeal where Parliament has, for sound policy reasons, refused to do so. Another procedure need not be provided as long as a reasonably effective procedure exists. A reasonably effective procedure has not been provided here, however. Section 231.3(7) and other procedures afford a measure of protection to the appellants but do not provide an adequate statutory provision for constitutional review of a search warrant.

Where a search is being conducted at the pre-trial stage, there is no trial judge and unlike the situation after the charge, no express Charter guarantee that proceedings must take place within a reasonable time. An investigation can go on indefinitely in continuing breach (if the search provisions are unconstitutional) of the appellants' Charter rights for an extensive period. The property of the individual subject to the search may remain in the custody of the state for a protracted period in violation of Charter norms.

The power to issue a search warrant under the ITA is vested in a superior court judge and at common law a decision of a superior court judge cannot be the subject of collateral attack. The judge issuing the warrant is not in a position to review for constitutionality at an *ex parte* hearing, and may not have the jurisdiction to do so on a later review of the *ex parte* order. An action for a declaration would not be barred, even if on later review the judge is competent to review the warrant and the empowering legislation on the basis of constitutionality, because that remedy would not provide sufficient constitutional protection.

The appellants should be permitted to pursue an action for a declaration. Since the action for a declaration is a discretionary remedy, however, the judge, in the exercise of his or her discretion, should consider the specific circumstances presented and refuse to entertain the action if satisfied that criminal proceedings against the accused would be initiated within a reasonable time. This would avoid the overlap and delay that have been among the major informing considerations in devising the rules for the governance of the discretion to allow or not to allow an action for a declaration to proceed.

A declaration should issue declaring s. 231.3 of the ITA and the search warrant issued thereunder to be of no force or effect. The appellants, in light of that declaration, are also entitled to the return of their documents and other property and all copies and notes thereof.

While an action for a declaration is an appropriate remedy at this stage of the proceedings, certiorari generally appears to be a more suitable instrument for reviewing the constitutionality of the action, and the possibility that it might have issued in this case should be left open. At common law certiorari does not lie against a decision of a superior court judge, but what is alleged here is a breach of a constitutional right which may call for an adaptation of the inherent powers of a superior court to

make the procedure conform to constitutional norms. If certiorari might have issued, there would appear to be little use for the declaratory action in this context.

Per L'Heureux-Dubé J.: The reasons of La Forest J. were joined given that the majority decision in *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, applied.

Per Sopinka, McLachlin and Iacobucci JJ.: Section 231.3 of the ITA violates the reasonable search guarantee found in s. 8 of the Charter for the reasons given in *Baron v. Canada*, [1993] 1 S.C.R. 416.

The offence and search warrant provisions of the ITA are referable to both the federal criminal law and taxation power, and jurisdiction to legislate procedure in matters relating to these provisions is shared between the provinces and the federal government, subject to federal paramountcy in the event of conflict between federal and provincial legislation. Parliament is free to assign jurisdiction to any tribunal it chooses, whatever the source of its legislative power. If federal legislation is silent, the ordinary rule is that a litigant suing on a federal matter in a provincial court takes the procedure of that court as he or she finds it. This does not mean that provincial legislation does not apply unless "adopted" by federal legislation. The authorities make it clear that a province has legislative authority to adjudicate federal matters and that such legislation is only ousted if it conflicts with federal legislation. The fact that there is alleged to be a comprehensive procedure contained in federal legislation is only relevant to determine whether provincial legislation is ousted because it conflicts with federal legislation. It is not ousted in relation to declaratory relief, which includes the right of appeal conferred by provincial legislation, and should also extend to ancillary relief which enables the Court to give effect to the declaration.

Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338, should be distinguished so as not to foreclose an appeal in proceedings relating to a declaration that the statute authorizing a search warrant violates the Constitution, coupled with an application to set aside the search warrant. These two remedies can be exercised, in combination, prior to the laying of charges, and the result of such exercise may be appealed.

An application under s. 231.3(7) would be a wholly inappropriate proceeding to test the constitutional validity of the provision under which the seizure is made. It applies only if the judge is satisfied that the documents seized are not needed for an investigation or prosecution or were not seized in accordance with the warrant. Section 231.3(7) can only be resorted to if both the warrant and the statutory provision under which the warrant was issued are valid. Not only is subs. (7) not an appropriate forum with respect to a constitutional challenge of the search and seizure provision, but a judge would also not have jurisdiction to deal with such a challenge upon a plain reading of the words of the subsection.

In the alternative, *Knox Contracting* can be distinguished on the basis that the procedure relating to proceedings for declaratory relief on constitutional grounds cannot be characterized as criminal law so as to exclude a right of appeal. In *Knox Contracting* the proceeding taken was a motion to quash. There was no constitutional challenge to legislation in that case. Here, the proceeding taken was not simply to quash the warrant but an action for a declaration that s. 231.3 was invalid on constitutional grounds. A motion to quash, when not combined with an action for declaratory relief, may take its character for the purpose of division of powers from the underlying proceeding which it attacked. On the other hand, an action for a declaration as to the constitutional validity of a statute does not necessarily partake of the character of the statute which is attacked. It has a life of its own.

An action to declare a statutory provision unconstitutional is not transformed from a civil remedy to a criminal remedy merely because the declaration relates to a criminal statutory provision. It cannot be used as a substitute for an application to the trial judge in a criminal case in order to acquire a right of appeal. By virtue of s. 24(1) of the Charter, there are some proceedings available to an accused in the context of a criminal case in respect to issues that could be the subject of an action for a declaration. The superior courts have jurisdiction to entertain such applications even if the superior court to which the application is made is not the trial court. However, a superior court has a discretion to refuse to do so unless, in the opinion of the superior court, given the nature of the violation and the need for a timely review, it is better suited than the trial court to deal with the matter. The superior court would therefore have jurisdiction to entertain an action for a declaration seeking this kind of relief but subject to the same discretion to refuse to exercise it. The court is justified in refusing to entertain the action if there is another procedure available in which more effective relief can be obtained or the court decides that the legislature intended that the other procedure should be followed.

As a general rule, the court should exercise its discretion to refuse to entertain declaratory relief when such relief is sought as a substitute for obtaining a ruling in a criminal case. This will be the apt characterization of any declaration which is sought with respect to relief that could be obtained from a trial court which has been ascertained. The same considerations apply before a trial court has been ascertained if the relief sought will determine some issue in pending criminal proceedings and does not have as a substantial purpose vindication of an independent civil right. In such circumstances, the mere fact that relief was sought in the guise of an action for a declaration would not confer a right of appeal from the refusal to entertain the action.

No issue was raised here in respect of the British Columbia Supreme Court's jurisdiction or in respect of the exercise of its discretion to entertain the appellants' application by way of originating petition. There was no trial court because no charge was laid. The attack on the validity of the statutory provision authorizing the search, while it would affect the admissibility at trial of the things seized, was also vital to the taxpayers' civil interests. The search warrant would not only authorize a trespass but also seizure of personal property. The petition for a declaration was therefore properly entertained under the British Columbia rules of procedure. Those rules which clearly applied at first instance should also apply to permit an appeal here. If Parliament did not intend to exclude a petition for a declaration under provincial rules, it cannot have intended to exclude an appeal pursuant to the same rules.

...

APPEAL from a judgment of the British Columbia Court of Appeal (1989), 39 B.C.L.R. (2d) 1, [1990] 1 W.W.R. 97, 50 C.C.C. (3d) 201, 72 C.R. (3d) 196, 89 D.T.C. 5464, [1990] 1 C.T.C. 241, dismissing an appeal from a judgment of Lysyk J. (constitutional issues) (1988), 30 B.C.L.R. (2d) 342, [1989] 1 W.W.R. 508, 44 C.C.C. (3d) 79, 89 D.T.C. 5214, [1989] 1 C.T.C. 56, and from a judgment of McKenzie J. (non-constitutional issues) (1987), 15 B.C.L.R. (2d) 200, 36 C.C.C. (3d) 304, following the issuance of a search warrant by McEachern C.J.S.C. Appeal allowed. Section 231.3 of the Income Tax Act infringes s. 8 of the Charter.

Guy Du Pont, Basile Angelopoulos and Ariane Bourque, for the appellants.

John R. Power, Q.C., Pierre Loiselle, Q.C., and Robert Frater, for the respondent.
Janet E. Minor and Tanya Lee, for the intervener the Attorney General for Ontario.
Yves Ouellette, Judith Kucharsky and Diane Bouchard, for the intervener the Attorney General of Quebec.

Solicitors for the appellants: Phillips & Vineberg, Montréal.

Solicitor for the respondent: John C. Tait, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Attorney General of Quebec: Ouellette, Desruisseaux, Veillette, Montréal.

The judgment of La Forest, L'Heureux-Dubé and Cory JJ. was delivered by

1 LA FOREST J.:-- The substantive question to be resolved in this appeal, i.e., whether s. 231.3 of the Income Tax Act, as amended by S.C. 1986, c. 6, violates s. 8 of the Canadian Charter of Rights and Freedoms, has already been determined in favour of the appellants. In *Baron v. Canada*, [1993] 1 S.C.R. 416, it was held that the section does violate the Charter and so was of no force or effect. It is to be expected that the law enforcement and judicial authorities in the present case will act accordingly, whatever the result of this appeal may be. But, two broad procedural issues have very important implications for the workings of the enforcement provisions of the Income Tax Act and other federal statutes to which federal criminal procedures apply.

...

Rights of Appeal Generally

14 Since the appellants' efforts were largely directed to finding a right of appeal in this case, I will first make some comments about the nature of rights of appeal generally.

15 Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

16 There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice. A trial court, for example, is in a better position to assess the factual record. Thus most criminal appeals are restricted to questions of law or mixed questions of law and fact. A further policy rationale, and one that is important to the case before this Court, is that there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character. This is especially applicable to interlocutory matters which can ultimately be decided at trial; see *Mills v. The Queen*, [1986] 1 S.C.R. 863. On this point, McLachlin J., speaking for the majority in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, noted that there was a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them" (at p. 641). Such review should, in the

Court's view, normally take place at trial. This McLachlin J. added, "will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case" (at p. 641). Especially in the context of criminal procedure, there is value in not constantly interrupting the process, if the issues are all going to be heard eventually at trial in any event. As well, there is the simple value of a final decision to resolve a dispute without the costs, in time, effort and money, of further hearings.

17 For most civil matters, the provincial legislatures have created a right of appeal. In British Columbia, that right is found in the Court of Appeal Act. Section 6 sets forth the circumstances where appeals are available. The first issue in this case is whether that procedure applies to a penal proceeding falling within the exclusive jurisdiction of the federal Parliament, specifically a proceeding taken in respect of an alleged offence under the Income Tax Act.

...

Indexed as:

MacDonald v. Montreal (City)

Duncan Cross MacDonald, appellant;

and

City of Montreal, respondent;

and

The Attorney General of Canada, the Attorney General of Quebec,

the Société franco-manitobaine and

Alliance-Quebec, Alliance for

Language Communities in Quebec, interveners.

[1986] 1 S.C.R. 460

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

File No.: 17528.

Supreme Court of Canada

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

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

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

Appearing before the Municipal Court of the City of Montréal to answer a charge of violating a municipal by-law, appellant, an English-speaking person, unsuccessfully challenged the jurisdiction of the court to proceed against him on the ground that the unilingual French summons issued by the

court violated his fundamental rights as an English speaker under s. 133 of the Constitution Act, 1867. In a trial de novo in the Superior Court, appellant was again convicted. The court concluded that documents such as summonses emanating from the province's courts must be considered constitutionally valid so long as they are issued in one or other of the French or English languages. The Court of Appeal refused to grant leave to appeal from the judgment of the Superior Court. This appeal raises two issues: (1) whether the Supreme Court has jurisdiction to hear a case for which leave to appeal to a provincial [page461] court of appeal was denied by the provincial court of appeal and (2) if so, whether the summons, being expressed in the French language only, and not in the language of the English-speaking accused, offends the provisions of s. 133 of the Constitution Act, 1867, resulting in a total absence of jurisdiction of the Court to proceed against him.

Held (Wilson J. dissenting): The appeal should be dismissed.

(1) The Jurisdictional Issue:

Per Beetz, Estey, McIntyre, Lamer and Le Dain JJ.: This Court has jurisdiction to hear this case. It is a jurisdiction which, for obvious reasons of policy and comity, should be exercised most sparingly, in very rare cases such as this one, where there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court.

Per Dickson C.J. and Wilson J.: This Court has jurisdiction pursuant to s. 41(1) of the Supreme Court Act to review the Quebec Court of Appeal's decision not to grant leave to appeal from a judgment at trial. While the Court should in general maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it should not hesitate, in light of the broad language of s. 41(1) and the role of the Court as the ultimate appellate tribunal, to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly, constitutional significance to be at stake. To the extent that the *Ernewein* and *Nicholson* cases are inconsistent with this view, they should not be followed.

...

(2) The Constitutional Issue:

Per Beetz, Estey, McIntyre, Lamer and Le Dain JJ.: The summons in French given to the English-speaking appellant did not offend the provisions of s. 133 of the Constitution Act, 1867. On the plain meaning of s. 133, as construed by this Court in the two *Blaikie* cases, appellant has no right to be summoned before a court of Quebec by a process issued in his own language. The section provides that a process issued from a Quebec court may be in either of the official languages. If there is a right to use either language, there can be no obligation nor a duty to use the other. In judicial proceedings in the courts covered by s. 133, the language rights protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof. In the case at bar, there is therefore no doubt that the summons was valid. The Municipal Court of Montreal is a court of Quebec within the meaning of s. 133 and the summons -- clearly a document covered by the first *Blaikie* decision --, considered as a command or as a charge, was a process issuing from such a court or under its authority. It may then be unilingual in either the French or the English language.

It may well be desirable or fair that summonses be bilingual to ensure comprehension by the recipient, but such a requirement is not imposed by the explicit provision of s. 133. The section has not introduced a comprehensive scheme of official bilingualism but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism in Parliamentary debates and in judicial proceedings. This incomplete but precise scheme is a constitutional minimum which resulted from an historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, which can be complemented by federal and provincial legislation, and it is a scheme which can be modified by way of constitutional amendment. But it is not open to the courts under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

The requirements of natural justice and procedural fairness should not be invoked to construe s. 133. These requirements protect not language rights but other rights which the section was never intended to safeguard and with which it is entirely unrelated. It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court is not a language right but simply an aspect of the right to a fair hearing.

Per Dickson C.J.: The unilingual summons received by the appellant did not offend s. 133 of the Constitution Act, 1867. The words of the section, as construed by this Court in the first *Blaikie* decision, empower the courts of Quebec to issue unilingual documents. Any implied affirmative obligation which may be cast upon the "State" to give effect to a litigant's right to use either French or English is necessarily subordinated to the express authority of courts to issue process in one language only. It is therefore unnecessary in the present case to consider the precise extent of the litigant's right to use either language in the judicial setting.

Per Wilson J., dissenting: The Municipal Court of the City of Montreal had no jurisdiction to proceed against the appellant on the basis of a summons which violated his linguistic rights under s. 133 of the Constitution Act, 1867. The right conferred on a litigant by that section to use his own language in judicial proceedings imposes a correlative duty on the state to respect and accommodate that right. The words may/either in s. 133 in relation to the language of court proceedings were not employed in order to confer an option on the state to choose the official language in which it wishes to deal with a litigant but to confer an option on the citizen.

The legislative history of the pre-1867 Acts from which s. 133 devolved demonstrates clearly that the focus of concern was meaningful access to the judicial system by users of both official languages. Section 133 reflects a similar concern. It recognizes the linguistic duality in the Province of Quebec and assures both French and English-speaking citizens that their linguistic [page464] rights will be protected by the state in a meaningful fashion. The purpose of the section is to put the two official languages on an equal footing. It follows from this that the state's obligation is not satisfied if its courts and their documents speak in either French or English without regard to the language of the litigant. To fulfil its obligation, the state must deal with a litigant in the language he understands. Therefore, to comply with s. 133, the initiating documents emanating from the court must, at

a minimum, contain a directive to the recipient in the official language he understands alerting him to the importance of the document and advising him where to apply for a translation.

...

The judgment of Beetz, Estey, McIntyre, Lamer and Le Dain JJ. was delivered by
BEETZ J.:-

...

X - The Jurisdiction of this Court to Entertain the Appeal

128 I have had the advantage of reading the reasons of my colleague Wilson J. and I agree with her that we have jurisdiction to hear this case.

129 Since the decision of McCarthy J.A. to refuse leave to appeal has the effect of leaving intact the disposition of the case by Meyer J. and Judge Bourassa, which I think is the correct one, I should be content simply to dismiss the appeal.

130 However, had I been of the view that the appellant's case was meritorious, I would have allowed the appeal, set aside the judgments of McCarthy J.A., Meyer J. and Judge Bourassa and discharged the appellant. I would have agreed with Wilson J. that the case should not be returned to the Quebec Court of Appeal by leave of this Court.

131 The Quebec Court of Appeal had already decided the issue on the merits in the Walsh case and this is obviously the reason why McCarthy J.A., who was a member of the coram in Walsh, refused leave to appeal in the case at bar. I believe it would have been improper directly or indirectly to ask the Court of Appeal to reconsider its decision in Walsh, whatever view one might take of this decision. (Vide the reasons of the minority in Paul v. The Queen, [1960] S.C.R. 452, which I find preferable to those of the majority.)

132 But I wish to stress that this is a jurisdiction which, for obvious reasons of policy and comity, we should exercise most sparingly, in those very rare cases where, as in this case, there is a risk that a question of major constitutional importance [page504] might otherwise be put beyond the possibility of review by this Court.

...

Case Name:
1078385 Ontario Ltd. (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 1078385 Ontario Limited, Island Cove
Development Ltd., 1128625 Ontario Limited, 1362317
Ontario Limited, 1164801 Ontario Limited, 1099164
Ontario Limited, O.B. Properties Canada Ltd., Jam Sound
Specialists Canada Ltd., and O.B. Properties Limited
Partnership, (applicants)**

[2004] O.J. No. 6050

206 O.A.C. 17

16 C.B.R. (5th) 152

144 A.C.W.S. (3d) 209

2004 CarswellOnt 8034

Docket: M32003

Ontario Court of Appeal
Toronto, Ontario

J.M. Simmons J.A.
(In Chambers)

Heard: December 14, 2004.
Judgment: December 22, 2004.

(46 paras.)

*Creditors & debtors law -- Legislation -- Debtors' relief-- Companies' Creditors Arrangement Act
-- Motion by Oram for leave to appeal an order sanctioning a plan of arrangement under the Com-
panies' Creditors Arrangement Act and a related vesting order implementing the plan of arrange-
ment dismissed.*

Creditors & debtors law -- Payment of debt -- Unsecured debt v. secured debt -- Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that the debt of the secured creditors exceeded the equity in the debtor companies' property.

Motion by Oram, the applicant, for leave to appeal an order sanctioning a plan of arrangement under the Companies' Creditors Arrangement Act (CCAA) and a related vesting order implementing the plan of arrangement. Pursuant to the terms of those orders, the assets of the applicants (debtor companies) were vested in a new company owned by an affiliate of Amico Contracting & Engineering, the secured creditor that proposed the plan of arrangement. The debtor companies were the developers of Bob-Lo Island, which was a relatively small island located in the Detroit River. Oram was a shareholder of at least one of the debtor companies as well as an unsecured creditor. Under the agreement of purchase and sale forming part of the plan of arrangement, the assets of the debtor companies were sold for approximately \$11,500,000 in satisfaction of secured creditors' claims totalling \$19,219,744. Oram argued that the motion judge erred by allowing the secured creditors to use the CCAA procedure as a shortcut for liquidating secured assets and by failing to require the secured creditors to proceed with enforcing their security in the ordinary course.

HELD: Motion dismissed. Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that the debt of the secured creditors exceeded the equity in the debtor companies' property. Oram did not therefore establish any reasonable possibility that he had an economic interest in the assets forming the subject matter of the proposed appeal. In addition, to the extent there might be any arguable merit in the issue of whether the proposed plan of arrangement was contrary to the purposes of the CCAA, Oram failed to demonstrate that there was sufficient merit in that issue to justify granting leave to appeal in the circumstances of the case.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13

Appeal From:

Motion for leave to appeal from the orders made by Justice Joseph G. Quinn of the Superior Court of Justice dated November 22, 2004 and November 25, 2004, [2004] O.J. No. 6101.

...

1 J.M. SIMMONS J.A.:-- Randy Oram requests leave to appeal an order of Quinn J. dated November 22, 2004, [2004] O.J. No. 6101, sanctioning a plan of arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), and a related vesting order dated November 25, 2004, implementing the plan of arrangement. Pursuant to the terms of those orders, the assets of the applicants (the "debtor companies") were vested in a new company owned by an affiliate of Amico Contracting & Engineering (1992) Inc., the secured creditor that proposed the plan of arrangement.

...

42 Based on the foregoing reasons, I conclude that Randy Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that "the debt of the secured creditors exceeds the equity [in the debtor companies' property]". Randy Oram has not therefore established any reasonable possibility that he has an economic interest in the assets forming the subject matter of the proposed appeal. In addition, I conclude that to the extent there may be any arguable merit in the issue of whether the proposed plan of arrangement was contrary to the purposes of the CCAA, Randy Oram failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case.

43 As I have concluded that Randy Oram did not meet the test for granting leave to appeal, it is not necessary that I determine whether registration of the vesting order on November 25, 2004 renders the proposed appeal moot. However, I do not accept Randy Oram's submission that the fact that the recipient of the vesting order was a non-arm's length party somehow changes the considerations leading to the conclusion that, following registration, a vesting order is no longer subject to appeal: see *Re Regal Constellation Hotel Ltd.*, [2004] O.J. No. 2744 (C.A.). I also note that Randy Oram did not provide an explanation for failing to seek terms that would have permitted him to appeal the vesting order. Both of these factors militate against the viability of the proposed appeal.

...

J.M. SIMMONS J.A.

...

Case Name:
Allen-Vanguard Corp. (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 Arrangement and Reorganization
of Allen-Vanguard Corporation under the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended and Section
186 of the Ontario Business Corporations Act., R.S.O. 1990,
c. B.16, as amended, Applicants**

[2011] O.J. No. 3946

2011 ONSC 5017

81 C.B.R. (5th) 270

2011 CarswellOnt 8984

Court File No. CV-09-00008502-00CL

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: November 16, 2010.

Judgment: August 25, 2011.

(113 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Of concurrent proceedings -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Corporations, partnerships and associations law -- Corporations -- Directors and officers -- Personal liability of directors to persons other than the corporation -- Joint and several liability -- Derivative actions -- Powers of court -- Conduct of the action -- Oppression remedy -- Stay, discontinuance, settlement or dismissal -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Securities regulation -- Civil liability -- Misrepresentation in a prospectus -- Persons liable -- Underwriters -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Motion by the former directors and officers of the Corporation to enforce the terms of the Sanction Order and enjoin the class actions against them. Motion by the underwriters to stay or dismiss the shareholder class action against them. Cross-motion by the plaintiffs to vary the Sanction Order to permit the proposed actions. The Initial Order was made in December 2009 and stayed the existing Laneville action against the corporation. 100 per cent of affected creditors voted in favour of the plan, which the Corporation would have been unable to carry on without, and the Sanction Order was made. In the Laneville action, the shareholders alleged the corporation, directors and officers were liable for negligence, misrepresentation and oppression. The plaintiffs sought to continue the Laneville action against the directors. After the Sanction Order was made, the Love action was commenced by shareholders against the directors, officers and Corporation's underwriters and claimed negligence and failure to disclose transactions.

HELD: Motions allowed. Cross-motion dismissed. The release contained in the Sanction Order clearly permitted only those claims against directors that were contemplated by s. 5.1(2). These claims were not the type of claims contemplated by s. 5.1(2). It would be inconsistent with the CCAA to allow the plaintiffs to proceed with their oppression claim against the directors for acts or omissions undertaken in the Corporation's name prior to the Initial Order being made. The plaintiffs did not oppose the Sanction Order, so took their chances that the order would permit their claim to proceed. Allowing the claim to proceed would permit an inappropriate sort of priority for unsecured creditors. The claims against the directors in both actions were enjoined. Protection for the underwriters was not discussed when the Sanction Order was approved, but s. 5.1(2) was to be read narrowly to ensure to objectives of the CCAA. Furthermore, s. 5.1(2) could not be used to create a cause of action that would otherwise require court approval and leave. The plaintiffs had plenty of opportunity to seek leave to commence a derivative action but never did. The terms of the release in the Sanction Order deprived the underwriters of any indemnity they would otherwise be entitled to from the Corporation. The claim against the underwriters was struck in negligence and misrepresentation. Had the plaintiffs claimed and provided full particulars of fraud, such a claim may have survived as the terms of the release did not extend to fraud. The plaintiffs' motion to vary the terms of the Sanction Order was dismissed. It would be inappropriate to vary an order that was relied on by all parties and approved by all affected creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(1), s. 5.1(2), s. 5.1(3)

Excise Tax Act, R.S.C. 1985, c. E-15,

Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 131(1), s. 246(1)

Ontario Securities Act, s. 130, s. 138.3

Counsel:

Ronald G. Slaght, Q.C. and Eli S. Lederman for the Directors and Officers of Allen-Vanguard Corporation.

C. Scott Ritchie, Michael G. Robb and Daniel E.H. Bach for class action plaintiffs.

Alan L.W. D'Silva and Daniel S. Murdoch for Underwriters.

REASONS FOR DECISION

1 C.L. CAMPBELL J.:-- Two motions were heard together: the first by former directors and officers of Allen-Vanguard to enforce the terms of a Sanction Order, which the directors and officers say release them as well as Allen-Vanguard from all claims except those specifically provided for in section 5.1(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA.") In addition, the former directors assert that the claims of the Plaintiffs in two proposed Class Actions are not sustainable against them in law under s. 5.1(2) of the CCAA.

2 The second motion by the Underwriters of Allen-Vanguard seeks to dismiss or stay the action brought against the Underwriters by shareholders in a proposed Class Action.

...

25 As reported by the Monitor in the First Report, the Plan contemplated two releases: a General Release and an Equity Claims Release, both of which had been contemplated in the proposed Plan. Neither the Equity Claims Release nor the General Release was intended to release or deal with or affect in any respect claims under ss. 5.1(1), (2) and (3) of the CCAA, which read:

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.

5.1(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 oppressed conduct of directors.

5.1(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.

26 The Monitor in its Second Report remarked as follows:

- 28. The injunctions provided in the Plan are limited by section 5.1(2) of the CCAA. The injunctions barring any person from commencing, continuing or pursuing any proceeding on or after the Effective Time for a claim that such person may have against the Company or any current or former officer of the Company of the type referred to in subsection 5.1(2) of the CCAA ... but permit any such subsection 5.1(2) claim to proceed against a current or former director of the company except that any such claim against a current or former director of the company is permitted recourse, and sole recourse, to the Company's insurance policies in respect of its current and former directors. The estimated value of any coverage under such insurance is \$30 million as per the Luxton Affidavit.
- 29. The Monitor is aware of at least one group of stakeholders affected and by the Supplemental Injunction, being a group of current and former shareholders of the Company that have served a Notice of Action and Statement of Claim on the Company seeking approximately \$80 million in damages from the Company and its directors and officers, as further described in the monitors First Report. As stated above the terms of the Supplemental Injunction would permit this claim to survive against the current and former directors of the Company with recourse limited to the Companies insurance as referenced above."

27 The Releases and Sanctions are contained in the language of the Sanction Order. A summary of the provisions with paragraph references to the Sanction Order is as follows:

22. Releases are essential to the Plan
23. All Persons give full release to each of the Released Parties including contribution and indemnity but directors not released in respect of any claim of the kind referred to in section 5.1(2) of the CCAA.
24. Release of Applicant and current and former directors provided that nothing therein releases a director or current or former officer in respect of any claim of the kind referred to in section 5.1(2) of the CCAA.
25. All Persons enjoined and estopped from commencing or continuing actions with the exception of any claim against the directors of the kind referred to in section 5.1(2) of the CCAA..
26. Injunction and bar with respect to section 5.1(2) against the applicant ... and that the sole recourse for any claims against a current or former director or officer of the Applicant Limited to any recoveries from the Applicants insurance policies in respect of current or former directors and officers
27. Laneville Action dismissed as against the Applicant without prejudice to discovery rights against representative of the Applicant.

...

30 Having reviewed the language of the Releases contained in the Sanction Order, I am satisfied that the only basis that the release language permits claims as against the directors is if they are those contemplated in s. 5.1(2) of the CCAA not to be released.

31 The object of the CCAA is to facilitate the restructuring of an insolvent corporation. In order to effect restructuring, a compromise of creditors' claims is almost inevitably an essential ingredient of a Plan under the CCAA.

32 The Plan, to be effective and to obtain Court approval, requires consensus and agreement by various classes of creditors. Many of the issues that arise before a Plan is approved by the Court involve a contestation between creditor groups as to how they should be classified and what extent of what group approval should be appropriately required. No motion was brought to seek to lift the stay in respect of actions provided for in the Initial Order.

33 In this case, no creditor came forward to oppose approval of the Plan, including the terms of the release language as set out in the Sanction Order. The effect of a Sanction Order is to create a contract between creditors. (See *Canadian Red Cross Society* (2002), 35 C.B.R. (4th) 43 (Ont. S.C.J.).

34 The most significant feature of the CCAA Applications that have come before the Court in the last two or three years is that the negotiation has taken place to achieve consensus among creditors often before the Initial Order under the statute.

...

40 The CCAA has been said to be a skeletal statute designed to give flexibility and expediency in the ability of the company, with the concurrence of its creditors, to accomplish a restructuring of its debt in the avoidance of liquidation or bankruptcy, and does not contain a comprehensive code that lays out all that is permitted or barred. (See *ATB Financial v. Metcalfe & Mansfield Alternative Investments 11 Corp.*, 2008 ONCA 587 per Blair J.A. para. 44.)

41 Since the hearing in this matter, the Supreme Court of Canada has rendered a decision in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, which endorses the broad principles of the CCAA and the discretion granted to the Court to effect a restructuring if possible or an orderly liquidation.

...

44 I have quoted from the above decision at length to stress the nature of the discretion that is inherent in the CCAA statute to allow the Court to fashion a structure or process to best benefit stakeholders. Consistent with that purpose and as a matter of statutory interpretation, it is appropriate to look at the interpretation of s. 5.1(1) and (2) of the CCAA. Section 5.1(1) deals with "obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

...

59 The Sanction Order in this case by its terms provided release of the claims now sought to be pursued. By the terms of the Sanction Order, the only reasonable expectation of stakeholders would be that unless specifically authorized by the Order, any claim against directors would be barred. Potential claims against directors were not assigned to class plaintiffs nor was direction sought by any party about the effect of s. 5.1 prior to the issuance of the Order. Given the issue now before the Court and the disagreement of the parties, perhaps the better practice would have been to advise the Court of the issue and "carve" it out of the Plan.

60 The Court is put in a difficult position when asked in a very constrained timeframe to approve the restructuring with releases. It should certainly not be the expectation that in every instance, releases of the type here should be granted as a matter of course. Those with unpaid obligations of the company may assert that directors are liable if they fail to fulfill the company's obligation when they are legally bound to do so.

61 I am of the view that third-party releases in particular should be the exception rather than the rule. There may very well be instances in which the releases are not integral or necessary to the restructuring and should not be approved. That was not suggested in the approval process here. There was no evidence presented at the time of the granting of the Sanction Order to suggest that directors were not important to the restructuring. Indeed, the only evidence before the Court was to the contrary: that the directors were integral to the Plan's success.

62 In this case, the putative Plaintiffs did not oppose the granting of the Sanction Order and in effect took their chances that the Order might after the fact permit the limited claim referred to in the Monitor's Report.

63 All of the other stakeholders, including the secured creditors, directors, officers and the Applicant Company, approved the form of Order.

64 It is certainly speculative at this time to consider, had the form of Order proposed been objected to, to what extent the Court would have any jurisdiction to grant the language now sought by the Plaintiffs, without rejecting the Plan entirely.

65 The duty of directors is first and foremost to the company itself. The oppression remedy does not in my view permit one group (shareholders) to claim oppression when other stakeholders, for example employees or creditors or indeed the company itself, have allegedly suffered a loss that results in insolvency and are unable to seek redress and still preserve restructuring.

66 To vary or amend the Sanction Order now to permit the claims to continue might at the very least require the presence and concurrence of all of those who supported the form of Order in the first place.

...

Variation of the Sanction Order

106 As noted above in reference to the decision in *Canadian Red Cross*, a Sanction Order in addition to being an Order of the Court and subject to the normal rules for variation thereof, represents an agreed contract between the creditors of an insolvent corporation.

107 The Class Plaintiffs in the Laneville action did not seek to lift the stay at the time of the Initial Order. The Class Plaintiff accepted the Release provisions which extend to Underwriters when the Sanctioned Order was granted.

108 Underwriters were released by the terms of the Sanction Order, and the Order, which was not appealed, represents a final determination of the rights of shareholders as against Underwriters.

109 As was mentioned above, in respect of the suggestion of variation of the Sanction Order to permit the claim as against the directors, I conclude that it is not appropriate to vary a Sanction Order after the fact. The reliance that parties place on the finality of a Sanction Order is such that it would only be in extraordinary circumstances of a clear mistake, operative misrepresentation or fraud that would permit variation without re-opening the whole process.

110 In *Extreme Retail (Canada) Inc. v. Bank of Montréal*, [2007] O.J. No. 3304 (Ont. S.J.) [Commercial List], Stinson J. held at paragraph 21 that an Approval and Vesting Order was a final determination of the rights of parties represented in that proceeding. Morawetz J. adopted those comments in *Royal Bank Body Blue Inc.*, [2008] O.J. No. 1628, 2008 CanLII 19227 [Ont. S.C.], to the same effect at paragraphs 19 and 20. In my view the same principle applies to a Sanction Order.

111 I see nothing in the requests of either Underwriters or the Class Plaintiffs that would be appropriate to permit variation of the Sanction Order as each of them have proposed.

112 Should the Class Plaintiff in the Laneville action seek to pursue a claim against Underwriters limited alone in fraud, the action should be permitted to proceed subject to the Plaintiff persuading a judge that such a limited claim should be certified.

Conclusion

113 For the above reasons the motion by the directors will succeed to enjoin the claims as against them in both the Love and Laneville actions. The motion of Underwriters to strike is granted, and motions for variation of the Sanction Order of both Underwriters and the Class Plaintiffs are dismissed. Counsel may make written submissions on the issue of costs.

C.L. CAMPBELL J.

Indexed as:

Canadian Red Cross Society (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985 c. C-36
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
the Canadian Red Cross Society/La Société Canadienne De La
Croix-Rouge
AND IN THE MATTER OF the Canadian Red Cross Society/ La
Société Canadienne De La Croix-Rouge**

[1998] O.J. No. 3306

72 O.T.C. 99

5 C.B.R. (4th) 299

1998 CarswellOnt 3346

81 A.C.W.S. (3d) 932

Commercial List File No. 98-CL-002970

Ontario Court of Justice (General Division)

Blair J.

August 19, 1998.

(28 pp.)

[Ed. note: Supplementary reasons released August 19, 1998. See [1998] O.J. No. 3307. Further supplementary reasons also released August 19, 1998. See [1998] O.J. No. 3513.]

Counsel:

B. Zarnett, B. Empey and J. Latham, for the Canadian Red Cross.

E.B. Leonard, S.J. Page and D.S. Ward, for the Provinces except Que. and for the Canadian Blood Services.

Jeffrey Carhart, for the Héma-Québec and for the Government of Québec.

Marlene Thomas and John Spencer, for the Attorney General of Canada.

Pierre R. Lavigne and Frank Bennett, for the Quebec '86-90 Hepatitis C Claimants.
Pamela Huff and Bonnie Tough, for the 1986-1990 Haemophilic Hepatitis C Claimants.
Harvin Pitch and Kenneth Arenson, for the 1986-1990 Hepatitis C Class Action Claimants.
Aubrey Kaufman and David Harvey, for the Pre 86/Post 90 Hepatitis C Class Action Claimants.
Bruce Lemer, for the B.C. 1986-90 Class Action.
Donna Ring, for the HIV Claimants.
David A. Klein, for the B.C. Pre-86/Post-90 Hepatitis C Claimants.
David Thompson, agent for the Quebec Pre-86/Post 90 Hepatitis C Claimants.
Michael Kainer, for the Service Employees International Union.
I.V.B. Nordheimer, for the Bayer Corporation.
R.N. Robertson, Q.C. and S.E. Seigel, for the T.D. Bank.
James H. Smellie, for the Canadian Blood Agency.
W.V. Sasso, for the Province of British Columbia.
Justin R. Fogarty, for the Raytheon Engineers.
Nancy Spies, for the Central Hospital et al (Co-D).
M. Thomson, for the various physicians.
C.H. Freeman, for the Blood Trac Systems.

BLAIR J. (endorsement):--

Background and Genesis of the Proceedings

1 The Canadian Red Cross Society/La Société Canadienne de la Croix Rouge has sought and obtained the insolvency protection and supervision of the Court under the Companies' Creditors Arrangement Act ("CCAA"). It has done so with a view to putting forward a Plan to compromise its obligations to creditors and also as part of a national process in which responsibility for the Canadian blood supply is to be transferred from the Red Cross to two new agencies which are to form a new national blood authority to take control of the Canadian Blood Program.

...

Jurisdiction Issue

40 The issue of whether the Court has jurisdiction to make an order approving the sale of substantial assets of the debtor company before a Plan has been put forward and placed before the creditors for approval, has been raised by Mr. Bennett. I turn now to a consideration of that question.

41 Mr. Bennett argues that the Court does not have the jurisdiction under the CCAA to make an order approving the sale of substantial assets by the Applicant Company before a Plan has even been filed and the creditors have had an opportunity to consider and vote on it. He submits that section 11 of the Act permits the Court to extend to a debtor the protection of the Court pending a restructuring attempt but only in the form of a stay of proceedings against the debtor or in the form of an order restraining or prohibiting new proceedings. There is no jurisdiction to approve a sale of assets in advance he submits, or otherwise than in the context of the sanctioning of a Plan already approved by the creditors.

42 While Mr. Kaufman does not take the same approach to a jurisdictional argument, he submits nonetheless that although he does not oppose the transfer and approval of the sale, the Court cannot grant its approval at this stage if it involves "sanitizing" the transaction. By this, as I understand it, he means that the Court can "permit" the sale to go through - and presumably the purchase price to be paid - but that it cannot shield the assets conveyed from claims that may subsequently arise - such as fraudulent preference claims or oppression remedy claims in relation to the transaction. Apart from the fact that there is no evidence of the existence of any such claims, it seems to me that the argument is not one of "jurisdiction" but rather one of "appropriateness". The submission is that the assets should not be freed up from further claims until at least the Red Cross has filed its Plan and the creditors have had a chance to vote on it. In other words, the approval of the sale transaction and the transfer of the blood supply assets and operations should have been made a part and parcel of the Plan of Arrangement put forward by the debtor, and the question of whether or not it is appropriate and supportable in that context debated and fought out on the voting floor, and not separately before-the-fact. These sentiments were echoed by Mr. Klein and by Mr. Thompson as well. In my view, however, the assets either have to be sold free and clear of claims against them - for a fair and reasonable price - or not sold. A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back. In the context of the transfer of the Canadian blood supply operations, the prospect of such a claw back of assets sold, at a later time, has very troubling implications for the integrity and safety of that system. I do not think, firstly, that the argument is a jurisdictional one, and secondly, that it can prevail in any event.

43 I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan": *Re Dylex Limited and Others*, (1995), 31 C.B.R. (3d) 106, per Farley J., at p. 110.

44 As Mr. Zarnett pointed out, paragraph 20 of the Initial Order granted in these proceedings on July 20, 1998, makes it a condition of the protection and stay given to the Red Cross that it not be permitted to sale or dispose of assets valued at more than \$1 million without the approval of the Court. Clearly this is a condition which the Court has the jurisdiction to impose under section 11 of the Act. It is a necessary conjunction to such a condition that the debtor be entitled to come back to the Court and seek approval of a sale of such assets, if it can show it is in the best interests of the Company and its creditors as a whole that such approval be given. That is what it has done.

45 It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex*, supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legisla-

tion. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Re Lehndorff General Partner* (1993), 17 C.B.R. (3d) 24, at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

(emphasis added)

46 In the spirit of that approach, and having regard to the circumstances of this case, I am satisfied not only that the Court has the jurisdiction to make the approval and related orders sought, but also that it should do so. There is no realistic alternative to the sale and transfer that is proposed, and the alternative is a liquidation/bankruptcy scenario which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To forego that purchase price - supported as it is by reliable expert evidence - would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.

47 While the authorities as to exactly what considerations a court should have in mind in approving a transaction such as this are scarce, I agree with Mr. Zarnett that an appropriate analogy may be found in cases dealing with the approval of a sale by a court-appointed receiver. In those circumstances, as the Ontario Court of Appeal has indicated in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, at p. 6 the Court's duties are,

- (i) to consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (ii) to consider the interests of the parties;

(iii) to consider the efficacy and integrity of the process by which offers are obtained; and,

- (iv) to consider whether there has been unfairness in the working out of the process.

48 I am satisfied on all such counts in the circumstances of this case.

49 Some argument was directed towards the matter of an order under the Bulk Sales Act. Because of the nature and extent of the Red Cross assets being disposed of, the provisions of that Act must either be complied with, or an exemption from compliance obtained under s. 3 thereof. The circumstances warrant the granting of such an exemption in my view. While there were submissions about whether or not the sale would impair the Society's ability to pay its creditors in full, I do not believe that the sale will impair that ability. In fact, it may well enhance it. Even if one accepts the argument that the emphasis should be placed upon the language regarding payment "in full" rather than on "impair", the case qualifies for an exemption. It is conceded that the Transfusion claimants do not qualify as "creditors" as that term is defined under the Bulk Sales Act; and if the claims of the Transfusion Claimants are removed from the equation, it seems evident that other creditors could be paid from the proceeds in full.

...

BLAIR J.

Case Name:
Crystallex International Corp. (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
Crystallex International Corporation**

[2012] O.J. No. 2651

2012 ONCA 404

293 O.A.C. 102

91 C.B.R. (5th) 207

2012 CarswellOnt 7329

216 A.C.W.S. (3d) 550

4 B.L.R. (5th) 1

Dockets: C55434 and C55435

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., R.A. Blair and A. Hoy JJ.A.

Heard: May 11, 2012.

Judgment: June 13, 2012.

(99 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Costs of administration -- Appeal by major creditors of company under protection from court's approval of two loans and a management incentive plan dismissed -- Appeal from bridge loan was moot where money had been advanced, spent and repaid -- Approval of DIP loan was reasonable where financing was required for company to pursue arbitration claim which represented its only asset of value -- Loan did not constitute an arrangement requiring cred-

itor approval -- Survival of lenders' right after protection ended did not preclude loan -- Board was in best position to assess which employees were essential to restructuring -- Plan to retain executives was in company's best interest -- Companies' Creditors Arrangement Act, ss. 6, 11.2.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Orders -- Interim or interlocutory orders -- Appeal by major creditors of company under protection from court's approval of two loans and a management incentive plan dismissed -- Appeal from bridge loan was moot where money had been advanced, spent and repaid -- Approval of DIP loan was reasonable where financing was required for company to pursue arbitration claim which represented its only asset of value -- Loan did not constitute an arrangement requiring creditor approval -- Survival of lenders' right after protection ended did not preclude loan -- Board was in best position to assess which employees were essential to restructuring -- Plan to retain executives was in company's best interest.

Appeal by Computershare, trustee for holders of senior notes payable by Crystallex, from three orders made by the judge supervising Crystallex's protection proceedings. Crystallex's contract to develop a gold deposit in Venezuela was rescinded by the Venezuelan government, through no fault of Crystallex. As a result, Crystallex was unable to pay \$100,000,000 to the noteholders, due December 31, 2011. Crystallex obtained creditor protection on December 23, 2011. In the orders under appeal, Crystallex was authorized to obtain bridge financing of \$3,125,000 from Tenor, to obtain \$36,000,000 in DIP financing from Tenor, and to implement a Management Incentive Plan designed to ensure the retention of key executives until Crystallex's \$3,400,000,000 arbitration claim against the Venezuelan government was completed. The DIP loan entitled Tenor to 35 per cent of the net proceeds of the arbitration claim, provided governance rights that might continue after Crystallex exited protection, and other rights. Substantially all the creditors opposed these orders. Crystallex represented that it hoped to negotiate a plan of arrangement or compromise with the noteholders and other creditors by July 30, 2012, when the current stay was set to expire. By the time of the appeal, Tenor had advanced the bridge loan, and Crystallex had spent and repaid it.

HELD: Appeal dismissed. The appeal from the bridge loan was moot because the loan funds had been advanced, spent and repaid. The judge was not precluded from approving the DIP loan because the rights Tenor obtained pursuant to it might continue after Crystallex emerged from protection. The DIP loan was necessary for Crystallex to pursue its arbitration claim, its only asset of value. The judge did not err in focusing on this fact in deciding whether or not to approve the DIP loan. He did not misapprehend the evidence in finding the noteholders' offer to provide financing was not made on the same terms as Tenor's offer, and would not provide Crystallex with sufficient funds to pursue its arbitration claim. The judge reasonably exercised his discretion in approving the Tenor DIP loan. The loan was not a plan of arrangement or compromise requiring the approval of two-thirds of Crystallex's creditors. The loan did not compromise the terms of the noteholders' indebtedness or take away any of their legal rights. The recommendations of Crystallex's board, based on expert evidence, provided support for the judge's conclusion that the Management Incentive Plan should be approved. The board was in the best position to assess which employees were essential to the success of Crystallex's restructuring efforts.

...

Appeal From:

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated January 20, 2012, with reasons reported at 2012 ONSC 538, and from the orders of Justice Frank J.C. Newbould of the Superior Court of Justice dated April 16, 2012, with reasons reported at 2012 ONSC 2125.

...

The judgment of the Court was delivered by

A. HOY J.A.:--

I. OVERVIEW

1 The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

...

B. Crystallex's Submissions

58 Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

59 As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

60 Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*,

R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447, at para. 57.

61 Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. ANALYSIS

A. The Appeal from the Bridge Financing Order

62 The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

B. The Appeal from the Tenor DIP Financing Order

(1) *Century Services Inc. v. Canada (Attorney General)*

63 The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances".³ For the majority in *Century Services*, Deschamps J. wrote:

[69] The CCAA also explicitly provides for certain orders ...

[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 stakeholders are treated as advantageously and fairly as the circumstances permit.

64 It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

...

Case Name:
Grace Canada Inc. (Re)

**IN THE MATTER OF s. 18.6 of the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Grace Canada, Inc.**

[2008] O.J. No. 4208

50 C.B.R. (5th) 25

2008 CarswellOnt 6284

170 A.C.W.S. (3d) 692

Court File No. 01-CL-4081

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: September 30, 2008.

Judgment: October 17, 2008.

Released: October 23, 2008.

(81 paras.)

Civil litigation -- Civil procedure -- Settlements -- Approval -- Motion by Grace Canada for approval of the minutes of settlement allowed -- The claims against Grace arose from its manufacture of Zonolite Attic Insulation (ZAI) containing asbestos -- Under the minutes, Grace agreed to fund a multimedia notice program, establish a trust for Canadian property damage claims and channel any Canadian personal injury claims to a US asbestos trust -- The minutes were fair and reasonable and did not prejudice the interests of the Crown -- They also provided a mechanism for the resolution of Canadian ZAI claims without the delay and uncertainty of ongoing litigation.

Creditors and debtors law -- Proceedings -- Practice and procedure -- Settlements -- Motion by Grace Canada for approval of the minutes of settlement allowed -- The claims against Grace arose from its manufacture of Zonolite Attic Insulation (ZAI) containing asbestos -- Under the minutes, Grace agreed to fund a multimedia notice program, establish a trust for Canadian property damage

claims and channel any Canadian personal injury claims to a US asbestos trust -- The minutes were fair and reasonable and did not prejudice the interests of the Crown -- They also provided a mechanism for the resolution of Canadian ZAI claims without the delay and uncertainty of ongoing litigation.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6, s. 18.6(3), s. 18.6(4)
United States Bankruptcy Code,

Counsel:

Derrick C. Tay, Orestes Pasparakis and Jennifer Stam for Grace Canada Inc.

Keith J. Ferbers for Raven Thundersky.

Alexander Rose for Sealed Air (Canada).

Michel Bélanger, David Thompson, and Matthew G. Moloci, Representative Counsel for CDN ZAI Claimants.

Jacqueline Dais-Visca and Carmela Maiorino for The Attorney General of Canada.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- Grace Canada Inc. ("Grace Canada" and with the U.S. debtors, "Grace") bring this motion to seek approval of the Minutes of Settlement ("the Minutes") in respect of claims against Grace relating to the manufacture and sale of Zonolite Attic Insulation ("ZAI") in Canada (the "CDN ZAI Claims").

...

28 The Minutes contemplate a settlement of all CDN ZAI Claims, both personal injury ("CDN ZAI PI Claims") and property damage, on the following terms:

- (a) Grace agrees to provide in its Plan for the creation of a separate class of CDN ZAI PD Claims and to establish the CDN ZAI PD Claims Fund, which shall make payments in respect of CDN ZAI Claims;
- (b) on the effective date of Grace's Plan, Grace will contribute \$6,500,000 through a U.S. PD Trust to the CDN ZAI PD Claims Fund;
- (c) Grace's Plan provides that any holder of a CDN ZAI PI Claim ("CDN ZAI PI Claimant") shall be entitled to file his or her claim with the Asbestos Personal Injury Trust to be created for all PI Claims and funded in accordance with the US\$1.5 billion PI Settlement;
- (d) Representative Counsel shall vote, on behalf of CDN ZAI Claimants, in favour of the Plan incorporating the settlement; and

- (e) Representative Counsel shall be entitled to bring a fee application within the U.S. proceedings and any such payments received would reduce the amount otherwise payable to Representative Counsel under the Settlement.

In addition, Grace has agreed to fund a broad based media notice programme across Canada and an extended claims bar procedure for CDN ZAI PD Claims and Grace has also agreed to give direct notice to any known claimant.

29 Under the Minutes, the bar date for CDN ZAI PD Claims is not less than 180 days from substantial completion of the CDN ZAI Claims Notice Program. The period for filing ZAI PD Claims in the U.S. is considerably shorter and Grace has scheduled a motion with the U.S. Court on October 20, 2008 to approve the CDN ZAI PD Claims bar date. Grace has indicated that if granted, recognition of the U.S. order will be sought from this Court. There will be no bar date for CDN ZAI PI Claims.

30 Grace has indicated that it has contemplated that monies will be distributed out of the CDN ZAI PD Claims Fund based on a claimant's ability to prove that his or her property contained ZAI and that monies were expended to contain or remove ZAI from the property. Based on proof of ZAI in the home and the remediation measures taken by a claimant, that claimant may recover \$300 or \$600 per property.

31 The issues for consideration were stated by counsel to Grace as follows:

- (a) Does Representative Counsel have the authority to enter into the Minutes on behalf of all CDN ZAI Claimants?
- (b) Does the CCAA Court have the jurisdiction to approve the Minutes, including the relief in favour of Sealed Air Canada and the Crown?
- (c) Are the Minutes fair and reasonable? In particular, is their prejudice to the key constituencies?

32 The Representation Order is clear. It gives Representative Counsel broad powers, including the ability to negotiate on behalf of CDN ZAI Claimants. No party has objected to or taken issue with the Representation Order or with the authority of Representative Counsel to represent all CDN ZAI Claims.

33 I am satisfied that Lauzon and Scarfone have the authority, as Representative Counsel, to enter the Minutes of Settlement on behalf of all CDN ZAI Claimants.

34 I am also satisfied that the CCAA Court may approve material agreements, including settlement agreements, before the filing of any plan of compromise or arrangement. See *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) and *Calpine Canada Energy Limited (Re)* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (2007), 35 C.B.R. (5th) 27 (Alta. C.A.).

...

36 With respect to relief in favour of Sealed Air, Grace has agreed to indemnify Sealed Air Canada for certain liabilities in connection with ZAI. As part of the settlement, Grace seeks to ensure that the release of the CDN ZAI Claims includes a release for the benefit of Sealed Air Canada.

37 Counsel submits that such release is not only necessary and essential, but also fair given Sealed Air Canada's contribution to the PI Settlement under the Plan in excess of \$500 million. I am

satisfied that, in these circumstances, the release for the benefit of Sealed Air Canada is fair and reasonable.

38 The Minutes also provide a limited release in favour of the Crown. Pursuant to the Minutes, the Crown's claims for contribution and indemnity against Grace (being CDN ZAI Claims) are released. Counsel submits that the corollary is that the Crown is relieved of any joint liability it shares with Grace for CDN ZAI Claims.

39 Counsel to Grace again submits that such a release of the Crown is necessary. Otherwise, Grace could become indirectly liable through contribution and indemnity claims.

40 Counsel for Grace submits that, in certain circumstances, this Court has ordered third party releases where they are necessary and connected to a resolution of the debtor's claims, will benefit creditors generally, and are not overly broad or offensive to public policy. (See: *Re: Muscletech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59 (Ont. Sup. Ct.) and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269 (Ont. Sup. Ct.), aff'd., [2008] O.J. No. 597, 2008 ONCA 587 ("Metcalfe"), leave to appeal to S.C.C. denied, [2008] S.C.C.A. No. 337.)

41 Subsections 18.6(3) and (4) of the CCAA, allow the Ontario Court to make orders with respect to foreign insolvency proceedings, on such terms and conditions as the Court considers appropriate.

42 In assessing whether to grant its approval, the Court has to consider whether the Minutes are fair and reasonable in all of the circumstances.

...

76 I have been satisfied that the Minutes are fair and reasonable. The Minutes have been agreed to by Representative Counsel. In my view, the Minutes do not prejudice the interests of the Crown. I am also of the view that there is no prejudice to the ZAI PD Claimants who will have access to a significant fund to assist with their remediation costs. Their alternative is more litigation which, at the end of the day, would have a very uncertain outcome. I am also of the view that there is no prejudice to the ZAI PI Claimants who will have the opportunity to make a claim to the asbestos trust in the U.S. I am satisfied that the ZAI PI Claimants will be receiving treatment that is fair and equal with other PI Claimants. Further, it is noted that counsel to Grace advised that the Thundersky family are the only known ZAI PI Claimants. Their alternative is the continuation of a claim that on its face, would appear to have been statute barred in 1994.

77 I also accept the conclusions as put forth by counsel to Grace. This Settlement provides CDN ZAI PD Claimants with clear recourse to the CDN ZAI PD Claims Fund and CDN ZAI PI Claimants with recourse to the Asbestos Personal Injury Trust in situations where it is Grace's view that the Canadian claims have little or no value.

78 I am also satisfied that third party releases are, in the circumstances of this case, directly connected to the resolution of the debtor's claims and are necessary. The third party releases are not, in my view, overly broad nor offensive to public policy.

79 Counsel to Grace also submitted that Representative Counsel have been continuously active and diligent in both the U.S. and Canadian proceedings and Grace is of the view that it is appropriate that a portion of the funds paid under the settlement go towards compensation of Representative Counsel's fees. I accept this submission and specifically note that the Minutes provide for specified

payments to Representative Counsel, a Claims Administrator and a qualified expert to assist in the claims process, in a total amount of approximately CDN\$3,250,000.

80 In conclusion, the Minutes, in my view, represent an important component of the Plan. They provide a mechanism for the resolution of CDN ZAI Claims without the uncertainty and delay associated with ongoing litigation.

81 The Minutes are approved and an order shall issue in the form requested, as amended.

G.B. MORAWETZ J.

cp/e/qlbxm/qlcnt/qlaxr/qlaxw/qlced/qlhcs

Case Name:

Muscletech Research and Development Inc. (Re)

**RE: IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Muscletech Research and
Development Inc. and those Entities Listed on
Schedule "A" hereto, Applicants**

[2007] O.J. No. 695

30 C.B.R. (5th) 59

156 A.C.W.S. (3d) 22

2007 CarswellOnt 1029

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List - Toronto, Ontario

J.D. Ground J.

Heard: February 15, 2007.

Judgment: February 22, 2007.

(27 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Application by the insolvent applicants for the sanction of a distribution plan to resolve large number of product liability and other lawsuits allowed -- Applicants complied with the Act and did nothing that was contrary to it -- Plan was fair and reasonable.

Application by certain applicants under the Companies' Creditors Arrangement Act for the sanction of their distribution plan -- Plan proposed distributions to each creditor in the General Claimants Class and each creditor in the Personal Injury Claimants Class -- Such distributions were to be funded from the contributed funds paid to the Monitor by the subject parties defined in the Plan -- Plan was not a restructuring plan but was a unique liquidation plan funded entirely by parties other than the applicants -- Purpose and goal of the applicants seeking relief under the Act was to achieve

global resolution of a large number of product liability and other lawsuits that were commenced principally in the United States by numerous claimants and which related to products formerly advertised, marketed and sold by Muscletech Research and Development Inc. -- Applicants' successful restructuring depended on the resolution of the product liability claims -- HELD: Application allowed -- Applicants complied with all the requirements of Act and had adhered to previous court orders -- They were insolvent and had total claims in excess of \$5 million -- Nothing was done that was not authorized by the Act -- Plan was fair and reasonable -- Applicants had no assets and no funds with which to fund a distribution to creditors -- Without the contributed funds there would be no distribution and no Plan and the applicants' only alternative would be bankruptcy -- Unsecured creditors would receive nothing in the event of a bankruptcy -- Part of the Plan was that certain affected parties to the litigation would receive releases -- Releases were necessary because without them no funds would be contributed -- If the Plan was not sanctioned the parties would continue to be mired in extensive and expensive litigation that would have no predictable outcome.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 6, s. 12

Corporations Tax Act, s. 107

Excise Tax Act, s. 270

Income Tax Act, s. 159

Counsel:

Fred Myers and David Bish, for CCAA Applicants.

Derrick Tay and Randy Sutton, for Iovate Companies.

Natasha MacParland and Jay Schwartz, for the RSM Richter Inc.

Steven Gollick, for Zurich Insurance Company.

A. Kauffman, for GNC Oldco.

Sheryl Seigel, for General Nutrition Companies Inc. and other GNC Newcos.

Pamela Huff and Beth Posno for Representative Plaintiffs.

Jeff Carhart, for Ad Hoc Tort Claimants Committee.

David Molton and Steven Smith, for Brown Rudnick.

Brent McPherson, for XL Insurance America Inc.

Alex Ilchenko, for Walgreen Co.

Lisa La Horey, for E&L Associates, Inc.

ENDORSEMENT

1 J.D. GROUND J.:-- The motion before this court is brought by the Applicants pursuant to s. 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for the sanction of a plan (the "Plan") put forward by the Applicants for distributions to each creditor in the General Claimants Class ("GCC") and each creditor in the Personal Injury Claimants Class ("PICC"), such distributions to be funded from the contributed funds paid to the Monitor by the subject parties ("SP") as defined in the Plan.

...

The Plan is Fair and Reasonable

...

20 A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

21 With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

22 The sanction of the Plan was opposed only by prospective representative plaintiffs in five class actions in the United States. This court has on two occasions denied class action claims in this proceeding by orders dated August 16, 2006 with respect to products containing prohormone and dated December 11, 2006 with respect to Hydroxycut products. The first of such orders was appealed to the Ontario Court of Appeal and the appeal was dismissed. The second of such orders was not appealed. In my reasons with respect to the second order, I stated as follows:

... This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no mem-

ber of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Re Ephedra Products Liability Litigation* (2005) U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be \$ 30, entitling each claimant to a distribution of about \$ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering \$ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

[35] In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez et al. v. Metabolife International Inc.* (2003) U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

23 The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.

The representative Plaintiffs also appear to challenge the jurisdiction of this court to authorize the Third Party Releases as one of the terms of the Plan to be sanctioned. I remain of the view expressed in paragraphs 7-9 of my endorsement dated October 13, 2006 in this proceeding on a motion brought by certain personal injury claimants, as follows:

With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

"the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."

Moreover, 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. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting

Claimants did file Proofs of Claim settling [sic] out in detail their claims against numerous Third Parties.

It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) Paperny J. stated at p. 92:

While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

24 The representative Plaintiffs have referred to certain decisions in the United States that appear to question the jurisdiction of the courts to grant Third Party Releases. I note, however, that Judge Rakoff, who is the U.S. District Court Judge is seized of the *MuscleTech* proceeding, and Judge Drain stated in a hearing in *Re TL Administration Corporation* on July 21, 2005:

It appears to us to be clear that this release was, indeed, essential to the settlement which underlies this plan as set forth at length on the record, including by counsel for the official claimants committee as well as by the other parties involved, and, as importantly, by our review of the settlement agreement itself, which from the start, before this particular plan in fact was filed, included a release that was not limited to class 4 claims but would extend to claims in class 5 that would include the type of claim asserted by the consumer class claims.

Therefore, in contrast to the Blechman release, this release is essential to confirmation of this plan and the distributions that will be made to creditors in both classes, class 4 and class 5.

Secondly, the parties who are being released here have asserted indemnification claims against the estate, and because of the active nature of the litigation against them, it appears that those claims would have a good chance, if not resolved through this plan, of actually being allowed and reducing the claims of creditors.

At least there is a clear element of circularity between the third-party claims and the indemnification rights of the settling third parties, which is another very important factor recognized in the Second Circuit cases, including *Manville*, *Drexel*, *Finely*, *Kumble* and the like.

The settling third parties it is undisputed are contributing by far the most assets to the settlement, and those assets are substantial in respect of this reorganization by this Chapter 11 case. They're the main assets being contributed.

Again, both classes have voted overwhelmingly for confirmation of the plan, particularly in terms of the numbers of those voting. Each of those factors, although they may be weighed differently in different cases, appear in all the cases where there have been injunctions protecting third parties.

The one factor that is sometimes cited in other cases, i.e., that the settlement will pay substantially all of the claims against the estate, we do not view to be dispositive. Obviously, substantially all of the claims against the estate are not being paid here. On the other hand, even, again, in the Second Circuit cases, that is not a dispositive factor. There have been numerous cases where plans have been confirmed over opposition with respect to third-party releases and third-party injunctions where the percentage recovery of creditors was in the range provided for under this plan.

The key point is that the settlement was arrived at after arduous arm's length negotiations and that it is a substantial amount and that the key parties in interest and the court are satisfied that the settlement is fair and it is unlikely that substantially more would be obtained in negotiation.

25 The reasoning of Judge Rakoff and Judge Drain is, in my view, equally applicable to the case at bar where the facts are substantially similar.

26 It would accordingly appear that the jurisdiction of the courts to grant Third Party Releases has been recognized both in Canada and in the United States.

27 An order will issue sanctioning the Plan in the form of the order submitted to this court and appended as Schedule B to this endorsement.

J.D. GROUND J.

...

Case Name:
Nortel Networks Corp. (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
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation,
Applicants**

[2010] O.J. No. 1232

2010 ONSC 1708

63 C.B.R. (5th) 44

81 C.C.P.B. 56

2010 CarswellOnt 1754

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 3-5, 2010.

Judgment: March 26, 2010.

(106 paras.)

Bankruptcy and insolvency law -- Property of bankrupt -- Pensions and benefits -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).

Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).

Motion by the applicant Nortel corporations for approval of a settlement agreement. The settlement agreement provided for the termination of pension payments and the termination of benefits paid through Nortel's Health and Welfare Trust (HWT). The applicants were granted a stay of proceedings on January 14, 2009, pursuant to the Companies' Creditors Arrangement Act, but had continued to provide the HWT benefits and had continued contributions and special payments to the pension plans. The opposing long-term disability employees opposed the settlement agreement, principally as a result of the inclusion of a release of Nortel and its successors, advisors, directors and officers, from all future claims regarding the pension plans and the HWT in the absence of fraud. The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), and the informal Nortel Noteholder Group (the "Noteholders") opposed Clause H.2 of the settlement agreement. Clause H.2 stated that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims. The Monitor supported the Settlement Agreement, submitting that it was necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The CAW and Board of Directors of Nortel also supported the settlement agreement.

HELD: Motion dismissed. Cause H.2 was not fair and reasonable. Clause H.2 resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue. The third party releases were necessary and connected to a resolution of the claims against the applicants, benefited creditors generally and were not overly broad or offensive to public policy.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2)

Counsel:

Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants.

Lyndon Barnes and Adam Hirsh, for the Nortel Directors.

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor.

Arthur O. Jacques, for the Nortel Canada Current Employees.

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF).

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees.

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund.

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group.

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada.

Pamela Huff, for the Northern Trust Company, Canada.

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees.

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration).

Sorin Gabriel Radulescu, In Person.

Guy Martin, In Person, on behalf of Marie Josee Perrault.

Peter Burns, In Person.

Stan and Barbara Arnelien, In Person.

ENDORSEMENT

G.B. MORAWETZ J.:--

...

B. Effect of the Settlement Approval Order

61 In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

62 Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.*, [2009] O.J. No. 2529 at para. 16. I am satisfied that this objective has been achieved.

64 The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

65 I am satisfied that the notice process was properly implemented by the Monitor.

66 I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel*, [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra*, at paras. 44 and 61.

68 Three sources for the court's authority to approve pre-plan agreements have been recognized:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel*, [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

69 In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of ar-

rangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.*, [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra*, and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

72 Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

73 A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

...

Third Party Releases

77 Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

78 The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

79 In *Grace 2008, supra*, and *Grace 2010, supra*, I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

80 In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

...

G.B. MORAWETZ J.

cp/e/qlrxg/qlpxm/qlaxw/qlced/qljyw

Indexed as:

Pacific National Lease Holding Corp. (Re)

**IN THE MATTER OF the Companies Creditors Arrangement Act
R.S.C. 1985, C. C-36, and
IN THE MATTER OF the Company Act, R.S.B.C. 1979, C. 59, and
IN THE MATTER OF the Pacific National Lease Holding
Corporation, Pacific National Financial Corporation, Pacific
National Leasing Corp., Pacific National Vehicle Leasing
Corp., Southborough Holdings Inc. and Pac Nat Equities Corp.**

[1992] B.C.J. No. 2309

19 B.C.A.C. 134

72 B.C.L.R. (2d) 368

15 C.B.R. (3d) 265

36 A.C.W.S. (3d) 389

Vancouver Registry: CA016047

British Columbia Court of Appeal
(In Chambers)

MacFarlane J.A.

Heard: October 22, 1992

Judgment: October 28, 1992

(13 pp.)

Debtor and creditor -- Insolvency -- Creditors arrangements -- Stay of all proceedings against insolvent debtor -- Statutory severance payments -- Creation of trust fund to secure making of severance payments.

Application for leave to appeal an order made under the Companies' Creditors Arrangement Act. The petitioner applied to establish a trust fund to indemnify its directors and officers with respect to statutory severance payments. In the alternative, it wished to use available funds to meet those

payments. There was no evidence that the operations of the petitioner would be impaired if the payments were not made. Its applications were refused. It argued that the trial judge erred in ordering the debtor not to abide by relevant mandatory statutory provisions.

HELD: Application dismissed. The Act preserved the status quo and protected all creditors while a re-organization was being attempted. The steps sought to be taken by the petitioner in this case would amount to an unacceptable alteration of that status quo. In exercising its powers under this statute, the court sought to serve creditors which included shareholders and employees. If in doing so, a decision of the court conflicted with provincial legislation, the pursuit of the purposes of the Act must prevail.

...

MACFARLANE J.A. (refusing leave to appeal):-- This is an application for leave to appeal an order of Mr. Justice Brenner pronounced the 17th day of August, 1992, pursuant to the Companies Creditors Arrangement Act R.S.C. 1985, c. C-36 (the "C.C.A.A.").

...

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

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

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

29 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.

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

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

MACFARLANE J.A.

Case Name:
Stelco Inc. (Re)

**APPLICATION UNDER the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36 as amended
IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or
arrangement with respect to Stelco Inc., and other
applicants listed in Schedule "A"**

[2005] O.J. No. 4883

78 O.R. (3d) 241

261 D.L.R. (4th) 368

204 O.A.C. 205

11 B.L.R. (4th) 185

15 C.B.R. (5th) 307

144 A.C.W.S. (3d) 15

2005 CarswellOnt 6818

Dockets: C44436 and M33171

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.J. Sharpe and R.A. Blair JJ.A.

Heard: November 14, 2005.
Judgment: November 17, 2005.

(41 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Application by the Informal Independent Converts' Committee for leave to appeal, and appeal, a decision dismissing their motion to classify the Subordinated Debenture Holders as a separate class for voting purposes on a Proposed Plan of Compromise to unsecured creditors dismissed.

Application by the Informal Independent Converts' Committee (IICC) for leave to appeal a decision dismissing their motion to classify the Subordinated Debenture Holders as a separate class for voting purposes on a Proposed Plan of Compromise to unsecured creditors. The appeal arose out of the reorganization of Stelco and related companies, pursuant to the Companies' Creditors Arrangement Act (CCAA). Stelco had been in the midst of the fractious process for approximately twenty-one months. Stelco had presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval and the vote was scheduled for November 15, 2005. On November 10, the IICC sought an order from the supervising judge classifying the Subordinated Debenture Holders whom they represented, as a separate class for voting purposes. The motion was dismissed on the basis that the IICC did not show a reason to separate from the other unsecured creditors.

HELD: Leave to appeal allowed. Appeal dismissed. The classification of creditors was determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. The IICC did not demonstrate a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of the supervising judge that there were no different practical interests such that the IICC deserved a separate class. There was no legal error or error in principle in the supervising judge's exercise of discretion.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act

Appeal From:

Application for Leave to Appeal, and if leave be granted, an appeal from the Order of Farley J. dated November 10, 2005.

...

[Editor's note: A corrected version was released by the Court August 29, 2006; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the Companies' Creditors Arrangement Act ("CCAA").¹ Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

...

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

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

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.) at para. 24; *Country Style Food Services Inc. (Re)* [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) at para. 15; *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B), this court has not dealt with the issue since its decision in *Elan Corp. v. Comiskey*, supra, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Elan*.

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada - including this one - have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings - particularly in major ones such as this one involving Stelco - has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

...

R.A. BLAIR J.A.

S.T. GOUDGE J.A. -- I agree.

R.J. SHARPE J.A. -- I agree.

...

Case Name:
Timminco Ltd. (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 Proposed Plan of Compromise or
Arrangement with Respect to Timminco Limited and Becancour
Silicon Inc., Applicants**

[2012] O.J. No. 3931

2012 ONCA 552

219 A.C.W.S. (3d) 11

2 C.B.R. (6th) 332

2012 CarswellOnt 9633

Docket: M41062 and M41085

Ontario Court of Appeal
Toronto, Ontario

J.M. Simmons, R.G. Juriansz and G.J. Epstein J.J.A.

Heard: By written submissions.

Judgment: July 20, 2012.

(8 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Application by two unions for leave to appeal from order granting DIP financing provider super priority charge over debtor's assets dismissed -- Debtor would cease operating but for DIP financing -- Financing would only be provided in exchange for super priority charge -- Proceeding with restructuring was in best interests of all parties.

Statutes, Regulations and Rules Cited:

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

Appeal From:

On leave to appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated February 9, 2012.

Counsel:

Ashley J. Taylor and Erica Tait, for the applicants.

Douglas J. Wray and Jesse Kugler, for the Communications, Energy and Paperworkers Union of Canada.

Charles E. Sinclair, for the United Steelworkers.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- Leave to appeal is denied.

2 In the CCAA context, leave to appeal is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this Court is required to consider the following four-part inquiry:

- * whether the point on the proposed appeal is of significance to the practice;
- * whether the point is of significance to the action;
- * whether the proposed appeal is *prima facie* meritorious or frivolous; and
- * whether the appeal will unduly hinder the progress of the action.

See *Re Stelco* (2005), 78 O.R. (3d) 241

3 In our view, the proposed appeals lack sufficient merit to meet this stringent test.

...

J.M. SIMMONS J.A.
R.G. JURIAN SZ J.A.
G.J. EPSTEIN J.A.

Indexed as:

Resurgence Asset Management LLC v. Canadian Airlines Corp.

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended;
AND IN THE MATTER OF the Business Corporations Act (Alberta)
S.A. 1981, c. B-15, as amended, Section 185;
AND IN THE MATTER OF Canadian Airlines Corporation and
Canadian Airlines International Ltd.
Between
Resurgence Asset Management LLC, applicant, and
Canadian Airlines Corporation and Canadian Airlines
International Ltd., respondents**

[2000] A.J. No. 1028

2000 ABCA 238

[2000] 10 W.W.R. 314

84 Alta. L.R. (3d) 52

266 A.R. 131

9 B.L.R. (3d) 86

20 C.B.R. (4th) 46

99 A.C.W.S. (3d) 533

2000 CarswellAlta 919

Docket: 00-08901

Alberta Court of Appeal
Calgary, Alberta

**Wittmann J.A.
(In Chambers)**

Heard: August 3, 2000.
Judgment: filed August 29, 2000.

(57 paras.)

Application for leave to appeal from the order of Paperny J. Dated June 27, 2000.

Counsel:

D.R. Haigh, Q.C., D.S. Nishimura and A.Z.A. Campbell, for the applicant.
H.M. Kay, Q.C., A.L. Friend, Q.C. and L.A. Goldbach, for the respondents.
S.F. Dunphy, for Air Canada.
F.R. Foran, Q.C., for the monitor, Pricewaterhouse Coopers.

MEMORANDUM OF DECISION NO. 2

WITTMANN J.:--

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, pursuant to proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, ("CCAA"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

...

MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2) 142 (C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

...

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski*, *supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scarce judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 and *Galcor*, *supra*.

39 In *Sparling*, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering *Borowski*, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In *Galcor*, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The

B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in *Borowski* were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established prima facie meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in *Resurgence No. 1*, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 *Resurgence* submits that serious and arguable grounds surround the following issues: (a) Should *Resurgence* be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the CCAA? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions *Resurgence* made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, *Resurgence* must establish that it has a prima facie meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

...

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

WITTMANN J.A.

Case Name:
**Resurgence Asset Management LLC v. Canadian Airlines
Corp.**

**Resurgence Asset Management LLC
v.
Canadian Airlines Corporation and Canadian Airlines
International Ltd.**

[2001] S.C.C.A. No. 60

File No.: 28388

Supreme Court of Canada

Record created: February 13, 2001.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Status:

Application for leave to appeal dismissed with costs (without reasons) July 12, 2001.

Catchwords:

Procedural law -- Courts -- Leave to appeal -- Jurisdiction of three-member panel of the Court of Appeal to review a decision of a single justice of the Court of Appeal denying leave to appeal to that court pursuant to s. 13 of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-35 (CCAA) -- Legal test an applicant must satisfy in order to obtain leave to appeal under the CCAA.

Counsel:

David R. Haigh, Q.C. (Burnet, Duckworth & Palmer LLP), for the motion.
A. Friend, Q.C. (Bennett Jones LLP), contra.

Chronology:

1. Application for leave to appeal:

FILED: February 13, 2001. S.C.C. Bulletin, 2001, p. 362.

2. Motion to extend the time in which to serve and file the response of the respondent Canadian Airlines Corporation granted April 3, 2001. Time extended to March 23, 2001. Before: L. Meagher, Deputy Registrar. S.C.C. Bulletin, 2001, p. 695.
3. Application for leave to appeal:

SUBMITTED TO THE COURT: June 18, 2001. S.C.C. Bulletin, 2001, p. 1129.

DISMISSED WITH COSTS: July 12, 2001 (without reasons).
S.C.C. Bulletin, 2001, p. 1275.

Before: McLachlin C.J. and Iacobucci and Bastarache JJ.

Procedural History:

Judgment at first instance: Plan of compromise and arrangement proposed by Respondents sanctioned. Alberta Court of Queen's Bench, Paperny J., June 27, 2000.
[2000] A.J. No. 771.

Judgment on application: Applicant's application for leave to appeal dismissed.
Alberta Court of Appeal, Wittmann J.A., August 29, 2000.
[2000] A.J. No. 1028.

Judgment on appeal: Applicant's application seeking order confirming jurisdiction of three-Justice panel to hear appeal from single Justice of Court of Appeal denying leave to appeal under the CCAA dismissed. Alberta Court of Appeal, Conrad, McFadyen and O'Leary JJ.A., December 15, 2000.
[2000] A.J. No. 1634.

ver/rpl

Case Name:

Robertson v. ProQuest Information and Learning Co.

**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
Canwest Publishing Inc./Publications Canwest Inc., Canwest
Books Inc. and Canwest (Canada) Inc.**

**AND RE: Heather Robertson, Plaintiff, and
ProQuest Information and Learning Company, Cedrom-SNI Inc.,
Toronto Star Newspapers Ltd., Rogers Publishing Limited and
Canwest Publishing Inc., Defendants**

[2011] O.J. No. 1160

2011 ONSC 1647

Court File Nos. 03-CV-252945CP, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 15, 2011.

(34 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Settlements -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and

reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Application by Robertson and by the defendant Canwest Publishing Inc. for approval of a settlement. Robertson, who was a plaintiff in her own capacity and was also the representative plaintiff in a class proceeding, commenced this action in July 2003. The action was certified as a class proceeding in October 2008. Robertson claimed compensatory damages of \$500 million and punitive and exemplary damages of \$250 million against the defendants for copyright infringement. In January 2010 Canwest was granted an initial order pursuant to the Companies' Creditors Arrangement Act. In April 2010 Robertson filed a claim under the Arrangement Act for \$500 million. The Monitor's opinion was that this claim was worth \$0. The proposed settlement would resolve the class proceeding and the proceeding under the Arrangement Act. Court approval was not required for the claim under the Arrangement Act but it was required for the class proceeding. Under the settlement the claim under the Arrangement Act would be allowed in the amount of \$7.5 million for voting and distribution purposes. Robertson undertook to vote in favour of the proposed Plan under the Arrangement Act. The action would be dismissed against Canwest, which did not admit liability. The action would not be dismissed against the other defendants. The Monitor was involved in the negotiation of the settlement and recommended approval for it concluded that the settlement agreement was a fair and reasonable resolution for Canwest.

HELD: Application allowed. The settlement agreement met the tests for approval under the Arrangement Act and under the Class Act. No one, including the non-settling defendants who received notice, opposed the settlement. Robertson was a very experienced and sophisticated litigant who previously resolved a similar class proceeding against other media companies. The settlement agreement was recommended by experienced counsel and it was entered into after serious negotiations between sophisticated parties. It would result in a fair and reasonable outcome, partly because Canwest was in an insolvency proceeding with all of its attendant risks and uncertainties.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 34

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

Counsel:

Kirk Baert, for the Plaintiff.

Peter J. Osborne and *Kate McGrann*, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants.

REASONS FOR DECISION

S.E. PEPALL J.:--

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

...

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for \$500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at \$0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the *CCAA* proceedings. While I was the supervising *CCAA* judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

...

Discussion

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*":

"There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society*, (*Re:*) *Grace Canada Inc.*, *Muscletech Research and Development Inc.*, and (*Re:*) *Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,² the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*³; *Re Air Canada*⁴; and *Re Playdium Entertainment Corp.*⁵ To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*⁶ and *Re Calpine*.⁷

(ii) Class Proceedings Settlement

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992⁸. That section states:

29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceedings;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*⁹. The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

- a) the likelihood of recovery or success at trial;
- b) the recommendation and experience of class counsel; and
- c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*¹⁰:

Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*¹¹

(iii) The Robertson Settlement

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for \$11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*¹².

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of \$11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.¹³

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated

plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the *CCAA* Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

S.E. PEPALL J.

...

Case Name:

Statoil Canada Ltd. (Arrangement relatif à)

**IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:
STATOIL CANADA LTD., Petitioner - Impleaded party**

v.

HOMBURG INVEST INC., Respondent - Debtor-Petitioner

and

**THE CADILLAC FAIRVIEW CORPORATION LIMITED, BOS SOLUTIONS LTD.,
CANADIAN TUBULAR SERVICES INC., KEYWEST PROJECTS LTD., MHI
FUND MANAGEMENT INC., SPT GROUP CANADA LTD. formerly
NEOTECHNOLOGY CONSULTANTS LTD., PREMIER PETROLEUM CORP.,
TUCKER WIRELINE SERVICES CANADA INC., SURGE ENERGY INC., MOE
HANNAH MCNEIL LLP, LOGAN COMPLETION SYSTEMS INC., CE FRANKLIN
LTD., Impleaded third parties - Impleaded parties**

and

**SAMSON BELAIR/DELOITTE & TOUCHE INC., Impleaded Party -
Monitor**

[2012] Q.J. No. 3234

2012 QCCA 665

2012EXP-1531

J.E. 2012-824

EYB 2012-205048

No.: 500-09-022267-116 (500-11-041305-117)

Quebec Court of Appeal
District of Montreal

The Honourable Allan R. Hilton, J.A.

Heard: March 1, 2012.
Judgment: April 12, 2012.

(21 paras.)

Civil procedure -- Appeal -- Leave to appeal -- Questions which ought to be submitted to appeal -- Statoil's motion doesn't satisfy the Court that the judge's findings of fact could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene -- The great latitude given Companies' Creditors Arrangement Act supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised -- Motion dismissed.

Statoil Canada Ltd. (Statoil) seeks leave to appeal a judgment granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homburg's release from obligations it had contracted thereunder. Statoil argues that the motions judge did not have the power and jurisdiction to grant the orders sought, that Homburg did not have the legal standing and interest to seek the conclusions of the motion and that the motions judge exercise his powers so as to interfere with the contractual rights of third parties as he did.

HELD: Motion dismissed. To obtain leave to appeal under the Companies' Creditors Arrangement Act (CCAA), the court must determine whether the point on appeal is of significance to the practice, whether the point raised is of significance to the action itself, whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and whether the appeal will unduly hinder the progress of the action. The four recognized criteria are cumulative. Statoil doesn't satisfy the test incumbent upon it to be granted leave. Any appeal would have to proceed based on the trial judge's findings of fact. Whatever could be said of them, Statoil's motion doesn't satisfy the Court that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given CCAA supervising judges would have weighed heavily against any appeal succeeding given the apparent novelty of some of the questions raised.

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JUDGMENT

1 The Debtor Homburg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*,¹ and an initial order was issued on September 9, 2011. The supervising judge, the Honourable Mr. Justice Louis J. Gouin, rendered judgment on December 5, 2011 granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homburg's release from obligations it had contracted thereunder. The effect of the order was to immediately enforce the obligations of Statoil Canada Ltd. under those agreements with respect to the landlord and subtenants of the premises. Statoil now seeks leave to appeal that judgment pursuant to sections 13 and 14 of the *CCAA*.

2 Statoil urges a barrage of reasons why leave should be granted,² which are conveniently summarized in paragraph 52 of its motion:

- a) Did the motions judge have the power and jurisdiction to grant the orders sought in the Motion?
- b) Did Homburg have the legal standing and interest to seek the conclusions of the Motion?
- c) Could the motions judge exercise his powers so as to interfere with the contractual rights of third parties (Statoil, Cadillac Fairview and subtenants) in the manner that he did in the judgment?

3 A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,³ there are four such criteria:

- whether the point on appeal is of significance to the practice;
- whether the point raised is of significance to the action itself;
- whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;
- whether the appeal will unduly hinder the progress of the action.

4 Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.⁴ In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.

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INVESCO CANADA LTD. et al
Applicants (Moving Parties/Appellants)

-and- SINO-FOREST CORPORATION et al.
Respondents (Respondents)

S.C.C. Court File No.: 35541

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

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