Court of Appeal File No.: M42068
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Applicant

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

BOOK OF AUTHORITIES OF THE APPELLANTS, INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., AND COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

(Motion for Leave to Appeal from Sanction Order)

VOLUME 1 OF 2

January 28, 2013

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

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Secondary Sources

31.	George Rutherglen, "Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions" (1996) 71 N.Y.U.L. Rev. 258
32.	*The Oxford English Dictionary,* 2nd ed., s.v. "integral"

33.	*Words & Phrases*, Volume 4, s.v. “integral”
34.	*Black’s Law Dictionary*, 6th ed., s.v. “integral”

Tab 1

Case Name:

Abitibibowater inc. (Re)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC., BOWATER CANADIEN HOLDINGS INC. and THE OTHER PETITIONERS LISTED ON SCHEDULE "A", "B" and "C", Debtors
and
ERNST & YOUNG INC., Monitor
and
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR, Petitioner

[2009] Q.J. No. 16916

2009 QCCS 5482

2010EXP-20

J.E. 2010-10

[2010] R.J.Q. 167

64 C.B.R. (5th) 189

2009 CarswellQue 11821

EYB 2009-166332

No.: 500-11-036133-094

Quebec Superior Court
District of Montreal

The Honourable Clément Gascon, J.S.C.

Heard: November 2, 2009.
Judgment: November 9, 2009.

(104 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of act -- Abitibibowater could, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders would not further nor enhance its restructuring process -- Motion dismissed.

Her Majesty the Queen in Right of Newfoundland and Labrador (the Province) sought a declaratory order from the Court to access the electronic data rooms set up by the debtor, Abitibi -- Abitibi was under the protection of the Companies' Creditors Arrangement Act (CCAA) -- In the context of the restructuring process undertaken following the initial Order, it created electronic data rooms containing non-public financial and corporate information -- This was done in order to allow its stakeholders and their financial and legal advisors to better assess the ongoing condition of its business as the restructuring evolved -- To have access to the electronic data rooms, permission had first to be obtained from Abitibi -- The Province requested such an access to the electronic data rooms, but Abitibi denied its request -- The Province contended that Abitibi's refusal was contrary to the principles underlying the CCAA -- It argued that the denial was unfair, discriminatory and unjustifiable and insisted upon being treated in the same manner as other Abitibi's stakeholders -- Abitibi considered that the Province was neither a creditor of Abitibi, nor a genuine stakeholder in its restructuring -- It added that the Province did not come to Court with clean hands, but rather brought a Motion for collateral purposes, unrelated to the restructuring process -- In that regard, Abitibi insisted upon the fact the Province owed it in excess of $300 million for the recent wrongful appropriation of its assets -- HELD: Motion dismissed -- The status of the Province as creditor was not established, while its alleged status as potential creditor stood on rather weak grounds -- Access had been limited to some key undisputed creditors and their financial and legal advisors -- The alleged discrimination claimed by the Province was simply not established -- Abitibi could, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders would not further nor enhance its restructuring process -- The Court considered it reasonable for Abitibi to deny access to its electronic data rooms to a potential creditor or mere stakeholder with whom it had a legitimate debate and reasonable expectations of upcoming litigation.

Statutes, Regulations and Rules Cited:

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01

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JUDGMENT ON MOTION TO ACCESS
THE ELECTRONIC DATA ROOMS CREATED BY THE DEBTORS (#275)

1 Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province") seeks a declaratory order from this Court to access the electronic data rooms set up by the Debtors ("Abitibi").

2 Abitibi is under the protection of the Companies' Creditors Arrangement Act[1] ("CCAA") since April 17, 2009. In the context of the restructuring process undertaken following the Initial Order, it created electronic data rooms containing non-public financial and corporate information.

3 This was done in order to allow its stakeholders and their financial and legal advisors to better assess the ongoing condition of its business as the restructuring evolved. To have access to the electronic data rooms, permission has first to be obtained from Abitibi. Signature of confidentiahty agreements is required as well.

4 The Province requested such an access to the electronic data rooms. Abitibi denied its request.

5 In its Motion[2], the Province contends that Abitibi's refusal is contrary to the principles underlying the CCAA. It argues that the denial is unfair, discriminatory and unjustifiable. It insists upon being treated in the same manner as other Abitibi's stakeholders.

6 Abitibi strongly opposes the Motion[3].

7 It considers that the Province is neither a creditor of Abitibi, nor a genuine stakeholder in its restructuring. It adds that the Province does not come to Court with clean hands, but rather brings the Motion for collateral purposes, unrelated to the restructuring process. In that regard, Abitibi insists upon the fact the Province owes it in excess of $300 million for the recent wrongful appropriation of its assets.

THE ELECTRONIC DATA ROOMS

8 Based on the representations made to the Court, the electronic data rooms, subject of the debate, were created voluntarily at the initiative of Abitibi. There are no statutory requirements in the CCAA imposing upon a debtor company to do so.

9 Abitibi has elected to do it in order to assist, facWitate and advance its restructuring process and to help transmitting its non-public financial and corporate information to those who required it in that context.

10 Creating such data rooms for the benefit of stakeholders in a CCAA restructuring process is not unheard of. In large restructurings such as this one, puffing in place similar data rooms is acceptable, if not common, practice. It normally enhances the chances of success of the process. Seldom does one see litigation arising from the creation of these data rooms. No precedents have indeed been found on the issue that the Court is asked to decide.

11 Here, access to Abitibis electronic data rooms has, apparently, not been given to every stakeholder. In fact, according to Abitibi, no individual creditor has been granted such access so far.

12 To this day, the data rooms have rather been accessed solely by the financial and legal advisors of precise creditor groups like the Ad Hoc Committee of the Unsecured Noteholders, the Term

Lenders, the Ad Hoc Committee of the Senior Secured Noteholders, and the Unsecured Creditors Committee put in place pursuant to the Chapter 11 proceedings pending in the State of Delaware.

13 These electronic data rooms provide information that goes beyond the quite extensive financial information already circulated by the Monitor on a regular basis. To that end, no less than 20 reports are currently available on the Monitors public website.

14 They include, amongst others, regular four-week reporting on Abitibis cash-flow results, receipts and disbursements with variances analysis, current liquidity and revised cash-flow forecasts, and key performance indicators review. They cover as well a timely overview of current market conditions in the forest products industry.

THE POSITIONS OF THE PARTIES

a) The Province

15 The Province pleads that it needs to have access to the electronic data rooms to properly assess Abitibis financial status and to make informed decisions in the restructuring. It maintains that it has a duty to inform itself of the present and future potential ability of Abitibi to cover the Provinces claims against it.

16 To that end, it states that after Abitibi was granted CCAA protection in April 2009, the Province made a commitment to the tatters former employees whose entitlement to severance and termination pay was stayed by the Initial Order.

17 Thus, in June 2009, it allegedly began to implement a plan whereby Abitibi's former employees in the Province received their entitlement to severance and termination pay. In exchange, these former employees assigned their rights to make a claim in the restructuring process to an organisation created by the various unions involved and funded by the Province.

18 Apparently, the Province has expended in excess of $24 million from the public purse to fulfil these obligations. It contends that it will be repaid for these severance and termination expenses from the claims that will be made at some point during the restructuring process.

19 The Province also argues that Abitibi is responsible towards it for alleged environmental contamination from a former mine located in the town of Buchans. Relying on numerous media reports that it filed in the record[4], the Province claims that because of Abitibis economic activities, the latter has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined.

20 The Province alleges that it has incurred significant costs in that regard. It adds, furthermore, that agreements have been entered into for the Provinces environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's residual and environmental obligations.

21 In addition, during oral argument, the Provinces Counsel claimed that his client would also have alleged tax claims to raise against Abitibi. However, no allegation in the Motion refers to such assertion.

22 Because of the above, the Province submits that it should be treated similarly to other Abitibi's stakeholders with respect to the electronic data rooms. The Courts discretion under the CCAA

should, in its view, be exercised in favour of the Province so that the right of access sought may be granted without delay.

b) Abitibi

23 Abitibi replies that the Province is simply unable to justify any status as actual or even potential creditor in this restructuring process.

24 According to Abitibi, with regard to the funding process of Abitibis former employees, the allegations of the Motion indicate that the Province is simply not the assignee of the claims.

25 Abitibi states further that no evidence supports either the Provinces Counsels contentions that alleged tax claims would be owed to his client.

26 As for the environmental obligations that Abitibi would have, it considers that the Province is the owner of the lands and mining rights on which the mining site was situated. It adds that any residual interest was surrendered to the Province as far back as in 1994, such that the Province has owned and managed the lands in question for over 15 years.

27 Abitibi also notes that it never itself operated the mine in question, while the reports that have been received so far by the Province indicate a number of other possible causes of contamination.

28 Simply put, Abitibi is of the view that this contingent claim is, at best, highly speculative.

29 That said, Abitibi refers to the following background elements to justify its position that the Province does not come to Court with clean hands. In fact, it submits that ulterior motives warrant the filing ofthe Motion.

30 From Abitibis standpoint, the conflict with the Province on the access to the electronic data rooms has its roots in events going back to December 2008, some four months prior to the Initial Order issued in this case.

31 On December 4, 2008, after unsuccessful negotiations with the unions representing its workers, Abitibi announced the closure of the Grand Falls mill located in the Province. The closure was to take place in the first quarter of 2009.

32 In the days following the announcement, Abitibi attempted in vain to negotiate with the Province an orderly winding-down of the operations.

33 On December 16, 2008, without notice and within a single day, the Province introduced and passed into law the Abitibi-Consolidated Rights and Assets Act[5] (the "Abitibi Act").

34 Pursuant to the Abitibi Act, the Province purported

a) to seize with immediate effect substantially ail of the assets, property and undertakings ofAbitibi in the Province
b) to cancel substantially ail outstanding water and hydroelectric contracts and agreements between Abitibi and the Province
c) to cancel pending legal proceedings of Abitibi against the Province seeking the return of several hundreds of thousands of dollars in unlawfully assessed payments in respect of water rights;
d) to deny Abitibi any compensation for the seized assets ; and
e) to deny Abitibi access to the Provinces Courts to seek redress.

35 Abitibi voiced strong opposition to this enactment and denounced it as unconstitutional, contrary to basic principles of Canadian law and adopted in bad faith. In April 2009, one of Abitibis U.S. subsidiaries indeed filed a Notice of lntentto Submit a Claim to Arbitration in that regard under Chapter 11 of NAFTA[6].

36 According to Abitibi, the seized property and rights had a value in excess of $300 million. As well, the expropriated assets were generating revenues for Abitibi ; some of the fixed assets could have even been sold for profit during the restructuring process[7].

37 Because of this, Abitibi concludes that the filing of the Motion is nothing more than a reaction to the expected daims ofAbitibi against the Province. Therefore, as part of its own Motion to Contest the Provinces Motion, Abitibi itself seeks declaratory conclusions to the effect that the Province cannot daim any relief until it has recognized the property rights it has unlawfully seized.

38 Abitibi even wants this Court to immediately designate a Claims Officer to hear and determine the respective claims, counter-claims, cross-claims and set-off daims of the parties against each other.

ANALYSIS AND DISCUSSION

39 With all due respect to the position advanced by the Province, the Court considers that its Motion should be dismissed.

40 None of the arguments it submitted are persuasive under the circumstances. In contrast, Abitibis objections to the access sought are real ; they are serious and they are many.

a) The principles underlying the CCAA

41 To justify its request, the Province puts much emphasis on the principles underlying the CCAA. It is appropriate to briefly review them.

42 It has often been said. No one seriously disputes it anymore. The CCAA is a remedial statute. Its purpose is to facilitate compromises or arrangements between an insolvent debtor company and its creditors[8].

43 Admittedly, the restructuring process conducted under the CCAA is, first and foremost, that of the debtor company and its creditors who, ultimately, have the final say on the process.

44 Still, it is now accepted that the CCAA is designed as well to serve a broad constituency of stakeholders, be they investors, creditors, employees or even, sometimes, local communities. It has thus been stated that Courts must have regard not only to the interests of those that are directly affected by the restructuring process, but also to a wider public interest[9].

45 However, if this broader public dimension goes beyond the simple direct relations between the debtor company and its creditors, it does not stand alone by itself. This wider public interest or broader public dimension must always be put in the balance together with the interest ofthose most directly affected by the restructuring process.

46 Accordingly, in any application brought under the CCAA such as this one, it is fair to say that in giving weight to broader socio-economic or public interest considerations, the Court must keep in mmd the key objectives of the Act. That is, to facilitate a restructuring so as to reach a compromise between the debtor company and its creditors and allow the business to continue as a going concern[10].

47 As well, in exercising its jurisdiction in a broad and flexible manner to insure the CCAA's effectiveness, the Court must remember that its role is one of judicial oversight. It is there to supervise the process and keep it moving towards its ultimate goal, that of an acceptable arrangement.

48 In Re Stelco[11], the Ontario Court of Appeal stated that in carrying this supervisory function under the legislation, the judge in a CCAA restructuring process is exercising the statutory discretion provided by Section 11.

49 That said, in a CCAA restructuring process, the radically different economic stakes of the various creditors in the debtor company entail that it is not realistic to constantly expect or have a level playing field[12]. There will sometimes be asymmetries, variances and distinctions. Because of the flexibility ofthe CCAA, one is not to apply its regime rigidly, in the same manner in every situation.

50 Bearing these considerations in mmd, the Court considers that this is not a case where its judicial discretion should be exercised in the manner sought by the Province. There are no reasonable or reasoned justifications that would support it.

51 To begin with, the status ofthe Province as creditor is not established, while its alleged status as potential creditor stands on rather weak grounds.

52 Apart from that, relying on a mere and general quality of stakeholder remains quite insufficient to justify the relief sought. In this regard, the reasons for Abitibis denial appear legitimate and reasonable considering the objectives of the CCAA and the interests ofthose involved.

b) The creditor or potential creditor status of the Province

53 In this case, the Province has simply failed to adduce any reliable or admissible evidence to establish that it is, actually, a creditor of Abitibi.

54 On one hand, the Province alleges, without supporting-evidence, that it has made payments to certain former employees of the Abitibis Grand Falls mill. Yet, no evidence to establish the nature of the payments made or any lawful assignment of the related claims has been put forward.

55 Indeed, when one reads paragraphs 7, 8 and 9 of the Motion, it appears obvious that if Abitibis former employees in the Province claims have been assigned to anyone, it is to an organisation created by the various unions involved, not to the Province. Its role is simply to fund this organisation.

56 In that regard, the Motion itself refers to claims that will ultimately be made in the restructuring by an "Assignee". According to the Motion, this "Assignee" is certainly not the Province.

57 On the other hand, the Province has not provided the Court with any reasonable and convincing evidence in support of its other alleged status of potential creditor for environmental problems resulting from Abitibis economic activities.

58 The Motion has merely referred to several press articles in support of an alleged daim against Abitibi for the contamination arising from a closed mine in the town of Buchans.

59 These vague and unsubstantiated allegations are, at this point in time, barely supported. This is hardly sufficient to give to the Province an alleged standing as creditor or even potential creditor of Abitibi.

60 To conclude on this basis that the Province is a creditor of Abitibi would, in essence, substitute speculation for reason and guesswork for proof.

61 In a CCAA context, a potential creditor with a contingent claim bears the onus of showing, at the very least, that its claim is neither speculative nor remote[13]. Some credibie and reliabie evidence must be offered in support. None exists here.

62 Finally, even though the Provinces Counsel raised, during oral argument, that the Province would have a status as creditor of Abitibi by reason of some outstanding tax claims, no allegation in the Motion, nor any evidence adduced in support thereof, substantiate that contention.

c) The "stakeholder" argument

63 The Provinces other argument to the effect that it is, in any event, a "stakeholder" in Abitibis restructuring process is no more convincing than the first one. Nor is the submission that, as alleged stakeholder in the process, the Province should be entitied to an unfettered access to the electronic data rooms.

64 These data rooms have been set up to assist and enhance the Abitibi's restructuring process. However, there has not been an open access to the data rooms for every creditor, and certainly not for every potential stakeholder.

65 In fact, based on the Courts understanding, access has been limited to some key undisputed creditors and their financial and legal advisors.

66 More precisely, 50 far, access to the electronic data rooms has only been given to secured creditors of Abitibi whose assets are being used in the restructuring process, and to committees of unsecured creditors whose status is officially recognized in the US. proceedings or whose support is essential to the outcome of the restructuring because of the huge extent of the debt owed to them.

67 No evidence suggests that mere potential or contingent creditors such as the Province have been given the kind of access the Province is seeking. To the contrary, it appears that it has not been the case. From that standpoint, the alleged discrimination claimed by the Province is simply not established.

68 Likewise, the evidence offered does not support either the Provinces claim that it is entitled to the same rights as those of other stakeholders. Again, no stakeholder with a status similar to that of the Province has been given the access sought here.

69 Few would dispute that there are huge differences between the alleged status of the Province and that of key creditors whose claims are undisputed and whose invoivement remains pivotal to the final outcome of the restructuring.

70 In that regard, the Provinces reference to the testimony of Mr. Robertson at another hearing ignores the particular context in which it was given. It hardly justifies opening the doors of the electronic data rooms to all stakeholders without distinction. True, by definition[14], stakeholders are people who have an interest in a companys or organizations affairs. However, while creditors are inevitably stakeholders, not all stakeholders are necessarliy creditors.

71 In its Memorandum of Argument, the Province goes as far as pleading that the fact that it may not be a creditor of Abitibi is not a valid reason to deny the access sought. The Court does not share

that view. With respect, this is certainly a very important consideration to keep in mind on an issue like this one.

72 In fact, in the Courts opinion, seldom would a judge allow, in a CCAA restructuring process, mere stakeholders who are not creditors to have access to the non-public financial and corporate information ofthe debtor company.

73 In a similar fashion, access to the electronic data rooms to some creditors does not mean that similar access must necessarily be given to everyone who requests it. The fact that Abitibi should ensure transparency and openness in its restructuring proceedings and process does not entail that everyone shouid be treated similarly. Fair and equitable treatment does not correspond to equai and identical treatment at all costs.

74 For instance, Abitibi could well, in some cases, deny access to its electronic data rooms to some categories of creditors for legitimate commercial reasons. The example of a creditor who is a competitor of Abitibi comes to mind. There are no doubt others.

75 Arguably, practical reasons could also justify Abitibi limiting access to its electronic data rooms to prevent its use becoming impractical or the signing of confidentially agreements meaningless by reason of the fact that too many persons have access to the information.

76 This notwithstanding, the Province seems to suggest that because some creditors have had access to the electronic data rooms, all stakeholders, no matter what is their status, should be given the same opportunity. The Court disagrees.

77 Contrary to what the Province pleads, it is not a fundamental tenet of insolvency law that similarly situated "stakeholders" be treated in the same manner. The case law does not support this premise. It rather states that in insolvency law, unsecured creditors are normally treated in the same manner in similar situation[15]. To apply the statement to "stakeholders" as well, with no consideration to their precise status, goes way beyond what the case law indicates.

78 In a restructuring process under the CCAA, voting on the plan of arrangement remains, at all times, in the hands of the creditors. If the interest of stakeholders other than creditors should, sometimes, be taken into consideration in the exercise of the Courts judicial discretion or inherent jurisdiction, it does not elevate nor equate the status of stakeholders to that of creditors.

79 In the conduct of the restructuring process, mere "stakeholders" cannot realistically pretend to a status equal to that of the creditors. The latter have a say in the ultimate plan. The former do not unless they do qualify as creditors.

80 This being so, the Court is of the view that Abitibi can, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders (or, sometimes, even creditors) would not further nor enhance its restructuring process.

81 In this regard, lacking evidence of bad faith, the Court should be reluctant to intervene in the reasonable exercise of a debtor companys business judgment. Such exercise should not be second-guessed lightly.

82 Here, the Province wants access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover the Provinces undetermined and potential environmental claims.

83 The Court considers it reasonable for Abitibi to deny access to its electronic data rooms to a potential creditor or mere stakeholder with whom it has a legitimate debate and reasonable expectations of upcoming litigation. In particular where, like here, the electronic data rooms apparently contain information concerning the economic claims of Abitibi against the Province.

84 In such a situation, the CCAA process should not be used to further a collateral objective that, in the end, is not in connection with the ultimate goal of the Act.

85 The broader public dimension of the CCAA does not entail an unlimited and unfettered access to the non-public books, records and financial data of a debtor company for all potential or contingent claimants, be they a public or governmental body.

86 Similarly, considerations for the wider public interest and broad public dimension do not confer to a mere stakeholder the same status as a creditor in all aspects of the restructuring process.

87 To that end, the judgments rendered in the cases of Fracmaster[16] and Calpine[17] hardly support the Provinces argument. Transparency and openness in an asset sale process for an optimal recovery to the benefit of the debtor company is hardly comparable to the kind of openness and transparency that the Province is advocating here.

88 Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the CCAA. It is, to the contrary, in furtherance of the Provinces own interest of determining the real value of its potential claims that are yet to be established.

89 Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibis pockets will, one day, be deep enough.

90 This does not constitute a legitimate legal interest in the restructuring process, nor a legitimate commercial interest in its success. From the allegations of its Motion, it is rather fair to say that the Province does not appear to have any genuine interest in the restructuring of Abitibi. At the present time, nothing suggests that the Province will either shape the plan of arrangement or have a say in its approval.

91 The fact that the Province is a governmental body does not change anything. It does not have more investigative entitlement in the non-public financial or business information of a potential debtor than does any other person.

92 One could easily add that if the Provinces true goal is merely to assess Abitibi's on going financial condition, what the Monitor puts regularly on its website definitely provides the reader with what it needs in this respect.

93 In sum, the Court accepts Abitibis assertion that the Provinces purpose here is a collateral one. It has nothing to do with the key objectives of the CCAA, namely to facilitate a restructuring and insure that Abitibi continues as a going concern.

94 Abitibis denial ofthe Provinces request is legitimate and reasonable. It is based on proper considerations. This is not a situation where the Court should second-guess or review the exercise of Abitibis business judgment.

95 To paraphrase what Farley J. once wrote, justice does not dictate to grant the access sought. Nor does practicality demand that it be done here.

d) Closing remarks

96 In closing, the Court notes that both sides have said a lot on the Abitibi Act.

97 For its part, the Province considers that the Abitibi Act is constitutional, even though it is retrospective, targeted and confiscatory in nature[18].

98 In contrast, Abitibi contends that the enactment is contrary to fundamental constitutional principles of the Canadian Charter of Rights and Freedoms and Canadian Bill of Rights, as well as being unconstitutional. It considers the Act to be punitive, conflscatory in nature and repugnant to public policy[19].

99 While the Province argues thatthe potential claims of Abitibi against it as a result of the Abitibi Act are without merit, the latter maintains that if any claim is ever filed by the Province in the restructuring process, the Court will have to assess the constitutional validity of the Abitibi Act and the value of its cross-claims or set-off claims against the Province for the wrongful expropriation it has been subjected to.

100 Be that as it may, the Court views as premature the requests contained in the conclusions of Abitibi's own Motion to Contest. It is necessary to immediately designate a former judge as Claims Officer to hear and determine all alleged claims filed by the Province as well as any counter-claims or set-off claims to be raised by Abitibi.

101 For the time being, the Province has filed no claim in the Claims Process established in Abitibi's CCAA restructuring. Consequently, it is too early to implement any kind of special process in that regard.

FOR THESE REASONS, THE COURT:

102 DISMISSES the "Motion for a Declaration that the Petitioner is Entitled to Access to the Electronic Data Rooms Created by the Debtors"

103 DISMISSES as well conclusions [25] and [26] of the "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners";

104 WITH COSTS against Her Majesty the Queen in Right of Newfoundland and Labrador.

CLÉMENT GASCON, J.S.C.

* * * * *

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.

11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

* * * * *

SCHEDULE "B

BOWATER PETITIONERS

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

* * * * *

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATERVENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC

8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATERAMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATERALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

cp/s/qlcys/qlmlt/qlcla/qlcal/qlana

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

2 "Motion for a Declaration that the Petitioner is Entitled to Access the Electronic Data Rooms Created by the Debtors" dated October 16, 2009.

3 "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners" dated October 26, 2009.

4 Exhibit NL-1.

5 S.N.L. 2008, c. A-1.01., filed as Exhibit R-2.

6 Exhibit R-3.

7 Testimony of Alice Minville at the hearing.

8 Stelco Inc. (Bankruptcy), (Re), (2005), 9 C.B.R. (5th) 135, 2005 CanLII 8671 (CanLII), at paras 32 ff.; Metcalfe & Mansfield Alternative Investments II Corp., (Re), 2008 ONCA 587 (CanLII), at paras 44-61.

9 Metcalfe & Mansfield Alternative Investments II Corp., (re), 2008 ONCA 587 (CanLII), at paras 50-52; Syndicat national de l'amiante d'Asbestos v. Mine Jeffrey inc., [2003] R.J.Q. 420 (C.A.), at paras 27-30.

10 Metcalfe & Mansfield Alternative Investments II Corp., (Re), 2008 ONCA 587 (CanLII), at paras 50-52; Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 (CanLII), at paras 27-29.

11 (2005), 75 O.R. (3d) 5 (Ont. C.A.), at paras 32-34.

12 Janis P. SARRA, Rescue! : The Companies' Creditors Arrangement Act, (Toronto : Thomson Carswell, 2007), at page 11.

13 Re Air Canada, (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.).

14 Collins COBUILD Advanced Learner's English Dictionary on CD-ROM, Lexicon, 2003, HarperCollins Publishers, "stakeholders".

15 See, in this respect, Indalex Ltd. (Re), (2009), 55 C.B.R. (5th) 64 (Ont. S.C.) : Woodward's Ltd. (Re), (1993), 17 C.B.R. (3rd) 236 (B.C.S.C.); Pacific National Lease Holding Corp. (Re), (1992) 15 C.B.R. (3rd) 265 (B.C.C.A.).

16 Fracmaster (Re), (1999), 11 C.B.R. (4th) 204 (Alta Q.B.).

17 Calpine (Re), (2007), 28 C.B.R. (5th) 185 (Alta Q.B.).

18 To that end, it refers notably to British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, at pp. 503-504.

19 Amongst others, it invokes Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 and Laane & Baltser v. Estonian S.S. Line, [1949] S.C.R. 530.

Tab 2

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 released 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.

3 A cross-motion brought by Plaintiffs in the two proposed Class Actions seeks, if required, variation of the terms contained in the Sanction Order granted December 16, 2009, to permit the Class Actions to proceed.

4 By way of an endorsement dated February 9, 2011, the Court sought further information from the parties with respect to the factual circumstances that surrounded the agreement that was embodied in the terms of the Sanction Order. That information has been provided and will be referred to later in these Reasons.

5 The claims that the directors who are the moving parties seek to effectively enjoin are those brought in two Class Actions (hereinafter the "Laneville action" and the "Love action"), wherein former shareholders seek damages against directors, officers and Underwriters based on alleged misrepresentation to shareholders by the Defendants about the effect on Allen-Vanguard of its purchase of another company in 2007.

Background

6 As of December 2009, Allen-Vanguard was insolvent. An Application was made on December 9 for an Initial Order under the CCAA, appointment of a Monitor and a Plan Filing and Meeting Order. The effect of the Initial Order among other matters stayed the existing Class proceeding.

7 The circumstances that surrounded the Plan Filing/Meeting Order, the Court was advised, were necessary to avoid a bankruptcy. The subsequent vote on December 9, 2010 was approved in favour of the Plan by 100% of affected creditors.

8 The circumstances that surrounded the December 9, 2010 Application and Order were a variation on a CCAA process that has come to be known as a "pre-packaged" Application. The secured creditors agreed to a restructuring of their secured debt in circumstances involving a going concern sale of assets where, had a bankruptcy ensued, there would have been no recovery for creditors or shareholders beyond very incomplete recovery for those secured creditors.

9 The First Report of the then proposed Monitor, Deloitte and Touche, in support of the Initial Order, outlined the transaction that had been proposed to all creditors as early as September 2009, posted on SEDAR and to which (apart from the question of releases) no party was opposed on December 9.

10 The Plan provided for the Secured Lenders foregoing a portion of their existing debt and fees, converting the remainder of the existing debt into a multi-year restructured term loan with terms more favourable to the Company and a new revolving credit facility.

11 The Court accepted the opinion of Deloitte & Touche that without the proposed transaction, the Company would likely not be able to meet its financial obligations as they became due and would likely be unable to carry on the business beyond the very short-term, which would then necessitate liquidation.

12 The conclusion by Deloitte & Touche, accepted by the Court, was that the restructuring process in the Plan maximized the value of the Company for the benefit of all stakeholders and represented the best offer from that process.

13 The alternative faced by the Company was that of a forced liquidation, which as estimated by the Monitor would result in a shortfall to secured lenders in excess of $100 million.

The Laneville Action

14 The proposed Class Action Plaintiff in the Laneville action issued on October 9, 2009 a Statement of Claim dated November 26, 2009, which sought appointment on behalf of a Representative Plaintiff and for a class of Allen-Vanguard shareholders who allege that Allen-Vanguard Corporation and its directors and officers are liable for various misrepresentations, negligence and oppression.

15 The Statement of Claim detailed a transaction that occurred in 2007 for which the Class Plaintiffs claim the directors and officers failed to properly value and account for in the financial statements of Allen-Vanguard, when Allen-Vanguard purchased all of the shares of a private corporation called Mid-Eng Systems Inc.

16 In addition, the Class Plaintiff claims damages for negligent misrepresentation not only under the common law but as well under s. 138.3 of the *Ontario Securities Act* in connection with the same transaction.

17 The only creditor objection to the Plan taken at the time of the Initial Order was from counsel for the Proposed Class Plaintiff in the Laneville action, who sought an adjournment of the vote based on the wording of the proposed release terms.

18 The adjournment of the vote was not granted given the financial fragility of Allen-Vanguard, and the sanction hearing, which was to deal with the wording of the proposed release terms, was set for December 16, 2009.

19 The Second Report of the Monitor, dated December 10, 2010, advised the Court of the terms of the release and injunctions that had been negotiated, the terms of which were put forward for approval on an unopposed basis. No objection was taken at the sanction hearing by counsel for the Class Plaintiff and no amendment to the Release portion of the Sanction Order sought. Whatever had been negotiated between the parties came before the Court on an unopposed basis. Counsel for the Class Action Plaintiffs and for the Defendant directors had input into and agreed to the wording.

20 The Court has been advised that by agreement of counsel, the wording of the Release was negotiated by the parties with the recognition that there would likely remain an issue on which the Court would have to rule. That issue is now the subject of the first motion and the cross motion. I have been advised as a result of the inquiry of February 9, 2011 and what is now obvious as a result of the recent correspondence (including an affidavit sworn June 30, 2011 and objected to) is that Plaintiffs' counsel in the Laneville action and counsel for the directors had quite different views in respect of the kinds of claims that could be included in s. 5.1(2).

21 As I now understand it, counsel for the Allen-Vanguard Corporation made no representation or agreement that the claims in the Laneville action were within those permitted by s. 5.1(2) of the CCAA.

22 Counsel for the Plaintiff in the Laneville action believe that the language in the Sanction Order preserves the claims in both the Laneville action and the Love action, including the claims against the Underwriters. It is submitted by the Plaintiff that the jurisprudence in respect of s. 5.1(2) permits not only claims against directors but as well officers to the extent there is insurance coverage, and that the Plaintiffs' position is consistent with the jurisprudence under s. 5.1(2).

23 Counsel for the Directors and for Underwriters submit that counsel for the Plaintiff knew or ought to have known at the time they agreed to the language of the Plan of Arrangement and the draft Sanction Order that the claims asserted against the Directors and Officers of Allen-Vanguard might nevertheless fail to meet one of the exceptions set out in s. 5.1(2) of the CCAA.

24 In the result, the issue of what was or was not agreed to as part of the Sanction Order comes down to the question of whether or not the wording of s. 5.1(2) of the CCAA, read in context of statutory interpretation, is sufficient to permit continuance of claims in the Laneville and Love actions.

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.

The Love Action

28 On February 8, 2010, after the Sanction Order had been made, another Proposed Representative Plaintiff, Gordon Love, commenced a second action and is represented by the same counsel as in the Laneville action. The Statement of Claim, dated March 10, 2010 against the directors and officers of Allen-Vanguard Corporation, includes claims against Cannacord Financial Ltd (and others collectively referred to as "Underwriters.")

29 An Amended Statement of Claim dated August 10, 2010 asserts in the Love action claims for negligence against directors, officers and Underwriters, all arising out of the transaction and alleged failure to properly disclose the transaction in the financial statements and transaction referred to in paragraph 15 above in respect of a 2007 acquisition.

Issues

1. Do the Laneville action and the Love action and their proposed class claims fall within those claims non-exempt under s. 5.1(2) of the CCAA?
2. Does the language of the Release contained in the Sanction Order apart from s. 5.1(2) permit either the Laneville or Love actions, including that against Underwriters, to continue?
3. Is there any basis on which the Court could or should vary the terms of the Release section of the Sanction Order?

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.

35 One can rightly understand the reluctance on the part of a provider of interim financing to continue to do so on an indefinite basis, when the approval process may be dragged out for days, weeks or months.

36 All secured creditors whose security continues to deteriorate during the period of negotiation will seek an early determination of the consensus necessary for approval of a Plan; otherwise, liquidation may be preferable.

37 Such consensus requires agreement among many stakeholders, including not just creditors but as well current and former directors and officers, many of whose continued cooperation is necessary and integral to a Plan's success.

38 To avoid the inequity that would result from creditor claims that were outstanding as against directors at the time of a CCAA application, s. 5.1(2) was amended in 1997 to its present form. As Hart J. noted in *Re-Liberty Oil & Gas Ltd.* 2002 ABQB 949 at paragraph 4, before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief against directors of the petitioning company subject to exceptions.

39 It is appropriate to approach statutory interpretation with the assumption that meaning is to be accorded to each of the words used in the provision within the overall purpose of the CCAA. The absence of other words can also be purposeful.

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.

42 The case involved a contest between the deemed trust provisions of the *Excise Tax Act* and the CCAA. Madam Justice Deschamps, speaking for the majority, noted the need for clarity of the underlying purpose with respect to the CCAA.

43 Paragraphs 12 to 14, 17, 58-59 and 63 of that decision read as follows:

> 12. Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R.J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.
>
> 13. Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.
>
> 14. Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

...

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).

...

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* reflex, (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting.)

...

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?

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."

45 A Plan can therefore provide for the compromise of claims against directors where a director may in law be liable for the payment of a company's obligation with the exceptions set out in s. 5.1(2).

46 In my view, the best that can be said of s. 5 is that it is not as clearly drafted as it might have been.

47 It is noteworthy that in the first line of s. 5.1(2), the only claims that may not be excluded in a compromise are those against "directors." Claims that can be excluded in a compromise include those against "officers" and the "company" itself. Why is this the case? One reason undoubtedly is the personal liability that directors face under both Federal and Provincial legislation, or the personal undertaking of a director to a creditor such as a personal guarantee. (See *C.I.T. Financial v Lambert* 2005 BCSC 1779.)

48 By way of example, s. 131(1) of the OBCA provides that directors are made personally liable for unpaid wages of the corporation's employees to a maximum of six months. Reading through s. 5.1(1) and (2), there is nothing in the wording that would prevent the compromise of such claims against officers or the company itself, but not as against directors. The CCAA does not contain a definition of the word "creditor" but does of the terms "secured creditor," "unsecured creditor" and "shareholder." It would seem that for the purposes of the CCAA and in particular s. 5.1(2), a creditor would include both a secured creditor and an unsecured creditor, but would not include a shareholder.

49 Section 5.1(2) refers only to creditors and not shareholders as prospective claimants, whether in contract, tort or statutory oppression.

50 In this case, the claims by the Class Action Plaintiffs are on behalf of shareholders against directors, since the effect of the CCAA stayed the action against the company Allen-Vanguard. The claims arise with respect to a 2007 transaction and the pre-filing financial statements, but the claims do not involve officers or the company, only directors.

51 While framed in negligence, the claims in these actions seek to involve the remedy of oppression under the OBCA to enlist the broad scope of remedy possible under that statute. However, it is only in respect of unpaid obligations of the company and other contract-type claims where the law imposes liability on the Defendant directors that invokes the exception in s. 5.1(2). It is noteworthy that the word "negligence" does not appear in the section at all.

52 In their essence, the claims in the two actions allege a failure on the part of the directors in 2007 and the company to enter into a provident transaction and the transaction represented a misrepresentation to shareholders of the value of the transaction causing a reduction in shareholder value. Such claims are not of the same kind as those contemplated in section 5.1(1). They do not relate to "obligations of the company where the directors are by law liable."

53 The claims relate to transactions that were well in advance of the Initial CCAA Order. In *Re Canadian Airlines Corp.* 2000 ABQB 442 (leave refused to ABCA, [2000] A.J. No. 1028, and to SCC, [2001] S.C.C.A. No. 60), it was held that claims against the directors should only be released if they arose prior to the date of the CCAA proceeding.

54 I agree that the oppression remedy is expansive in scope and empowers the Court to make determinations and orders that can have a direct and even a radical impact on the internal management and status of a corporation, including even an order winding up the corporation. (See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) and *Incorporated Broadcasters Ltd. v. CanWest Global*, [2001] O.J. No. 4882, 2001 CanLII 28395 (Ont. S.C.) at paragraphs 101-105.) Oppression as it occurs within s. 5.1(2) of the CCAA must be read within the context of the section itself.

55 The claims in the Love and Laneville actions are in negligence and no other remedy is sought apart from a claim for damages and access to whatever insurance may be available to respond to claims against directors and officers. There is nothing before the Court to suggest that the insurers, assuming there is a valid policy, are aware of the restriction on remedy.

56 I see no basis from the pleadings in this action for which it would be appropriate to consider the scope of relief that might otherwise apply under the oppression remedy section of the OBCA. Counsel for the Plaintiffs in the Proposed Class Actions cannot bolster their position by limiting recovery to the applicable Directors and Officers Insurance, when there is no basis for the claim at all, either under the language of the Release or the meaning to be accorded to s. 5.1(2).

57 In *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, the Supreme Court of Canada commented on the expectations of stakeholders including but not limited to shareholders, in considering a Plan of Arrangement in the context of an oppression claim. Part of the test for "oppression" referred to in that decision is an expectation on the part of the claimant to be "treated in a certain way and that failure to meet the expectation involved unfair conduct."

58 I fail to understand how the expectation of one or more shareholder groups can be any different with respect to the impugned transaction than those of creditors or indeed the company itself vis-à-vis the directors, particularly since neither the officers nor the company itself is pursued.

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.

67 Counsel for the proposed Plaintiffs refer to several decisions, which they urged support the proposition that shareholder actions for oppression against directors are permitted under s. 5.1(2) of the CCCA.

68 Each of those decisions, while fact-specific, in my view is consistent with a narrow range of actions warranted for a shareholder against the director under the exception to s. 5.1(2).

69 In *Re-Liberty Oil & Gas Ltd.*, 2002 ABQB 949, where the action did proceed, the allegation involved a personal representation, indeed a fraudulent one, by the defendant director to two individuals who happened to be shareholders. The complained acts were not those of the company (as here), but rather personal and direct as between the director and shareholder. In other words, there was the proximity that one would expect in a tort situation.

70 In *Worldwide Pork Corp.*, 2009 SKQB 414, the action was not permitted to proceed. At paragraphs 14 and 15 Justice Dawson said:

> It must be remembered that the oppression remedy is not designed to settle every dispute of a corporation but only those that involve and abuse of the corporate system and for which a common-law remedy does not exist.
>
> As well, the plaintiffs have pled that their claim is for damages, for loss of profits and loss of pay out dividends. There must be a causal connection between the alleged oppressive conduct and the loss claimed to be suffered by the plaintiffs. That is, there must be a causal nexus between the alleged conduct and the loss suffered by the plaintiffs. There is no pleading which sets out how the alleged loss of profit or dividends resulted from the conduct alleged to be oppressive. But in any event the losses claimed are losses as a result of Worldwide Pork not being profitable, that is, being unable to provide a return to shareholders for their investment. Such a loss cannot support an action for oppression since it comes with in the exception contained in section 5.1(2)(b) of the CCAA.

71 In *Re-Blue Star Battery Systems International Corp.* (2000), 10 B.L.R. (3d) 221, Farley J. of this Court dealt with a claim very much like that considered by the Supreme Court of Canada in *Century Services, supra,* as it involved G.S.T. At paragraph 12, he said

> Thus it appears to me that RevCan, not having put itself into position where it could (and did) perfect its derivative claims as set out in section 323(2)(a) of the

> *Excise Tax Act* never had a claim against the directors which could survive the sanction of the Plan vis-à-vis the Applicants. Nothing that this Court could do at the present time (that is, at the time when considering the CCAA sanctioned motion) could crystallize a RevCan claim against the directors. RevCan would have to take additional multiple steps over some period of time to establish a claim against the directors."

72 Farley J. went on to discuss the hypothetical of a claim in oppression against the directors as provided for in s. 5.1(2) in the context where the creditor had put the directors on notice of the promise of the company to pay the tax.

73 The argument of the Proposed Plaintiffs here is that "oppressive conduct" is not to be carved out, but that wrongful conduct that involves directors, even though the action as against the company cannot continue, it can continue against the directors.

74 What in my view is consistent with the decisions in the three cases mentioned and in the Québec case *Papiers Gaspésia* 2006 QCCS 1460 (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released.

75 It would be inconsistent with the scheme of the CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order. There would be little if any incentive to directors to pursue restructuring if they were going to be so exposed. On the other hand, personal undertakings or obligations of directors made during the CCAA process should not easily be released.

76 To permit the kind of claims as the Proposed Plaintiffs would see them would create a priority to that class of unsecured creditors that properly should belong to the creditors as a group. No leave to continue the Class action was sought before the Sanction Order was granted and even on this motion no submission was put forward for the exercise of discretion under section 5.1(3).

77 None of the cases referred to in argument dealing with s. 5.1(2) squarely deals with the issue raised here -- that the section was intended to related to post-filing claims or personal undertakings of directors to creditors in connection with the proposed plan prior to filing.

78 The final argument on behalf of Class Plaintiffs is that to deny the claim of shareholders as against directors would only benefit their insurers, since the Class Plaintiffs have agreed to limit any recovery to the amount of the insurance. I fail to see how this advances the position of the Proposed Plaintiffs. No information was put before the Court about the particulars of the insurance. The Court has no information to know whether or not the insurers even know of this issue.

79 If the claim does not lie as against the directors in the first place under s. 5.1(2), the limitation of the claim as against the potentially available insurance does not advance the case of the class of Plaintiffs.

80 There would be little meaning left to s. 5.1 if all claims of negligence and wrongful conduct against directors for pre-filing activity could not be released and no need for the discretion provided

for in s. 5.1(3) for Court to override this compromise as not being fair or reasonable. As noted above in the passages from the *Century Services* case, the purpose of the CCAA and the discretion granted to the Court are to permit restructuring to work, not create new causes of action.

81 The concern of the Court, which necessitated the further inquiry, was that the language of the Sanction Order might imply on the part of the Applicant and directors who had knowledge of the particulars of the claim that the facts could give rise to a s. 5.1(2) claim. I am satisfied based on the further information provided that no such admission is to be implied.

82 The relief sought by the directors is therefore granted.

Underwriters

83 Underwriters acted on share and warrant offerings of Allen-Vanguard in September 2007 and certified a related prospectus. The Love Class Action was commenced in February 2010 and the proposed Representative Plaintiff claims damages against Underwriters under s. 130 of the *Securities Act (Ontario)* and also makes claims on the basis of negligence, unjust enrichment and waiver of tort.

84 Underwriters rely on the provisions of the releases granted by the Sanction Order and in particular the claims against the Applicant Company Allen-Vanguard. As well, Underwriters rely on the definition of "Equity Claims" in the Sanction Order and submit that because the provisions of the Order in paragraph 26(ii) bar certain claims against third parties who might claim contribution and indemnity against the restructured company, they should be entitled to the benefit of that provision.

85 The response of the proposed Class Plaintiffs in the Love litigation is that the claim against Underwriters is based on the negligence, fraud or wilful misconduct of Underwriters. It is submitted that Underwriters are not entitled to indemnity as against Allen-Vanguard for the several negligence of Underwriters, either at law or under s. 130 of the *Securities Act*.

86 The proposed Class Plaintiff submits that given the nature of the claim as against Underwriters, Underwriters would never have had a right to an indemnity for the claims asserted in the Love Action and therefore there were no such claims to be released.

87 It is submitted that Underwriters bargained any possible indemnity away by the terms of their contract with Allen-Vanguard in September 2007, and that even if they had the benefit of an indemnity, all that was required for the Plan's success was that Alan-Vanguard be protected from Underwriters, not that Mr. Love's claims against Underwriters be eliminated.

88 Counsel for the Plaintiff in the Love Action also urges that Underwriters did not have the right of indemnity as at the time of the Initial Order, and the Sanction Order bars any indemnity that they might otherwise have had and there is nothing in the language of either Order to preclude the claim of the Class Plaintiff against Underwriters limited to Underwriters' negligence.

89 Finally, it is submitted that since Underwriters did not "bring anything to the table" in respect of the restructuring, there is no basis on which the Court should vary the Sanction Order to now provide the indemnity that the Order fails to provide.

90 In the alternative, the Class Plaintiffs suggest that the Sanction Order be clarified, if necessary, to clearly provide the right of the Class Plaintiff to proceed against Underwriters.

91 In my view, there is a distinction to be made between the claim as against the directors and that against Underwriters, since in the case as against the directors, the parties appear to have bargained that if the claim could be brought under s. 5.1(2), it could proceed. That consideration was known to the parties who negotiated and agreed on the form of the Sanction Order and that was the only claim not otherwise covered by the Release terms.

92 In the case of Underwriters, there was nothing to suggest that any discussion or negotiation took place with respect to specific protection for Underwriters or the allowance of a claim against Underwriters at the time that the Sanction Order was approved.

93 This is another reason why in my view s. 5.1(2) of the CCAA should be read narrowly with respect to pre-filing claims or claims that relate to pre-filing activity.

94 The *Ontario Business Corporations Act*, R.S.O. 1990 c. B. 16 ("OBCA") contains a statutory process for that kind of action and remedy sought by the Class Plaintiffs in both actions. Section 246(1) reads as follows:

> **246.**(1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

95 The Supreme Court of Canada dealt with the issue of collective shareholder claims versus claims that are those of the corporation itself in *Hercules Management Ltd. et al. v. Ernst & Young*, 1997 CanLII 345, [1997] 2 S.C.R. 165. The case involved a claim by shareholders of the corporation against its auditors for an alleged negligence in preparation of financial statements of the corporation. Paragraph 48 of the reasons refers to and adopts a statement of Farley J. in *Roman Corp. v Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Gen. Div.) at p. 260.

> As a matter of law the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

96 The plaintiffs in *Hercules* asserted reliance on financial statements in monitoring the value of their equity and then due to auditors' negligence, they failed to extract it before the financial demise of the company.

97 The Supreme Court, in assessing the claim, referred at paragraph 59 to the rule in *Foss v. Harbottle*, 67 E.R. 189:

> 59. The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Pruden-*

tial Assurance Co. v. Newman Industries Ltd. (No. 2), [1982] 1 All E.R. 354, at p. 367, as follows:

> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60. The manner in which the rule in *Foss v. Harbottle*, *supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognize that in supervising management, the shareholders must be seen to be acting <u>as a body</u> in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61. This line of reasoning finds support in Lord Bridge's comments in *Caparo*, [1980] 1 All E.R. 568, *supra*, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. <u>But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders ... will be recouped by a claim against the auditor in the name of the company, not by individual shareholders</u>. [Emphasis in Supreme Court decision.]

It is also reflected in the decision of Farley J. in *Roman I, supra,* the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia,* that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

62. One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done <u>to the corporation</u>. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

98 The policy of limiting indeterminate liability as in *Hercules* is consistent with the basis for the limitation of claims under s. 5.1(2) as set out above. In my view the words of s. 5.1(2) do not create a cause of action that would otherwise not exist except by leave of the Court. It simply provides an exception to what otherwise could be included in a release.

99 The release terms contained in the Sanction Order would deprive Underwriters from any claims for contribution or indemnity to which they would otherwise be entitled at law from the Company and its directors and officers should the actions of the Class Plaintiffs proceed.

100 This is just one further reason to support not just what is required for a derivative action but also what is required to be taken into consideration before the Court issues a Sanction Order in this case in effect on consent.

101 As noted above, what has come to be known as a "liquidating" CCAA application can provide problems not just for the parties but the Court itself. The presumption behind the timing of the Application in this case was that if not granted quickly, bankruptcy would have ensued with the inevitable loss of jobs, assets and creditor claims.

102 The Class Plaintiffs are taken to have known of the CCAA proposal as early as September 2009 and could have sought leave to commence a derivative action prior to or during the CCAA process. No such step was taken.

103 I am satisfied that it is appropriate in the circumstances to stay the claims as against Underwriters in negligence and misrepresentation.

104 The Claim against Underwriters also alleges fraud. If the only claim were in fraud and full particulars of alleged fraud were contained in the pleading, the claim might survive since the wording of the Release does not extend to fraud.

105 Apart from fraud, claims in negligence against Underwriters are caught by the terms of the Release. Arguably, the claims are those of the Company that are specifically released.

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.

cp/e/qlrxg/qlvxw/qlbdp/qlced/qlhcs

Tab 3

Indexed as:
Canada Post Corp. v. Lépine

Canada Post Corporation, Appellant;
v.
Michel Lépine, Respondent, and
Attorney General of Canada and Cybersurf Corp.,
Interveners.

[2009] 1 S.C.R. 549

[2009] 1 R.C.S. 549

[2009] S.C.J. No. 16

[2009] A.C.S. no 16

2009 SCC 16

File No.: 32299.

Supreme Court of Canada

Heard: November 17, 2008;
Judgment: April 2, 2009.

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

(58 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Private international law -- Foreign or external judgments -- Recognition procedure -- Parallel class proceedings commenced in different provinces -- Whether Quebec court hearing application for recognition of judgment can take account of doctrine of forum non conveniens in determining

whether foreign authority had jurisdiction -- Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3155(1), 3164.

Private international law -- Foreign or external judgments -- Recognition procedure -- Parallel class proceedings commenced in different provinces -- Notice procedure for Ontario judgment certifying class proceeding and approving settlement agreement -- Quebec residents bound by settlement agreement -- Whether notice procedure for Ontario judgment entailed contravention of fundamental principles of procedure that precluded recognition of Ontario judgment in Quebec -- Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(3).

Private international law -- Foreign or external judgments -- Recognition procedure -- Lis pendens -- Parallel class proceedings commenced in different provinces -- Whether Quebec and Ontario proceedings gave rise to situation of lis pendens -- Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(4).

[page550]

Summary:

In September 2000, the Canada Post Corporation began marketing a lifetime Internet service in Canada, but it terminated its commitment in September 2001. This led to complaints and various proceedings. In Quebec, a customer who had purchased this service filed a motion for authorization to institute a class action on behalf of every natural person residing in Quebec who had purchased it. Subsequently, in Ontario, the Superior Court of Justice certified a class proceeding and approved a settlement agreement pursuant to which Canadian consumers could obtain a refund of the purchase price of the CD-ROM and receive three months of free Internet access. According to the Ontario judgment, the settlement agreement was binding on every resident of Canada who had purchased the service except those in British Columbia. On the next day, the Quebec Superior Court authorized the Quebec class action on behalf of a group limited to residents of Quebec. The Corporation then sought to have the Ontario judgment recognized under art. 3155 *C.C.Q*. The Quebec Superior Court dismissed the Corporation's application on the basis that the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec, which constituted a contravention of the fundamental principles of procedure (art. 3155(3) *C.C.Q*.). The Quebec Court of Appeal affirmed that judgment on this issue and added that although the Ontario court had jurisdiction over the proceeding, it should have declined jurisdiction over Quebec residents by applying the doctrine of *forum non conveniens* (arts. 3155(1), 3164 and 3135 *C.C.Q*.). Finally, the two class proceedings gave rise to a situation of *lis pendens*, since the Quebec proceeding had been commenced first (art. 3155(4) *C.C.Q*.).

Held: The appeal should be dismissed.

In applying the doctrine of *forum non conveniens*, the Court of Appeal added an irrelevant factor to its analysis of the foreign court's jurisdiction. Although the application of this doctrine finds support, at first glance, in the very broad wording of the reference in art. 3164 *C.C.Q*. to Title Three on the international jurisdiction of Quebec authorities, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign judgments set

out in the *Civil Code of Québec*. In reviewing an application for recognition of a foreign judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, [page551] apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would therefore be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. The application of the specific rules set out in arts. 3165 to 3168 *C.C.Q.* will generally suffice to determine whether the foreign court had jurisdiction. It may be necessary in considering a complex legal situation to apply the general principle in art. 3164 *C.C.Q.* and to establish a substantial connection between the dispute and the originating court. But even when it is applying that general rule, the court hearing the application for recognition cannot rely on a doctrine that is incompatible with the recognition procedure. In the instant case, there is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. [paras. 34-38]

In the context in which they were published, the notices provided for in the judgment of the Ontario Superior Court of Justice contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* In a class action, it is important that the notice procedure be designed so as to make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. Compliance with these requirements constitutes an expression of the necessary comity between courts and a condition for preserving it within the Canadian legal space. In the instant case, the clarity of the notice was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The Ontario notice was likely to confuse its intended recipients, as it did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. [paras. 42-46]

The Quebec courts were also precluded from recognizing the Ontario judgment on the basis of *lis pendens* pursuant to art. 3155(4) *C.C.Q.* The interpretation to the effect that a class action exists only as of its filing date, after it has been authorized, is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. The application for authorization to institute a class action is a form of judicial proceeding between parties for the [page552] purpose of determining whether a class action will in fact take place. In the instant case, the three identities were present at the stage of this application. The basic facts in support of both proceedings were the same for Quebec residents, the object was the same and the legal identity of the parties was established. [paras. 51-55]

Cases Cited

Referred to: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321; *Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Thompson v. Mas-

son, [1993] R.J.Q. 69; *Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374.

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, arts. 3134 to 3168, 3135, 3137, 3155, 3158, 3164, 3168.

Code of Civil Procedure, R.S.Q., c. C-25.

Fair Trading Act, R.S.A. 2000, c. F-2.

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History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.), 2007 QCCA 1092, [2007] R.J.Q. 1920, [2007] SOQUIJ AZ-50446058, [2007] J.Q. no 8498 (QL), 2007 CarswellQue 13496, affirming a decision of Baker J., J.E. 2005-1631, [2005] SOQUIJ AZ-50325631, [2005] Q.J. No. 9806 (QL), 2005 CarswellQue 5457, 2005 CanLII 26419. Appeal dismissed.

Counsel:

Serge Gaudet, Gary D. D. Morrison and *Frédéric Massé*, for the appellant.

François Lebeau and *Jacques Larochelle*, for the respondent.

Alain Préfontaine, for the intervener the Attorney General of Canada.

No one appeared for the intervener Cybersurf Corp.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction

A. *Nature of the Appeal*

1 In September 2000, the appellant, the Canada Post Corporation ("Corporation"), began marketing a lifetime Internet service in Canada. Many consumers purchased the service. However, the Corporation terminated its lifetime commitment in September 2001 and discontinued the service, which led to complaints and various proceedings. There was a settlement in Ontario after the Ontario Superior Court of Justice had certified a class proceeding and approved a settlement agreement with the Corporation. A class action had also been instituted in Quebec. The Corporation sought to have the Ontario judgment recognized under art. 3155 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), and to have the Quebec proceedings dismissed, but [page554] the Quebec Superior Court dismissed its application. The Quebec Court of Appeal affirmed that judgment. For reasons that differ in part from those given by the Court of Appeal, I would dismiss this appeal, which concerns the conditions under the *Civil Code of Québec* for recognizing a judgment rendered outside Quebec. The appeal also raises issues concerning the management of parallel class actions instituted in different provinces.

B. *Origin of the Case*

2 The events on which this case is based began in September 2000, when the Corporation offered its customers a lifetime Internet access package using software designed by the intervener Cybersurf Corp., an Internet service provider. The software came on a CD-ROM that was sold for $9.95. In exchange for free service, purchasers agreed to have advertising transmitted to their computers. According to the Corporation, it sold 146,736 CD-ROMs across Canada. For reasons not specified by the parties, the Corporation discontinued the lifetime Internet service on September 15, 2001. Some consumers were upset, and their reactions led, *inter alia*, to the proceedings now before this Court.

3 In 2001, the Alberta government complained to the Corporation under the *Fair Trading Act*, R.S.A. 2000, c. F-2. Then, on February 6, 2002, Michel Lépine, the respondent in this appeal, filed a motion in the Quebec Superior Court for authorization to institute a class action under Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25. He sought to institute the action against the Corporation on behalf of every natural person residing in Quebec who had purchased the Corporation's Internet package. On March 28, 2002, Paul McArthur also commenced a class proceeding against the Corporation in the Ontario Superior Court of Justice. He sought leave to represent everyone who had purchased the Corporation's CD-ROM and Internet service, except Quebec residents. Finally, on May 7, 2002, John Chen commenced a class proceeding in the British Columbia Supreme Court on behalf of residents of that province who had purchased the [page555] CD-ROM distributed by the Corporation. A settlement was reached in Alberta in December 2002, and the Corporation undertook to refund the purchase price of the CD-ROM to Canadian consumers who returned the CD-ROM to it.

4 Negotiations were conducted to settle the class proceedings under way in Quebec, Ontario and British Columbia. The Corporation offered the same settlement as in Alberta, which it later enhanced by offering three months of free Internet access. According to information provided by the parties, the applicants for certification of the class proceedings in British Columbia and Ontario accepted the Corporation's offers. The applicant for authorization in the Quebec action, Mr. Lépine, rejected them.

5 The application for authorization of the Quebec class action, which the Corporation contested vigorously, was still pending at the time of these negotiations. On June 18, 2003, the Quebec Superior Court decided to hear the application on November 5, 6 and 7 of that year.

6 In the meantime, in Ontario in early July 2003, the parties to the Ontario and British Columbia proceedings entered into a settlement agreement with the appellant based on the offer they had accepted. The agreement created two classes of claimants. The first was limited to British Columbia residents. For the purposes of the Ontario proceeding, the second class included residents of every province of Canada except British Columbia, as it no longer excluded Quebec residents despite the fact that the respondent, Michel Lépine, was proceeding with his application for authorization to institute a class action in Quebec and had rejected the proposed settlement. To give effect to the settlement, the Ontario application for certification was amended on November 19, 2003 to include Quebec residents in the class.

7 Beginning at the time of negotiation of the settlement, various proceedings that had contradictory purposes and effects were commenced in the Ontario Superior Court of Justice and the [page556] Quebec Superior Court. When informed of the settlement with the Corporation, Mr. Lépine sought unsuccessfully to obtain safeguard orders from the Quebec Superior Court as well as a declaration that the Ontario agreement could not be set up against Quebec residents. His motion was heard on July 22, 2003, but the judge merely ordered the Corporation to give Quebec counsel details related to the applications for approval in Ontario and British Columbia.

8 Nevertheless, the Quebec Superior Court heard Mr. Lépine's application for authorization on the scheduled dates, November 5 to 7, 2003, despite attempts by the Corporation to obtain a stay of the hearing and the judgment. The judge reserved his decision on November 7.

9 The Ontario proceeding also continued. The Superior Court of Justice heard the application for certification of the class proceeding, to which the application for approval of the settlement agreement had now been added. Mr. Lépine's Quebec counsel did not appear in the Ontario proceeding. However, he sent the judge hearing the application for certification and approval a letter asking him to decline jurisdiction over Quebec residents for reasons he set out in detail. On December 22, 2003, the Superior Court of Justice certified the class proceeding and approved the settlement. It excluded British Columbia residents but not Quebec residents from the class. It did not comment on Mr. Lépine's request, but referred to that request in the following terms in its recitals: "... and upon being advised of the situation in the Province of Quebec and the correspondence forwarded to this Court by Quebec counsel, François LeBeau ... ." Thus, the Ontario Superior Court of Justice approved the settlement reached with the Corporation without reservation and ordered that notices of the judgment be published accordingly. The following are the most important heads of relief in its order:

> 1. THIS COURT ORDERS AND ADJUDGES that for purposes of the settlement, as set out in the Settlement Agreement attached as Schedule "A" ("the [page557] Settlement Agreement"), the within action is certified as a

> Class Proceeding pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.
>
> ...
>
> 3. THIS COURT ORDERS AND ADJUDGES that, as set out in the Settlement Agreement, the group of persons who are members of the Ontario Class be:
>
> > "Any person in Canada, not a resident of the Province of British Columbia, who purchased a CD-Rom through any Canada Post outlet at a retail price of $9.95, exclusive of applicable taxes, the packaging of which displayed the words 'free internet for life', on or after September 27, 2000."
>
> 4. THIS COURT ORDERS AND ADJUDGES that the claims asserted on behalf of the Class are for breach of contract and misrepresentation and the relief sought is damages, including punitive, aggravated and exemplary damages, interest and costs as set out in the Amended Statement of Claim.
>
> ...
>
> 10. THIS COURT ORDERS AND ADJUDGES that any Class Member who does not opt-out within the time provided and in the manner described in the Settlement Agreement is bound by the Settlement Agreement and this Order and is hereby enjoined from pursuing any claims covered by the Settlement Agreement against the Defendants.

On the next day, December 23, 2003, the Quebec Superior Court rendered a judgment authorizing the institution of a class action against the Corporation on behalf of a group limited to residents of Quebec.

10 Finally, on April 7, 2004, the British Columbia Supreme Court approved the settlement for the class of British Columbia residents. The settlement with the Corporation had accordingly been completed.

11 In the meantime, the judgments rendered by the Ontario Superior Court of Justice and the Quebec Superior Court had created an unavoidable [page558] legal conflict. On the one hand, a class action against the Corporation was continuing in the Quebec Superior Court. On the other hand, the Corporation had obtained a judgment from the Ontario Superior Court of Justice declaring that the claims against it had been settled, including the claims of Quebec residents. To break the impasse, the Corporation applied to the Quebec Superior Court in June 2004 to have the judgment of the Ontario Superior Court of Justice recognized and declared enforceable. To this date, more than four years later, the Ontario judgment has not yet been recognized in Quebec, and the class action authorized by the Quebec Superior Court has not yet been heard.

II. Judicial History

A. *Quebec Superior Court*, [2005] Q.J. No. 9806 (QL)

12 On July 20, 2005, Baker J. of the Quebec Superior Court dismissed the Corporation's application for recognition of the judgment of the Ontario Superior Court of Justice on the basis that the application did not meet the requirements of art. 3155 *C.C.Q.* Baker J. based his decision to refuse recognition on the ground of contravention of the fundamental principles of procedure, which is provided for in art. 3155(3) *C.C.Q.* In his view, the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec and the notices given in that action.

B. *Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.)*, 2007 QCCA 1092, [2007] R.J.Q. 1920

13 In a unanimous decision written by Rayle J.A., the Quebec Court of Appeal dismissed the Corporation's appeal from the Superior Court's judgment. Rayle J.A. found that there were three reasons to refuse recognition. She conceded that the Ontario Superior Court of Justice had jurisdiction over Mr. McArthur's application. But in her view, that court should have declined jurisdiction over Quebec residents by applying the doctrine of [page559] *forum non conveniens*. Next, she agreed with the trial judge that the confusion created by the notices concerning the class proceeding certified in Ontario had resulted in a contravention of the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* Finally, the Court of Appeal found that the two class proceedings gave rise to a situation of *lis pendens*. Because the Quebec proceeding had been commenced first, art. 3155(4) *C.C.Q.* precluded the Quebec courts from recognizing the Ontario judgment. The Court of Appeal did not rule on the issue of violation of international public order under art. 3155(5) *C.C.Q.* However, Rayle J.A. stated that she was puzzled by the decision of the Ontario Superior Court of Justice judge to exclude British Columbia residents but not Quebec claimants from the class. She wondered why the Ontario court had not adhered to the principles of interprovincial comity in relation to the Quebec court, which had been the first one seised of the dispute. The Corporation appealed that judgment to this Court, asking that it be reversed.

III. Analysis

A. *Issues*

(1) Nature of the Issues

14 This appeal concerns the interpretation and application of art. 3155 *C.C.Q.* with regard to the recognition of a judgment rendered in a class proceeding in Ontario. I prefer to characterize that judgment as an external rather than a foreign one, despite the language used in the *Civil Code of Québec*. In essence, the dispute between the parties raises three issues. First, can a Quebec court hearing an application for recognition of an external judgment take account of the doctrine of *forum non conveniens*? Next, did the Ontario Superior Court of Justice adhere to the fundamental principles of procedure? If there were defects, did they entail a contravention of the fundamental principles of civil procedure within the meaning of art. 3155(3) *C.C.Q.*? Finally, did the application for authorization in Quebec and the application for certification in Ontario give rise to a situation of *lis pendens*?

[page560]

15 The discussion of these issues will also require some comment on the issue of interprovincial judicial comity in the conduct of interprovincial class actions. Although the outcome of this appeal does not depend on the resolution of this last issue, it is one that now seems likely to affect the conduct of class actions involving two or more Canadian provinces, as well as relations between the superior courts of different provinces. It therefore merits some thought, as can be seen from the problems or reactions it appears to have provoked in this case.

(2) The Parties' Positions

16 The appellant submits that none of the provisions of art. 3155 *C.C.Q.* stood in the way of its application for recognition in Quebec and that the Quebec Superior Court should therefore have recognized the judgment of the Ontario Superior Court of Justice. According to the Corporation, the Quebec court could not raise the application of the doctrine of *forum non conveniens* by the Ontario court as an issue. The Corporation adds that the notices given in Quebec were consistent with the fundamental principles of procedure. Finally, it denies that the conditions for *lis pendens* were met.

17 The respondent relies primarily on the judgment of the Quebec Court of Appeal on the three issues being discussed. He also alleges that the Ontario proceedings were conducted in a manner inconsistent with international public order, which the appellant disputes. This argument need not be considered in the circumstances of this case. Finally, the Attorney General of Canada has intervened on the issue of the application of the doctrine of *forum non conveniens* in the procedure for the recognition of judgments rendered in the provinces of Canada. Before considering these questions, I believe it will be helpful to summarize the rules governing the recognition of external judgments by Quebec courts under the *Civil Code of Québec*.

[page561]

B. *Legal Framework for the Judicial Recognition of External Judgments*

18 The rules on the international jurisdiction of Quebec authorities and the recognition of foreign or external judgments are found, respectively, in Title Three (arts. 3134 to 3154) and Title Four (arts. 3155 to 3168) of Book Ten of the *Civil Code of Québec* on private international law. The two titles are closely related. I will come back to this in the course of my analysis.

19 In substance, Title Three sets out general rules and specific rules for identifying the connecting factors that will give Quebec authorities jurisdiction in an international context. Where there are no specific rules, whether a Quebec authority has jurisdiction will depend on whether the defendant is domiciled in Quebec (art. 3134). As a whole, these rules ensure compliance with the basic requirement that there be a real and substantial connection between the Quebec court and the dispute, as this Court noted in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at paras. 55-56.

20 Other provisions of Title Three supplement these rules by giving the Quebec court a discretion to either intervene or decline to do so in a dispute. Article 3135 is particularly important, as it confirms the incorporation of the doctrine of *forum non conveniens* into private international law in

Quebec. Under this provision, a Quebec court may decline to hear a case over which it has jurisdiction if it considers that the authorities of another country are in a better position to decide.

21 Title Four concerns foreign judgments or judgments rendered outside Quebec that are brought before the courts of that province. It establishes the conditions for the recognition and enforcement of such judgments.

22 In accordance with the evolution of private international law, which seeks to facilitate the free flow of international trade, the basic principle laid down in art. 3155 *C.C.Q.* for all the rules in [page562] Title Four is that any decision rendered by a foreign authority must be recognized unless an exception applies. The exceptions are limited: the decision maker had no jurisdiction, the decision is not final or enforceable, there has been a contravention of the fundamental principles of procedure, *lis pendens* applies, the outcome is inconsistent with international public order, and the judgment relates to taxation. This legislative intent is clear from the wording of art. 3155:

> **3155.** A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
>
> (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
>
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
>
> (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
>
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
>
> (6) the decision enforces obligations arising from the taxation laws of a foreign country.

23 Article 3158 limits the scope of a Quebec court's power to review a foreign decision. The court must confine itself to considering whether the requirements for recognizing the decision have been met. It cannot review the merits of the case or retry the case. Article 3158 expressly prohibits this:

> **3158.** A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

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24 However favourable these principles may be to the recognition of foreign decisions, it must still be found that none of the exceptions provided for in art. 3155 *C.C.Q.* apply. In particular, as art. 3155(1) provides, the Quebec court must find that the court of the country where the judgment was rendered had jurisdiction over the matter. In this regard, Title Four also contains arts. 3164 to 3168, which set out rules the Quebec court is to apply to determine whether the foreign authority had jurisdiction. The main analytical tool for art. 3164 relates to the technique of referring to the rules in Title Three on establishing the jurisdiction of Quebec authorities.

25 This provision creates a mirror effect. The foreign authority is deemed to have jurisdiction if the Quebec court would, by applying its own rules, have accepted jurisdiction in the same situation (G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 416). To this principle, art. 3164 *C.C.Q.* adds the requirement of a substantial connection between the dispute and the foreign authority seised of the case:

> **3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

26 Articles 3165 to 3168 then set out more specific rules applicable to a variety of legal situations. Only art. 3168 is important for the purposes of this case. It identifies the cases in which a Quebec court will recognize a foreign authority's jurisdiction in personal actions of a patrimonial nature. This provision applies to the matters in dispute here. It provides for six situations in which a foreign authority's jurisdiction will be recognized in such actions:

> **3168.** In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:
>
> (1) the defendant was domiciled in the country where the decision was rendered;

[page564]

(2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;

(3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;

(4) the obligations arising from a contract were to be performed in that country;

(5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the defendant has recognized the jurisdiction of the foreign authority.

27 Because of the way these rules of recognition are set out in the legislation, a problem rises that is of particular significance for the analysis of the instant case. Do the jurisdictional rules in arts. 3164 to 3168 incorporate, by reference to Title Three, the doctrine of *forum non conveniens*? Do they thus give a Quebec court the power, even if the foreign authority's jurisdiction has been established, to determine whether the court that rendered the decision should have applied the doctrine of *forum non conveniens*? Can a Quebec court refuse to recognize a judgment rendered outside Quebec because, in its opinion, the foreign court should, pursuant to that doctrine, have declined jurisdiction over the case?

C. *Mirror Effect and Application of the Doctrine of Forum Non Conveniens*

28 The question of the mirror effect and its scope has been a problem in Quebec private international law since the *Civil Code of Québec* came into force. In art. 3164 *C.C.Q.*, the legislature has not been as clear as might be hoped about the scope of its reference to the provisions of Title Three of Book Ten (see, for example, Goldstein and Groffier, at p. 416). This drafting problem has led some Quebec authors and judges to support what is known as the "little mirror" theory. This theory seems to be based on a literal interpretation of the reference in art. 3164 [page565] to the general provisions of Title Three on determining whether a Quebec authority has jurisdiction and on the exercise of such jurisdiction. Under that interpretation, because the reference does not exclude any of Title Three's provisions, it necessarily encompasses the doctrine of *forum non conveniens*, which is accepted in Quebec private international law under art. 3135 *C.C.Q.*

29 Thus, according to the theory, the possibility of applying the doctrine of *forum non conveniens*, when considering a motion for judicial recognition of a foreign or external judgment, supplements the provisions on establishment of the foreign court's jurisdiction by enabling the Quebec authority to more effectively ensure compliance with the basic requirement under art. 3164 *C.C.Q.* of a substantial connection between the dispute and the country whose authority is seised of the case. Moreover, this interpretation means that, when considering whether a foreign court has jurisdiction over an action of a patrimonial nature, the Quebec authority will not limit itself to determining

whether the application for recognition corresponds to one of the situations provided for in art. 3168 *C.C.Q.* The Quebec court can also consider how the foreign authority should have applied the doctrine of *forum non conveniens* to decide whether or not to decline jurisdiction.

30 Goldstein and Groffier, who support the little mirror theory, stress the importance they attach to the wording of art. 3164 *C.C.Q.*, which does not limit the scope of the reference to the general provisions of Title Three (at p. 417):

> [TRANSLATION] It must first be noted that the jurisdiction of Quebec authorities that is extended to foreign authorities is logically determined not only through specific connecting principles, *but also through the general provisions* such as those on *forum non conveniens, forum conveniens* and exclusive jurisdiction. In referring to the Quebec rules on jurisdiction, art. 3164 C.C.Q. does not limit them to the specific rules (arts. 3141 to 3154 C.C.Q.) and therefore refers implicitly to arts. 3134 to 3140 C.C.Q. as well. The latter provisions considerably alter the specific rules on jurisdiction [page566] in Quebec by giving the courts a broad discretion. It should therefore be accepted that foreign authorities can have the same freedom to exclude heads of jurisdiction that the Quebec courts would have excluded. As Professor Glenn points out:
>
>> The foreign authority's jurisdiction is assessed not broadly, in light of the connections accepted under the various heads of jurisdiction, but in light of the specific circumstances of each case. The question is whether the Quebec authority would have agreed to exercise its jurisdiction in such circumstances. The mirror principle becomes the principle of a "little mirror" that reflects the specific circumstances of the case in light of the general provisions.

(Emphasis in original.)

These authors add that the Quebec court may therefore apply the doctrine of *forum non conveniens* to determine how, in its view, the foreign court should have applied that very doctrine (p. 417; along the same lines, see also: H. P. Glenn, "Droit international privé", in *La réforme du Code civil* (1993), vol. 3, 669, Nos. 117-19, at pp. 770-72).

31 The Quebec Court of Appeal adopted this approach in the instant case. It recognized that the Ontario Superior Court of Justice had jurisdiction over the subject matter in the usual sense of the term (para. 64). However, because it found that it had to consider the jurisdiction of the Ontario court through the prism of the reciprocity required by the little mirror theory, it concluded that the Superior Court of Justice should have applied the doctrine of *forum non conveniens* and should, on that basis, have excluded Quebec residents from the class in the class proceeding it was certifying (paras. 64-69). The Superior Court of Justice should have recognized that it was not the most appropriate forum with respect to this class of claimants, and thus deferred to the jurisdiction of the Quebec Superior Court.

32 However, some Quebec authors reject the application of *forum non conveniens* in the recognition of foreign or external judgments. They would limit the effect of the reference to Title Three in art. 3164 by excluding *forum non conveniens* from [page567] it. For example, in a study on the

rules for recognizing and enforcing foreign or external judgments in Quebec, Professor Geneviève Saumier is highly critical of the application of this doctrine ("The Recognition of Foreign Judgments in Quebec -- The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677). According to her, this interpretation of art. 3164 *C.C.Q.* is not justified despite the very general language used in drafting that provision. In her opinion, to apply the doctrine of *forum non conveniens* when considering an application for recognition confuses the establishment of the foreign court's jurisdiction as such with the exercise of that jurisdiction (pp. 691-92). Thus the literal interpretation of art. 3164 *C.C.Q.* cannot be reconciled with the general principle in art. 3155 *C.C.Q.* that a foreign or external judgment should be recognized once the originating court has been shown to have jurisdiction in the strict sense, and it is inconsistent with the fact that this principle remains the cornerstone of the system of recognition of foreign judgments established by the *Civil Code of Québec*. The addition of a mechanism based on the discretion of the court to which the application has been made, one that depends in all cases on the existence of a specific factual context, is inconsistent with this principle (pp. 693-94).

33 Professor Jeffrey Talpis refers to a few cases in which Quebec courts have favoured the application of the doctrine of *forum non conveniens* in the recognition and enforcement of foreign decisions. However, he expresses serious reservations about the soundness of this approach, which he considers incompatible with the legal framework for the recognition of foreign or external judgments set out in the *Civil Code of Québec*:

> Despite the fact that some support obviously exists in jurisprudence and doctrine for the "little mirror" approach, it is somewhat distressing to note that a reviewing court can decide that the originating court should have declined jurisdiction on *forum non conveniens* grounds and that the first court's failure to do so may be justification for denial of recognition of the resulting judgment is rather distressing. To deny [page568] recognition for failure to do something that is only discretionary in the first court would seem to contradict the very foundations of the exceptional character of the *forum non conveniens* doctrine in Quebec. This "second guess" approach is even more disturbing in an inter-provincial context. Be that as it may, one cannot deny that application of the two grounds does provide a good antidote to inappropriate foreign forum shopping.
>
> (*"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec--United States Crossborder Litigation* (2001), at p. 109; see also the critical comments of Bich J.A. of the Quebec Court of Appeal in *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189, at paras. 174 *et seq.*)

34 In my view, these reservations about extending the application of the doctrine of *forum non conveniens* to the recognition of foreign or external judgments in Quebec are justified. I do not deny that the application of this doctrine finds support, at first glance, in the very broad wording of the reference to Title Three in art. 3164 *C.C.Q.* However, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign or external judgments set out in the *Civil Code of Québec*. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context

would be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. In this respect, I believe that it will be helpful to repeat the quotation of the first paragraph of art. 3155 of the *Civil Code of Québec,* which sets out the following exception to the obligation to recognize a foreign decision:

> ... the authority of the country where the decision was rendered had no jurisdiction ... .

The words chosen by the legislature specify the nature of the analysis the court hearing the application for recognition must conduct. The court must ask whether the foreign authority had jurisdiction, but is not to enquire into how that jurisdiction was supposed to be exercised.

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35 Furthermore, this distinction between jurisdiction and the exercise thereof is recognized in the wording of the provisions of the *Civil Code of Québec* on the jurisdiction of Quebec authorities. Article 3135 *C.C.Q.* provides that a Quebec court may refuse to exercise jurisdiction it has under the relevant connecting rules. However, in reviewing an application for recognition of a foreign or external judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention.

36 Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. The Court of Appeal added an irrelevant factor to the analysis of the foreign court's jurisdiction: the doctrine of *forum non conveniens*. This approach introduces a degree of instability and unpredictability that is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the *Civil Code*. It is hardly consistent with the principles of international comity and the objectives of facilitating international and interprovincial relations that underlie the *Civil Code*'s provisions on the recognition of foreign judgments. In sum, even when it is applying the general rule in art. 3164, the court hearing the application for recognition cannot rely on a [page570] doctrine that is incompatible with the recognition procedure.

37 It would accordingly have been sufficient had the Quebec authorities asked whether the Ontario Superior Court of Justice had jurisdiction, in the strict sense, over the dispute. If it did, their next step would have been to determine whether the respondent, Mr. Lépine, had established that there were other obstacles to the recognition of the Ontario judgment, as indeed the Quebec Court of Appeal found that he had.

D. *Jurisdiction of the Ontario Superior Court of Justice*

38 There is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. The question whether there were obstacles to the recognition of the judgment is more problematic, especially given the allegations that it had been rendered in contravention of the fundamental principles of procedure and that the motion for authorization made in Quebec and the parallel application for certification made in Ontario had given rise to a situation of *lis pendens*.

E. *Issue of Notices to the Quebec Members of the National Class*

39 One of the main arguments made by the respondent in contesting the application for recognition relates to the issue of contravention of the fundamental principles of civil procedure. Under art. 3155(3) *C.C.Q.*, such a contravention precludes enforcement. The Court of Appeal accepted this argument, among others, to justify dismissing the application for recognition.

40 The issue of the application of art. 3155(3) arises in relation to the notices given pursuant to the Ontario Superior Court of Justice's judgment certifying the class proceeding. The respondent submits that the very content of the notices contravened the [page571] fundamental principles of procedure. In his opinion, the notices published in Quebec newspapers were insufficient and confusing. Their wording did not enable class members residing in Quebec to understand the impact of the Ontario judgment on their rights and on the authorization of the class action by the Quebec Superior Court on December 23, 2003.

41 This argument does not amount to a request to review the Ontario Superior Court of Justice's decision. The judge hearing the application for recognition does not examine the merits of the judgment (art. 3158 *C.C.Q.*). However, at the stage of recognition and, therefore, of enforcement of the judgment, he or she must consider whether the procedure leading up to the decision and the procedure for giving effect to it are consistent with the fundamental principles of procedure. The judge hearing the application is concerned not only with the procedure prior to the judgment but also with the procedural consequences of the judgment. This approach is particularly important in the case of class actions.

42 A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights -- in particular the possibility of opting out of the class action -- they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under [page572] way in Quebec. Were the notices provided for in the Ontario court's judgment therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

43 The Ontario Court of Appeal stressed the importance of notice to members in a case involving an application for recognition of a judgment rendered in Illinois, in the United States. It emphasized the vital importance of clear notices and an adequate mode of publication (*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, at paras. 38-40). In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. In light of the requirement of comity between courts of the various provinces of Canada, they are no less compelling in a case concerning recognition of a judgment from within Canada. Compliance with these requirements constitutes an expression of such comity and a condition for preserving it within the Canadian legal space.

44 In the context of the instant case, I agree with the opinion expressed by the Quebec Court of Appeal and with the findings of the trial judge on the notice issue. The procedure adopted in the Ontario judgment certifying the class proceeding for the purpose of notifying Quebec members of the national class established in the judgment contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.*, and enforcement was therefore precluded.

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45 The clarity of the notice to members was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The notice published in Quebec pursuant to the Ontario judgment did not take this particular circumstance into account. Those who prepared it did not concern themselves with the situation resulting from the existence of a parallel class proceeding in Quebec and the publication of a notice pursuant to the Quebec Superior Court's judgment authorizing the class action. The notice made it look like the Ontario proceeding was the only one. Nor, even though Quebec residents were also a group under the Quebec class action, did the notice clearly state that the settlement applied to them. In this regard, the Quebec Superior Court carefully described the problems that had resulted from the procedure adopted to give effect to the Ontario court's judgment certifying the class proceeding in the context in which that procedure was conducted. Thus, on February 21, 2004, the designated representative in the Quebec class action published a notice of the authorization to institute a class action on behalf of a group that was limited to Quebec residents. The notice indicated that the members could request exclusion on or before April 21, 2004. In the Ontario class proceeding, the notice published on April 7, 2004, that is, shortly before the expiry of the time limit for requesting exclusion from the Quebec action, stated that a settlement had been reached in class proceedings commenced in Ontario and British Columbia but did not mention that the settlement also applied to Quebec residents. The way the notice was written was likely to confuse its intended recipients, as Rayle J.A. of the Quebec Court of Appeal correctly noted in her opinion (see para. 73).

46 In sum, the Ontario notice did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. The argument made by the respondent in this respect was in itself sufficient to justify dismissing the application for recognition. However, another [page574] argument raised by the respondent and accepted by the Quebec Court of Appeal -- *lis pendens* -- should also be examined.

F. *Lis Pendens*

47 The respondent has argued since the beginning of the recognition proceedings that enforcement was precluded by a situation of *lis pendens*, as provided for in art. 3155(4) *C.C.Q.* The Quebec Superior Court expressed no opinion on this point, but the Court of Appeal accepted this argument.

48 There are two different legal situations in which *lis pendens* is dealt with in Quebec private international law. The first reference to *lis pendens* in the *Civil Code of Québec* appears in art. 3137, which is found among the general rules that establish the bases for the jurisdiction of Quebec authorities and the fundamental conditions for exercising that jurisdiction in relation to a dispute involving a foreign element. Under art. 3137, a Quebec court may stay its ruling on a dispute over which it otherwise has jurisdiction if there is a situation of *lis pendens* with respect to an action under way before a foreign authority. *Lis pendens* depends on the existence of three identities, that of the parties, that of the facts on which the actions are based and that of the object of the actions:

> **3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

49 The second situation of *lis pendens*, the one with which we are concerned in this appeal, arises in respect of an application for recognition of a judgment rendered by a foreign authority. Under art. 3155, this situation is one of the cases in which a decision rendered outside Quebec cannot be declared enforceable in that province.

50 The first situation concerns the discretion of a Quebec court to decide whether it will exercise [page575] its jurisdiction despite a finding of *lis pendens* (*Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), at p. 1351). In the second situation, the one that arises in respect of an application for recognition of a foreign or external judgment, the court hearing the application has been given no discretion under art. 3155(4) *C.C.Q.* The legislature has precluded the application of the general principle of recognition of foreign or external judgments in a situation of *lis pendens* (see: Glenn, No. 105, at pp. 763-64). Thus, when the conditions for *lis pendens* are met, the *Civil Code of Québec* guarantees that the Quebec court has priority, provided that it was seised of the case first.

51 What must now be determined is whether, as a result of *lis pendens*, the Quebec courts were precluded in the case at bar from recognizing the judgment of the Ontario Superior Court of Justice. The conditions for *lis pendens* are well established in the domestic context in Quebec civil law. Like *res judicata, lis pendens* depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, *La preuve civile* (4th ed. 2008), Nos. 788-89, at p. 635; *Rocois Con-*

struction Inc. v. Québec Ready Mix Inc., [1990] 2 S.C.R. 440). However, in private international law matters, the nature of the required identities is altered somewhat in the *Civil Code of Québec* in the case of *lis pendens*. In particular, in art. 3137, as in art. 3155(4), the Code retains identity of the parties and identity of the object but substitutes identity of the facts on which the actions are based for identity of the cause of action.

52 This change takes account of the problems involved in reconciling the specific features of legal systems that come into contact with each other, as well as the diversity in their substantive law concepts and procedural rules. The Quebec judge therefore considers the facts on which the actions are based and does not go beyond the differences in the legal systems in question to try to find an identity of the cause of action. The analysis thus focuses more on the respective objects of the two actions (*Birdsall*, at pp. 1351-52; Goldstein and Groffier, at pp. 325-26).

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53 However, the appellant argues that, in any event, the Quebec courts did not even have to consider the question of *lis pendens*. According to art. 3155(4), *lis pendens* is relevant only if the Quebec proceeding predates the foreign action. The Corporation submits that the Quebec proceeding commenced no earlier than the date the Quebec Superior Court authorized the class action, that is, December 23, 2003. In support of this argument, the appellant relies, *inter alia*, on *Thompson v. Masson*, [1993] R.J.Q. 69, in which the Quebec Court of Appeal stressed that a class action does not commence until it is filed, that is, after the judgment authorizing the class action. Before that time, there is only an authorization proceeding whose purpose is to screen applications. In the instant case, according to the appellant, the Ontario proceeding predated the Quebec action because it was certified one day before the class action was authorized in Quebec.

54 This interpretation is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. While it is true that Mr. Lépine's action did not exist yet in Quebec at the time the judgment certifying the class proceeding was rendered in Ontario, an application for authorization was nevertheless before the Quebec Superior Court prior to December 23, 2003. The term "dispute" has a broad meaning that encompasses all types of legal proceedings (see *Black's Law Dictionary* (8th ed. 2004), at p. 505; see also, regarding the term "*litige*" used in the French version of art. 3155(4), H. Reid, *Dictionnaire de droit québécois et canadien* (3rd ed. 2004), at p. 355; *Le Grand Robert de la langue française* (2nd ed. enl. 2001), vol. 4, at p. 864; Goldstein and Groffier, at p. 384). The application for authorization is a form of judicial proceeding between parties for the specific purpose of determining whether a class action will take place. The Quebec proceeding predated the one in Ontario, and the Quebec court was therefore seised before the Ontario court, which means that art. 3155(4) *C.C.Q.* was applicable.

55 At that stage, the three identities were present. The basic facts in support of both proceedings were [page577] the same for Quebec residents, namely the purchase and discontinuation of an Internet access service. The object was also the same: compensation for breach of the undertaking. Identity of the parties was established: a legal representative, the applicant at the authorization stage, was acting for the entire group of residents. The identity of the representative in a class action may vary in the course of the proceeding, but there is always one representative for all the members. What the courts have required is not physical identity of the parties, but legal identity (*Hotte v.*

Servier Canada Inc., [1999] R.J.Q. 2598 (C.A.), at p. 2601; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 410- 11). The *lis pendens* argument was well founded, and the Court of Appeal rightly accepted it. Like the contravention of the fundamental principles of procedure, the *lis pendens* situation precluded judicial recognition of the decision of the Ontario Superior Court of Justice.

G. *National Classes and Parallel Class Actions*

56 In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

57 As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial [page578] jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.

IV. Conclusion

58 For these reasons, I would dismiss the appeal with costs.

Solicitors:

Solicitors for the appellant: Heenan Blaikie, Montréal.

Solicitors for the respondent: Unterberg, Labelle, Lebeau, Montréal.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

cp/e/qllls

Tab 4

Indexed as:
Canadian Airlines 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 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.**

[2000] A.J. No. 771

2000 ABQB 442

[2000] 10 W.W.R. 269

84 Alta. L.R. (3d) 9

265 A.R. 201

9 B.L.R. (3d) 41

20 C.B.R. (4th) 1

98 A.C.W.S. (3d) 334

Action No. 0001-05071

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Heard: June 5 - 19, 2000.
Judgment: filed June 27, 2000.

(185 paras.)

Counsel:

A.L. Friend, Q.C., H.M. Kay, Q.C., R.B. Low. Q.C. and L. Goldbach, for the petitioners.

S.F. Dunphy, P. O'Kelly and E. Kolers, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., D.N. Nishimura, A.Z.A. Campbell and D. Tay, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C. and G. McCue, for Neil Baker, Michael Salter, Hal Metheral and Roger Midiaty.
F.R. Foran, Q.C. and P.T. McCarthy, Q.C., for the Monitor, PwC.
G.B. Morawetz, R.J. Chadwick and A. McConnell, for the Senior Secured Noteholders and the Bank of Nova Scotia Trust Company.
C.J. Shaw, Q.C., for the unionized employees.
T. Mallett and C. Feasby, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for the Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for the Calgary and Edmonton Airport Authority.

REASONS FOR DECISION

PAPERNY J.:--

I. INTRODUCTION

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the Companies' Creditors Arrangement Act ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

3 Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a

fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

4 CAC and CAIL are corporations incorporated or continued under the Business Corporations Act of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common

shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the Canada Transportation Act (relaxing certain rules under the Competition Act to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. $100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the oneworldTM Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity investment and

support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the Air Canada Public Participation Act. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related

services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
b) sales for future air travel were down by approximately 10% compared to 1998;
c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that ac-

quisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

   Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings com-

menced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

   The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

   > The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
   >
   > The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

   Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

   Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

53 The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office

in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

57 Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the Alberta Business Corporations Act ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. ANALYSIS

59 Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or 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.

60 Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

(1) there must be compliance with all statutory requirements;
(2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example Re Sammi Atlas Inc. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and Re T. Eaton Co., [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

62 Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

(a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

63 I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.
(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.
(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.
(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in Cadillac Fairview (Re), [1995] O.J. No. 274, 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

67 Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

68 The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

(a) consolidating all of the issued and outstanding common shares into one common share;
(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;

(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

69 Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be "subject to an order for re-organization"; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

70 The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

71 The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
>
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

72 Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) - consolidation of Common Shares	167(1)(f)
(b) - change of designation and rights	167(1)(e)

(c) - cancellation	167(1)(g.1)
(d) - change in shares	167(1)(f)
(e) - change of designation and rights	167(1)(e)
(f) - cancellation	167(1)(g.1)

73 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

74 In R. Dickerson et al, Proposals for a New Business Corporation Law for Canada, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of Royal Oak Mines Inc., [1999] O.J. No. 4848 and Re T Eaton Co., supra in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value.

They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in Savage v. Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who be-

came Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s. 6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

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.

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. Resurgence relied on Barrette v. Crabtree Estate, [1993], 1 S.C.R. 1027 at 1044 and Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "excluding the claims excepted by s. 5.1(2) of the CCAA" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the

date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5.1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

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.

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.

3. Fair and Reasonable

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., supra, 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.

a. Composition of the unsecured vote

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 then 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.

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example Quintette Coal Ltd., (1992) 13 C.B.R. (3d) 146 (B.C.S.C) and Re Alabama, New Orleans, Texas and Pacific Junction Railway Co. (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

99 The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

100 The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

101 The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, Hochberger v. Rittenberg (1916), 36 D.L.R. 450 (S.C.C.)

102 In Northland Properties Ltd. (Re) (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> >
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead re-

mained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed. There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in Northland Properties Ltd. (Re).

104 If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

105 The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (Keddy Motor Inns Ltd. (Re) (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (Campeau Corp. (Re) (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); Skydome Corp. (Re), [1999] O.J. No. 1261, 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (Quintette Coal Ltd. (Re), (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and Northland Properties (Re), supra at 9.

107 Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

108 Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

110 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

111 As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

112 The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

113 Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

114 While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

115 The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

116 The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

117 The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

119 Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

120 There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

121 The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan

Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

123 Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

124 There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

125 If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are not treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

127 Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

128 CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-

current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

129 Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the Aeronautics Act and the Canada Transportation Act, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

131 There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

133 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million. There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

135 The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

136 Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in Re T. Eaton Co., [1999] O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

138 The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in T. Eaton Co, supra, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

139 Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or

unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: First Edmonton Place Ltd. v. 315888 Alberta Ltd., (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: Re Diligenti v. RWMD Operations Kelowna (1976), 1 B.C.L.R. 36 (S.C).

141 The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in First Edmonton Place, supra at 57:

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: Pente Investment Management Ltd. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: Re Royal Oak Mines Ltd., supra, para. 4., Re Cadillac Fairview, [1995] O.J. 707 (Ont. Sup. Ct), and Re T. Eaton Company, supra.

144 To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

145 It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

146 Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

148 The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

149 It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

150 At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to all creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

152 The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

154 The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

155 Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

156 I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

157 Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

158 The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am un-

able to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

161 Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

163 The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased after the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air

Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

165 The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing.

e. The Public Interest

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, Reorganizations Under the Companies' Creditors Arrangement Act (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In Re Repap British Columbia Inc. (1998), 1 C.B.R. (4th) 49 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In Re Quintette Coal Ltd., supra, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include Canadian Red Cross Society (Re), (1998),5 C.B.R. (4th) 299 (Ont. Gen. Div.) and Algoma Steel Corp. v. Royal Bank of Canada (Trustee of), [1992] O.J. No. 795 (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the Transportation Act, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example Wandlyn Inns Ltd. (Re) (1992), 15 C.B.R. (3d) 316 (N.BQ.B), Quintette Coal, supra and Repap, supra. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to Algoma Steel v. Royal Bank of Canada., supra at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in Re Sammi Atlas Inc., (1998), 3 C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

180 I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

PAPERNY J.

cp/i/qljpn/qlhcs

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.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on

payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the CCAA on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

(a) To provide near term liquidity so that Canadian can sustain operations;
(b) To allow for the return of aircraft not required by Canadian; and
(c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;
(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;
(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;
(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the CCAA.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the CCAA and an order for reorganization pursuant to s. 185 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15 as amended ("ABCA"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought declarations that the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the ABCA.

15 The fairness hearing lasted two weeks during which viva voce evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the ABCA to reorganize the corporation.

LEAVE TO APPEAL UNDER THE CCAA

18 The CCAA provides for appeals to this Court as follows:

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

19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Online: Alberta Courts)("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

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

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

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.

22 In Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:
>
> (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
>
> (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;
>
> (c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s. 80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;
>
> (d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and
>
> (e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In Norcan Oils Ltd. v. Fogler, [1965] S.C.R. 36, it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following Norcan have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: Re Universal Explorations Ltd. and Petrol Oil & Gas Company Limited (1982), 35 A.R. 71 (Q.B.) and Re Gibbex Mines Ltd. et al., [1975] 2 W.W.R. 10 (B.C.S.C.).

26 Norcan applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the ABCA, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ABCA for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on Re Blue Range Resource Corp. (1999), 244 A.R. 103, (C.A.), to argue that leave to appeal can be granted after a CCAA plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the CCAA supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in Norcan, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the ABCA, cannot be allowed since that remedy must be granted within the context of the CCAA proceedings. As recognized by the learned chambers judge, allegations of oppression were considered

in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the ABCA requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of CCAA insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is 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 scare 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.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a prima facie meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned

chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a prima facie meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is prima facie meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the CCAA proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any prima facie error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

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.

cp/i/qljpn/qlcal

Tab 5

Case Name:

Canwest Global Communications (Re)

IN THE MATTER OF Section 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of Canwest Global Communications and the other applicants

[2010] O.J. No. 3233

2010 ONSC 4209

70 C.B.R. (5th) 1

2010 CarswellOnt 5510

Court File No. CV-09-8396-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Oral judgment: July 28, 2010.

(39 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by CMI Entities for approval of plan allowed -- Plan contemplated acquisition of Canwest television interests by Shaw subsidiary with proceeds used to satisfy claims of senior subordinated noteholders and additional payment to Monitor to satisfy claims of other affected creditors -- Plan contemplated delisting and extinguishment of equity compensation plans and related options or equity-based awards -- Creditor support for plan was overwhelming -- Plan reflected settlement with existing shareholders -- Plan was fair and reasonable, met statutory requirements and was in public interest -- Plan emergence agreement outlining implementation was also approved -- Companies' Creditors Arrangement Act, s. 6.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 173, s. 173(1)(e), s. 173(1)(h), s. 191, s. 191(1)(c), s. 191(2)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 6, s. 6(1), s. 6(2), s. 6(3), s. 6(5), s. 6(6), s. 6(8), s. 11, s. 36

Counsel:

Lyndon Barnes, Jeremy Dacks and Shawn Irving, for the CMI Entities.

David Byers and Marie Konyukhova, for the Monitor.

Robin B. Schwill and Vince Mercier, for Shaw Communications Inc.

Derek Bell, for the Canwest Shareholders Group (the "Existing Shareholders").

Mario Forte, for the Special Committee of the Board of Directors.

Robert Chadwick and Logan Willis, for the Ad Hoc Committee of Noteholders.

Amanda Darrach, for Canwest Retirees.

Peter Osborne, for Management Directors.

Steven Weisz, for CIBC Asset-Based Lending Inc.

REASONS FOR DECISION

1 S.E. PEPALL J. (orally):-- This is the culmination of the *Companies' Creditors Arrangement Act*[1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI

to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and
(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice

to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

(a) there must be strict compliance with all statutory requirements;
(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
(c) the Plan must be fair and reasonable.

See *Re: Canadian Airlines Corp.*[2]

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of

"Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (1) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Re Canadian Airlines*[3].

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Re Canadian Airlines*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

> (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
> (b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
> (c) alternatives available to the plan and bankruptcy;
> (d) oppression of the rights of creditors;
> (e) unfairness to shareholders; and

(f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Re Armbro Enterprises Inc.*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

23 Similarly, in *Re: Uniforêt Inc.*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *Metcalfe v. Mansfield Alternative Investments II Corp.*[8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Enti-

ties, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested.[9]

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Re Air Canada*[10] and *Re Calpine Canada Energy Ltd.*[11] I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods v. Merrill Lynch Capital Partners Inc.*[12] and *Re Laidlaw Inc*[13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *Re: A & M Cookie Co. Canada*[14] and *Mei Computer Technology Group Inc.*[15]

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

S.E. PEPALL J.

cp/e/qlafr/qlmxj/qljxr/qlcas/qljyw

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

2 2000 ABQB 442 at para. 60, leave to appeal denied 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to S.C.C. refused July 12, 2001, [2001] S.C.C.A. No 60.

3 Ibid,at para. 64 citing *Olympia and York Developments Ltd. v. Royal Trust Co.* [1993] O.J. No. 545 (Gen. Div.) and *Re: Cadillac Fairview Inc.* [1995] O.J. No. 274 (Gen. Div.).

4 Ibid, at para. 3.

5 (1993), 22 C.B.R. (3rd) 80 (Ont. Gen. Div.).

6 *Ibid*, at para. 6.

7 (2003), 43 C.B.R. (4th) 254 (QUE. S.C.).

8 (2008), 92 O.R. (3rd) 513 (C.A.).

9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

11 (2007), 35 C.B.R. (5th) 1.

12 (1996), 43 CBR (4th) 10.

13 (2003), 39 CBR (4th) 239.

14 [2009] O.J. No. 2427 (S.C.J.) at para. 8/

15 [2005] Q.J. No. 22993 at para. 9.

Tab 6

Indexed as:

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.

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

[2010] A.C.S. no 60

2010 SCC 60

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

Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrange-

ment Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

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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. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] 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, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the

CCAA to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[page384]

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

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By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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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.

Counsel:

Mary I. A. Buttery, Owen J. James and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, David Jacyk and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 **DESCHAMPS J.**:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated

(S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

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3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA*

contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] 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, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[page399]

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in

this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s.2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's

property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

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39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution .... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust

priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

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48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-

ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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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.). Accord-

ingly, "[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 [page413] 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.

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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 [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] 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 [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's

GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion

is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

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85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and

the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to compet-

ing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
>
> ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

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103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in

almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA, CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter,

may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*,

has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there

> be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

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122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

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125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008),

at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It di-

rects that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the

restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income*

Tax Act and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Em-*

ployment Insurance Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

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(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

[page454]

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

cp/e/qlhbb

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

Tab 7

Case Name:
Cheng v. Worldwide Pork Co.

Between
Tom King Tong Cheng, in His Personal, Capacity and as Trustee of Cheng Family Trust, Plaintiffs, and
Worldwide Pork Company Limited, Kenji Nose in His Personal Capacity and as Trustee of Nose Family Trust, Defendants

[2009] S.J. No. 277

2009 SKQB 186

54 C.B.R. (5th) 86

334 Sask.R. 227

2009 CarswellSask 303

177 A.C.W.S. (3d) 292

Docket: Q.B.G. No. 2885/2002

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

C.L. Dawson J.

May 22, 2009.

(92 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Amendment of -- Parties -- Adding or substituting -- Application by plaintiff to amend statement of claim dismissed with limited exception -- The plaintiff sought to add former directors of the corporate defendant -- The defendant had entered creditor protection and an amended arrangement plan compromised all claims including the plaintiff's -- The court found that the plan's release precluded the plaintiff's claims against the proposed defendants with one limited exception related to alleged oppressive conduct -- Leave was granted to further amend the pleadings in order to determine whether a claim against the proposed defendants arose and was within the exception -- Companies' Creditors' Arrangement Act, s. 5.1(2) (b).

Bankruptcy and insolvency law -- Companies' Creditors' Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Claims against directors -- Application by plaintiff to amend statement of claim dismissed with limited exception -- The plaintiff sought to add former directors of the corporate defendant -- The defendant had entered creditor protection and an amended arrangement plan compromised all claims including the plaintiff's -- The court found that the plan's release precluded the plaintiff's claims against the proposed defendants with one limited exception related to alleged oppressive conduct -- Leave was granted to further amend the pleadings in order to determine whether a claim against the proposed defendants arose and was within the exception -- Companies' Creditors' Arrangement Act, s. 5.1(2) (b).

Application by the plaintiff, Cheng, to amend the statement of claim in his action against the defendants, Worldwide Pork, Nose, and the Nose Family Trust, to add Skinner, Donnawell and the provincial Crown as defendants. A company controlled by the plaintiff applied for funding from the Agriculture Food and Equity Fund. The Fund provided financing through the purchase of $1 million in preferred shares in the defendant, a company through which the plaintiff's company operated a pork processing facility. The defendant was to redeem the preferred shares according to a formula, failing which the Fund had the right convert the shares into a loan. The defendant had a right to appoint a director to the defendant's Board. The proposed defendants, Skinner and Donnawell, served as the appointees. The shares were subsequently converted into a demand loan for $1.5 million. The following year, the defendant applied for creditor protection and obtained a stay of proceedings including the plaintiff's action. The plaintiff filed a proof of claim alleging that the defendant was indebted to him for $2.6 million based on claims for breach of contract, shareholder oppression and wrongful dismissal. A judge concluded that the total value of the plaintiff's claims was $197,500. An amended arrangement plan compromised all debts owed by the defendant by converting their dollar value into shares of a new company that held a percentage of the shares of the defendant. The plaintiff sought to amend his claims to add the proposed defendants, and claims for breach of director's fiduciary duty and vicarious liability on the part of the Crown. The defendants submitted that the amended plan compromised and extinguished the plaintiff's claims against the proposed defendants.

HELD: Application dismissed with limited exception. The amended plan compromised the claims of creditors and was binding on the plaintiff. The release extended to include a release for claims based on breach of fiduciary duty. The plaintiff's claims did not fall within the limitations on the release provided for in the amended plan, which made reference to claims not capable of release under s. 5.1(2) of the Companies' Creditors Arrangement Act. The plaintiff's proposed amendments regarding the defendant's former directors did not fall within the exceptions provided for by s. 5.1(2) of the Act. The provincial Crown was released from the vicarious liability claims as a shareholder in the defendant. Three proposed amendments potentially fell within the scope of the exception for oppressive conduct by directors. However, the pleadings were insufficient to determine whether they disclosed material facts giving rise to a cause of action within the exception against the proposed defendants. Leave to further amend by a specified deadline was granted.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.S. 1978, c. B-10, s. 234

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1, s. 5.1(2), s. 5.1(2)(a), s. 5.1(2)(b), s. 6(a), s. 11.5(1)

Queen's Bench Rules of Court, Rule 38, Rule 165, Rule 222A, Rule 236

Counsel:

David R. Barth for the plaintiffs.

Michael W. Milani, Q.C. for the proposed defendants Amos Skinner.

Ernie Donnawell and the Government of Saskatchewan.

JUDGMENT

1 C.L. DAWSON J.:-- The plaintiffs apply, pursuant to Rule 165 of *The Queen's Bench Rules of Court*, to amend the statement of claim in the within action and to add Amos Skinner, Ernie Donnawell and the Government of Saskatchewan as defendants.

2 The plaintiffs (also referred to as "Cheng") seek alternatively, pursuant to Rule 236, that the Government of Saskatchewan produce those documents in its possession that relate to the defendant, Worldwide Pork Company Limited and the directors of Worldwide Pork Company Limited that the Government of Saskatchewan appointed. The plaintiffs seek, in the further alternative, pursuant to Rule 222A, leave to examine that Government of Saskatchewan officer currently in charge of the Agriculture Food and Equity Fund.

BACKGROUND

3 The Agriculture Food and Equity Fund ("AFEF") was established by the Government of Saskatchewan (the "Government") as a fund administered by the Agricultural Credit Corporation of Saskatchewan ("ACS"). The function of ACS was to provide investment capital to the food industry in Saskatchewan. In 2003 the operations of AFEF were wound up and AFEF's assets and liabilities were transferred to ACS.

4 It appears that around 2000 a corporation called CITA Foods Inc. ("CITA"), which was controlled by the plaintiff, Tom Cheng, applied for funding from AFEF in order to enable CITA to purchase a pork slaughter and processing facility in Moose Jaw, Saskatchewan. AFEF provided funding to CITA through the form of an investment in a company called Worldwide Pork Company Limited ("WWP"). WWP was the company through which CITA operated the pork processing facility.

5 In 2000 the Government, through AFEF, invested $1,000,000.00 in WWP by subscribing 1,000,000 Class "C" preferred shares. The preferred shares were issued in the name of AFEF. At the time that AFEF became a shareholder, the other shareholders of WWP were Kenji Nose, Nose Family Trust, Tom Cheng, Cheng Family Trust, Okanomi House Limited and Yamato Development Canada Inc.

6 AFEF's share rights relating to the 1,000,000 preferred shares included the following:

1. AFEF was entitled to elect one director to the Board of Directors of WWP;
2. WWP was to redeem the preferred shares commencing March 31, 2004 according to a formula;
3. In the event that WWP failed to redeem AFEF's preferred shares, AFEF had a right to convert any or all of the shares (and any dividends or interest owing) into a loan payable to AFEF by WWP.

7 In April 2000 Amos Skinner, an investment manager with AFEF, became AFEF's appointee to the Board of Directors of WWP. In 2001 Mr. Skinner resigned as a director of WWP and Ernie Donnawell, an investment manager with AFEF, became AFEF's appointee to the Board of WWP.

8 On May 11, 2001 Mr. Skinner ceased being an employee of the Government. On May 30, 2001 Mr. Skinner became President and Chief Executive Officer of WWP. In January 2002 Mr. Skinner resigned as President and Chief Executive Officer of WWP.

9 On March 28, 2002 Ernie Donnawell resigned as a director of WWP. Between May 2002 and November 2003, Mr. Donnawell was elected to and resigned from the WWP Board a number of times.

10 On December 31, 2002 the plaintiffs, Tom Cheng and Cheng Family Trust ("Cheng") issued the within statement of claim against the defendants, WWP and Kenji Nose.

11 In February 2003 the preferred shares owned by AFEF in WWP were transferred to ACS. After that date, the Government's investment in WWP was held through ACS.

12 On May 28, 2004, ACS wrote to WWP notifying WWP that as WWP had failed to redeem the preferred shares on March 31, 2004, as required, ACS was converting the shares into a demand loan. ACS also advised that it was exercising its conversion rights in respect of 999,999 of the preferred shares. This resulted in all but one of the preferred shares being converted into a demand loan in favour of ACS, in the amount of $1,329,634.00. ACS later indicated to WWP that it had miscalculated the amount owing, and indicated that the demand loan was for $1,512,196.02. WWP was also indebted to ACS under other credit facilities.

13 On July 5, 2005 WWP applied to the court for protection under *The Companies' Creditors Arrangement Act*, R.S., 1985, c.C-36 ("CCAA"). The court file regarding the CCAA proceedings is Q.B.G. No. 1175 of 2005. On July 5, 2005 Justice Ball ordered a stay of all proceedings against WWP under a CCAA initial order. That initial order stayed all claims against WWP, which included the within plaintiffs' statement of claim, which was issued December 31, 2002. That CCAA order said, in part:

> 12. During the Stay Period, no Proceeding or Enforcement shall be commenced or continued against any one or more of the Directors in regard to or in respect of:
>
> (a) claims involving acts or omissions of those individuals in their capacity as Directors or in any way related to matters arising from their role as Directors; or
> (b) claims in any way related to any matters arising from the appointment of such individuals by and on behalf of the Applicant to any corporation, partnership or venture, including their appointment or

election by or on behalf of the Applicant to any other board of directors or other governing body or committee;

that arose prior to the date of this Order, and without limiting the generality of the foregoing, no shareholder of the Applicant or any other Person may commence or continue any Proceeding or Enforcement or claim any relief in relation to losses or damages that such Person alleges they have suffered in their capacity as shareholder or in relation to derivative rights of that shareholder against any Director, in either case, without first obtaining leave of this Court granting such Person permission to do so.

14 A review of the CCAA court file indicates that on August 17, 2005, [2005] S.J. No. 643, Justice Ball made a further order which lifted the July 5, 2005 stay of proceedings order against the directors of WWP, in limited circumstances. The relevant portions of that order lifting the stay are as follows:

1. Paragraph 12 of the July 5, 2005 Initial Order (since extended) is amended by adding the following paragraph:

"The provisions of this paragraph do not apply to the corporations and individuals described below in respect of any Proceeding or Enforcement against one or more of the Directors in regard to or in respect of:

(a) claims that relate to contractual rights of one or more of the creditors; or
(b) claims based on allegations of misrepresentations made by Directors to creditors or of wrongful or oppressive conduct by Directors;

as described in the draft Statement of Claim attached as an exhibit to the Affidavit of Paul J. Harasen sworn July 29, 2005, and leave is granted to those corporations and individuals who produced and shipped hogs to Worldwide Pork Company Limited that are named as Plaintiffs in the Statement of Claim when it is issued, and those Plaintiffs may assert the allegations asserted in the draft Statement of Claim, and may commence and continue the claims contained in the draft Statement of Claim."

15 This August 17, 2005 order lifting the stay only applied to the specified claims of the creditors who produced and shipped hogs to WWP, as referred to in a draft statement of claim filed in support of the application to lift the stay. It did not apply to the plaintiffs' statement of claim here.

16 The CCAA proceedings continued. A claims proving process was put into place on September 27, 2005, by court order. Under that order, the Monitor was to assess all claims and accept or reject them. Those creditors whose claims were rejected by the Monitor were entitled to apply to Justice Ball for a hearing as to the validity of that creditor's claim. The status and the amount of a creditor's claim was relevant for the purposes of voting on the restructuring plan that was to be submitted to the court by WWP.

17 Cheng filed a Proof of Claim alleging that WWP was indebted to Cheng for various claims in the total amount of $2,602,000.00. The Monitor disallowed the Cheng CCAA claims. Cheng then applied to the court for an order determining the amount of the Cheng claims. Cheng appended the within statement of claim (without the proposed amendments) to the affidavit in support of the application to determine the amount of the plaintiffs' claim. On January 5, 2006 Justice Ball issued a fiat in respect of the Cheng claims. Justice Ball concluded that the total value of the Cheng CCAA claims was $197,500.00.

18 On January 4, 2006 WWP filed its Plan of Compromise and Arrangement (the "Plan"). The Plan was amended on January 20, 2006 (the "Amended Plan"). That Amended Plan dealt specifically with the issue of what creditors' rights would be extinguished, settled or compromised if the Amended Plan were approved by the creditors and the court. Relevant portions of that Amended Plan include the following:

...

2.3 Unaffected Claims

The Plan does not affect or compromise the Claims of the following Creditors and other Persons;

(a) Post-Filing Claims of any Person;
(b) Claims of the Monitor, its counsel and WWP's counsel and professional advisors for amounts that would comprise all or part of the Administrative Charge as defined in the Initial Order;
(c) Claims of the DIP Lender for any amount owing in respect of the DIP Loan approved by the Court from time to time;
(d) Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or any other taxation authority;

(i) for any statutory deemed trust amounts which are required to be deducted from employees' wages, including amounts in respect of employment insurance, Canada Pension Plan and income taxes;
(ii) for goods and services or other applicable sales taxes payable by WWP or their customers in connections with the sale of goods and services by WWP to such customers; and

(e) Claims of the Excluded Secured Creditors.

For further certainty and to avoid any confusion, the Contingent Employee Claims shall not be a Post-Filing Claim and shall be compromised as set forth in this Plan.

...

4.1 WWP's Creditors

(b) Settlement of Claims of Creditors

Each Creditor, other than Employees of WWP in respect of any claims as employees of WWP and the Excluded Secured Creditors, and subject to paragraph 4.1(c) hereof, shall receive in full satisfaction of its Claim as determined in accordance with the Claims Procedure Order;

(i) Where the Claim of the Creditor does not exceed $500, or where the Creditor has elected to reduce the amount of its claim to $500, such Creditor shall receive an amount equal to the lesser of the amount of its Claim and $500, which amount shall be paid within 90 days of the Effective Date;
(ii) Where the claim of the Creditor exceeds $500 and the Creditor has not elected to reduce the amount of its claim to $500, such Creditor shall receive common shares in NewCo. Shares in NewCo. will be issued on the basis of one share for each one hundred dollars (or part thereof) owing pursuant to the Accepted Claim for Voting Purposes of that Creditor.

WWP shall amend its articles and bylaws or cause them to be amended, so that from and after the Effective Date, it shall, subject to the provisions of *The Business Corporations Act* (Saskatchewan) and any other applicable legislation and subject to compliance with financial covenants in agreements with its lenders, be required to annually declare and pay out in dividends such amounts of funds as it has generated annually from operations, after provision is made by WWP for its ongoing operational requirements, after any provision required for debt servicing has been made in compliance with any agreements with third party lenders, after provision is made for any preferred share redemption that is required and subject to any amounts to be paid in priority to any payment of dividends to the holders of common shares of WWP.

(c) Settlement of Shareholders Claims

Notwithstanding each Shareholders:

(a) Accepted Claim for Voting Purposes or Disputed Claim, if any;
(b) number of existing shares in WWP; and
(c) outstanding shareholders loans to WWP;

the Shareholders' Claims shall be compromised by the Shareholders receiving a combined total of 10% of the shares of NewCo. to be allocated amongst such Shareholders on a pro rata basis based upon the common share shareholdings of such parties in WWP on the Filing Date, and all other amounts owing to such Shareholders by WWP shall be extinguished. The existing shares of such Shareholders in WWP, and the preferred share of ACS in WWP, shall be cancelled as at the Effective Date.

...

(d) Settlement of Employee Claims

The Claims of the Employees of WWP will be compromised under this Plan as follows:

(i) On or after the Effective Date the Employees will be paid 95% of the Admitted Wage Claims;

(ii) The Admitted Vacation Entitlement Claims of the Employees shall be maintained by WWP for the Employees. For those Employees that return to employment with WWP, they shall retain their unused vacation entitlements that form part of the Admitted Vacation Entitlement Claims. In respect of any Employee that does not return to employment with WWP within 12 months of the Effective Date, WWP shall pay to that Employee 85% of the value of the Admitted Vacation Entitlement Claims of that Employee as such existed at the Filing Date, with such amounts to be paid within 18 months of the Effective Date; and

(iii) The Contingent Employee Claims shall be extinguished upon the Effective Date.

(e) Establishing NewCo. and Issuance of Shares to Creditors

On or prior to the Effective Date, WWP shall cause NewCo. to be incorporated or established by WWP (at the expense of WWP). The Monitor, or his designate, shall be appointed as the interim director of NewCo., until the first meeting of the shareholders of NewCo. referred to below. On the Effective Date, NewCo. will issue in favour of the participating Creditors the appropriate number of common voting shares in the capital stock of NewCo. on the bases set forth in sections 4.1(b) and 4.1(c) above, provided that no fractional shares shall be issued. The rights of the holders of these common voting shares shall be consistent with the rights of the holders of common voting equity shares, including the right to receive dividends as and when declared. A meeting of shareholders of NewCo. will be convened within 6 months of the Effective Date to elect a board of directors of NewCo. and to conduct such other business as may be required or determined by the shareholders of NewCo. and the interim acting director of NewCo.

...

(i) Extent of Release

For greater certainty: each of

(a) **the payments to a Creditor under subparagraph 4(1)(b)(i) above;**

(b) **the issuance of shares in NewCo pursuant to subparagraph 4(1)(b)(ii) above;**

(c) **the issuance of shares in NewCo pursuant to paragraph 4(1)(c) above; and**

(d) **the settlement of the Employee Claims pursuant to paragraph 4(1)(d) above.**

shall settle in full all claims, causes of action, demands, rights, indebtedness, obligations and liability (collectively, "Rights") of the Creditor holding such Rights whether such Rights are made or asserted against WWP or are capable of being asserted against any other Person, including whether pursuant to a joint and several obligation with WWP, a several obligation, a guarantee obligation, an absolute obligation, a contingent obligation or any obligation of any nature derived directly or indirectly from or through or in relation to any Rights, including any Rights that may be asserted under or pursuant to any livestock dealer bond or any livestock dealer regulations, whether against WWP or any other Person, other than the Rights of the DIP Lender in respect of the DIP Loan.
[Emphasis Added]

...

4.12 Releases

Except as provided hereafter, on the Effective Date, WWP and each and every present and former shareholder, officer, director, employee, financial advisor, legal counsel and agent of WWP and the Monitor and their respective legal counsel (individually, a "Released Party") and any person claimed to be liable derivatively through any Released Party **(including any Person described in paragraph 4.1(i) above, with respect to all rights of such Person),**shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any li-

ability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert including, without limitation, any and all claims in respect of potential statutory liabilities of the former and present directors and officers of WWP, and any alleged fiduciary or other duty, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Date in any way relating to, arising out of or in connection with Claims or Post-Filing Claims, the business and affairs of WWP, this Plan and the CCAA Proceedings to the full extent permitted by law, and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce WWP's obligations under the Plan or any related document), provide that nothing herein:

(a) shall release or discharge a Released Party from a Claim which cannot be compromised under the CCAA; or
(b) shall affect the rights of any Person to pursue any recoveries for a Claim against a Released Party that may be obtained against a third-party insurer or other entity not released under this Plan (but, for certainty, any such Claim to which an insurer may be subrogated shall be released hereunder); provided, further, however, that notwithstanding the foregoing releases under the Plan, any Claim asserted against WWP pursuant to Article 2.3(c) of this Plan shall remain subject to any right of set-off that otherwise would be available to WWP in the absence of such releases; or
(c) shall release the directors and former directors of WWP in respect of any claims that may be made against them by creditors pursuant to the Order of Mr. Justice D. Ball, granted on August 17, 2005 in the CCAA proceedings.

...

6.2 Application for Court Sanction Order

If Creditor approval is obtained, WWP shall forthwith apply for the Court Sanction Order. Unless otherwise provided in the Order, the Court Sanction Order shall not become effective until the Effective Date. On the Effective Date, subject to the satisfaction of the conditions contained in Sections 6.1 and 6.4 hereof, the Plan will be implemented by WWP and shall be binding upon all Creditors having Claims or Rights affected by this Plan and Post-Filing Claims affected by this Plan to the extent of such Claims or Rights or Post-Filing Claims and upon all other Persons. If the conditions contained in Sections 6.1 or 6.4 are not satisfied, the Effective Date will not occur and this Plan and the Court Sanction Order shall cease to have any further force or effect, unless otherwise ordered by the Court.

...

8.4 **Compromise Effective for All Purposes**

The compromise or other satisfaction of any Claim under this Plan, if sanctioned and approved by the Court under the Court Sanction Order shall be binding on the Effective Date on all Creditors in accordance with the term of this Plan and such Creditor's heirs, executors, administrators, legal personal representatives, successors and assigns, for all purposes.

8.5 **Consents, Waivers and Agreements**

On the Effective Date, each Creditor affected by this Plan shall be deemed to have consented and agreed to all of the provisions of this Plan in their entirety. In particular, each such Creditor (for greater certainty, except for the DIP Lender in respect of the DIP Loan) and other affected Persons shall be deemed:

...

(d) to have released any and all Claims and Rights, save and except the Unaffected Claims and all payments or other Distributions to be made to such Creditor pursuant to the provisions of this Plan or any agreement or arrangement contemplated by this Plan. [Emphasis in Original]

19 The effect of the Amended Plan was that all debts owing to secured and unsecured creditors of WWP were to be compromised, by converting the dollar value of such debts into shares of NewCo., a holding company that was to hold a specified percentage of the common shares of WWP. As well, all claims of shareholders, whether they were in respect of shareholder loans or any other amounts owed to them by WWP, were to be compromised by such shareholders receiving a pro rata share of 10% of the NewCo. shares. That is, 10% of the NewCo. shares were to be allocated among the existing shareholders of WWP. As well, all employee claims were settled, in general, by a payment of 95% of the admitted wage claim.

20 On January 25, 2006 at the creditors' meeting, the majority of creditors voted to accept the Amended Plan.

21 The Amended Plan was sanctioned by the court on February 6, 2006. The February 6, 2006 Court Sanction Order of Justice Ball stated the following at paras. 10 and 12:

10. Upon the Effective Date, all Claims and Rights, except Unaffected Claims, of Creditors of the Applicant be and they are hereby forever discharged and extinguished, subject to payment of any amounts to be paid under the Plan, the issuance of the shares in the Applicant to NewCo. and the issuance of shares in NewCo. to the Creditors entitled to receive same, as provided in the Plan.

...

12. Upon the occurrence of the Effective Date, subject to:

(a) the repayment of the DIP Loan to the DIP Lender;

(b) the payment of the amounts to be paid under the Plan;
(c) the issuance of the shares of the Applicant to NewCo. as provided in the Plan;
(d) the issuance of shares in NewCo. to the Creditors entitled to receive same, as provided in the Plan; and
(e) the payment of 95% of the Admitted Wage Claims to the Employees;

all Charges held by any Creditors of the Applicant shall be released and discharged, except the Administrative Charge (as that term is defined in the Initial Order), and the Post-Application Creditors Charge (as that term is defined in the Order Extending the CCAA Proceedings made July 18, 2005 by Justice D. Ball). In the event that the Creditor holding such released and discharged Charge does not deliver to the Applicant's counsel, Balfour Moss LLP, a withdrawal and discharge respecting such Charge to be utilized on or after the Effective date, the Applicant may apply to the Court for an Order releasing or discharging such Charge, at the cost and expense of such Creditor.
[Emphasis Added]

22 Following the effective date of the Amended Plan, the Monitor issued shares to all creditors of WWP in accordance with the Amended Plan and Court Sanction Order. Cheng was issued 1,521 shares in NewCo., representing 1.7% of the common shares in NewCo., in accordance with the Court Sanction Order.

23 The plaintiffs now apply to amend their statement of claim and applies to add Amos Skinner, Ernie Donnawell and the Government of Saskatchewan as defendants. The relevant portions of the plaintiffs' proposed amended claim include the following (the proposed amendments are underlined):

1. This is an action for breach of contract, shareholder oppression, breach of a director's fiduciary duty to his company, and wrongful dismissal.
2. The Plaintiff, Tom King Tong Cheng ("Tom"), resides in Richmond, British Columbia. Tom is a shareholder and director of Worldwide Pork Company Ltd.
3. The Plaintiff, Cheng Family Trust, is a trust located in Saskatchewan. Tom is the Trustee and also a director of Cheng Family Trust. Tom and Cheng Family Trust are minority shareholders of Worldwide.

...

5. The Defendant, Kenji Nose ("Nose"), resides in Vancouver, British Columbia. Nose is a shareholder, officer, and director of Worldwide. Nose is the Trustee and [also is also] [Editor's note: Text in brackets is struck out in the original.] the

managing director of the Defendant, Nose Family Trust. Nose Family Trust is liable for any and all damage suffered by reason of any actions taken by Nose while acting as its trustee.

...

6.1 The Defendant, The Government of Saskatchewan, represents the Crown in right of the Province of Saskatchewan. The Plaintiffs plead and rely on *The Proceedings against the Crown Act*. The Government of Saskatchewan, is vicariously liable for the actions and inactions of its employees, agents, and principals, including the Minister and Department of Agriculture and Food of Saskatchewan, Amos Skinner, and Ernie Donnawell.

6.2 The Defendant Ernie Donnawell resides in Regina, Saskatchewan.

6.3 The Defendant Amos Skinner resides in Wilkie, Saskatchewan.

...

8. The current Directors of Worldwide are Ernie Donnawell, Tom and Nose. Amos Skinner was a Director from Worldwides creation in 1999 until about May 2001.

...

9. The shareholders of Worldwide are Tom, Cheng Family Trust, Nose, Nose Family Trust, Okonomi House Limited ("Okonomi"), Yamato Development Canada Inc. ("Yamato"), and the Minister of Agriculture and Food of Saskatchewan. The Minister is involved through a government program called the Agri Food Equity Fund ("AFEF").

11. The Director Ernie Donnawell is an employee of the Government of Saskatchewan and currently represents the interests of AFEF. Prior to Ernie Donnawell, AFEF was represented by Amos Skinner.

...

22. On February 18, 2000, Okonomi and Cita Foods Inc. ("Cita") signed a five year contract for the sale of pork products ("the Purchase Agreement"). Tom signed the Purchase Agreement on behalf of Cita. Cita was to provide

the pork products to Okonomi. Cita's contract was then assigned to Worldwide.

23. Since the Purchase Agreement was assigned to Worldwide Nose has caused Okonomi to fail or refuse to acquire and pay for pork from Worldwide as required under the Purchase Agreement. Instead the Defendants have caused Worldwide to sell pork at a lower price to Rocky Japan. Rocky Japan is a company owned and controlled by Nose.
24. Furthermore, Worldwide and Nose, Ernie Donnawell and The Government of Saskatchewan have failed to commence and [sic] action against Okonomi for breach of contract or take any other action to rectify the breach of the Purchase Agreement.

...

26. As a director of Worldwide, Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan has not acted honestly and in good faith with a view to the best interests of the corporation.
27. Nose and The Government of Saskatchewan, through its agents, including Amos Skinner and Ernie Donnawell, has breached the fiduciary duties he owed to Worldwide in his capacity of director.

...

34. Nose and Worldwide have acted in an oppressive manner and unfairly disregarded the interests of Tom by failing to make any payment on account of deferred start up costs and shareholder loan, contrary to the agreements between Nose and Tom, contrary to Nose's representations, and contrary to Tom's reasonable expectations.
35. The Defendants, including The Government of Saskatchewan, have failed to provide notice to Tom of both director's and shareholder's meetings. Director's meetings have been held without providing notice to Tom and Tom has received no notice of shareholder's meetings, including the annual shareholder's meeting. The Defendants, including The Government of Saskatchewan, have also failed to advise Tom of material changes to Worldwide.
36. Nose and Worldwide, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan have acted in an oppressive manner and unfairly disregarded the interests of Tom and Cheng Family Trust by failing to enforce the Purchase Agreement, failing to try to make any profits, failing to pay dividends, failing to provide notice of director's meetings, failing to provide notice of shareholders meetings, and failing to employ Tom.
37. As a result of the actions, inactions, and breach of fiduciary duty of Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan, Worldwide and its shareholders, including Tom and Cheng Family Trust, have suffered damages, including monetary loss.

...

39. Prior to Purchase Agreement being closed, Amos Skinner (who represented AFEF and the Minister) and Nose colluded to force Tom to accept a management contract which was not satisfactory to Tom. Tom signed his management contract under duress.
42. Tom had a significant interest in and expectation of management of Worldwide. Tom had a reasonable expectation of a fair management package. Nose and The Government of Saskatchewan, and Worldwide have acted in an oppressive manner and unfairly disregarded the interests of Tom by terminating his employment as President and Chief Executive Officer.

...

49. THE PLAINTIFFS THEREFORE claim against the Defendants, jointly and severally:

(a) Payment on account of the deferred start up costs, ie. the time, effort and expenses of Tom incurred to get Worldwide up and running;
(b) Buyout of their shares by the company at fair market value;
(c) Compensation for unpaid past and future dividends;
(d) Appointment of an interim receiver-manager;
(e) In the alternative, an order removing the existing Directors and appointing new Directors;
(f) General Damages, for wrongful dismissal, and shareholder oppression, and breach of a director's fiduciary duty, including pay in lieu of notice;
(g) Monetary Damages, including special damages in an amount to be proven at trial;
(h) Vacation pay and other such payments and benefits as Tom may be entitled to;
(i) Pre-Judgment interest pursuant to The Pre-Judgment Interest Act;
(j) Aggravated and Punitive Damages;
(k) Costs of and incidental to the within action on a solicitor-client basis;
(l) A stay of the BC action;
(m) In the alternative, Set Off for any damages awarded in the BC action;
(n) Other such relief as counsel may request and this Honourable Court may award.

24 It is clear that the claims that Cheng seeks to advance against the proposed defendants Donnawell, Skinner and the Government in the proposed amended claim are the identical claims advanced against WWP and the defendant Kenji Nose, when the claim was issued in December 2002. Cheng advised the Monitor of these claims against WWP when Cheng's proof of claim, alleging that WWP was indebted to Cheng in the amount of $2,602,000.00 was filed. When Cheng was re-

quested to provide particulars of the claim, Cheng filed a copy of the within statement of claim (without the amendments adding the proposed defendants) with the Monitor. The allegations in the statement of claim were the basis upon which Cheng suggested WWP was indebted to Cheng, and the statement of claim was incorporated by reference into the Cheng proof of claim.

25 The only cause of action that might possibly be viewed as a new cause of action in the proposed amended claim is the proposed amendment to paragraph one, which amendment states that this is an action for "breach of directors' fiduciary duty to his company". Otherwise the causes of action in the proposed amended claim are the same as they existed at the time Cheng filed the proof of claim under the CCAA proceedings.

POSITIONS OF THE PARTIES

26 The plaintiffs now seek an order which would permit them to amend the statement of claim to add the proposed defendants Amos Skinner, Ernie Donnawell and the Government as parties. Counsel on behalf of the plaintiffs indicated, in chambers, that the Monitor in the CCAA action told him that the claims against the directors or other liable parties would not be extinguished by the CCAA court order which sanctioned the Amended Plan.

27 The plaintiffs seek, in the alternative the stated disclosure from the Government and the ability to discover Government officials.

28 The defendants assert that the court should not allow the amendments to the statement of claim, because the Amended Plan and Court Sanction Order clearly compromised and extinguished all of the Cheng claims against the directors, officers, shareholders and employees of WWP. The defendants assert further that the amendments assert no reasonable cause of action, are vexatious and frivolous and/or an abuse of process.

29 The defendants take the further position that the plaintiffs have not established entitlement to disclosure nor to cross-examine Government officials.

ISSUES

1. **Did the CCAA Amended Plan and Court Sanction Order compromise, extinguish or settle the proposed claims of the plaintiffs against the proposed defendants Skinner, Donnawell and the Government?**

2. **If the plaintiffs' proposed claims were not extinguished by the CCAA Amended Plan and Court Sanction Order, should the plaintiffs be allowed to amend their statement of claim as proposed?**

3. **Should the requested disclosure be ordered against the Government?**

4. Should the plaintiffs be granted leave to examine the Government's officer currently in charge of AFEF?

ANALYSIS

1. Did the CCAA Amended Plan and Court Sanction Order compromise, extinguish or settle the claims of the plaintiffs against the proposed defendants Skinner, Donnawell and the Government?

(a) The Law

30 Section 5.1 of the CCAA provides for the release of a petitioning debtor company's directors in a compromise arrangement in respect of a debtor company in limited circumstances. Specifically s. 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 that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

...

31 A plan of compromise respecting a debtor company may include in its terms provision for the compromise of claims against directors of a debtor company, where the directors are legally liable, in their capacity as directors, for the payment of such claims. The right to compromise such claims is limited by the provision of s. 5.1(2) of the CCAA. To facilitate the making of such compromises, s. 11.5(1) of the CCAA permits a stay order to be made against creditors with claims against directors.

32 The Ontario Court of Appeal in the *Metcalfe & Mansfield Alternative Investments II Corp. (Re)* 2008 ONCA 587 confirmed that a bankruptcy court also has jurisdiction to sanction the release of third parties (which would include parties other than directors referred to in s.5.1 of the CCAA) in circumstances that are deemed appropriate for the success of the plan. The Ontario Court of Appeal in *Metcalfe, supra* said at para. 43:

> [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. ...

33 The Ontario Court of Appeal went on to comment on this issue of releasing potentially liable parties further at paras. 61-63 and 70 and 74:

> [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 349; *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 (Ont. S.C.J.)at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Gen. Div.) at 518.
>
> **[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).**
>
> > [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.

...

[74] Third party releases have become a frequent feature in Canadian restructuring 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 AR. 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.
> [Emphasis Added]

34 It is clear that a plan of compromise or arrangement which releases directors and/or third parties and which is sanctioned by the court is binding on all creditors.

35 There is one relevant exception to the release of a director. Under s. 5.1(2) of the CCAA, a release may not relate to a claim against a director which cannot be compromised under the CCAA. Those claims that cannot be compromised under the CCAA are set out in s. 5.1(2) of the CCAA, which I repeat here for ease of reference:

5.1 ...

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

36 The Ontario Court of Appeal in *Metcalfe, supra* discussed the right of a creditor to pursue a claim for misrepresentation against a director, one of the excepted type of claims under s. 5.1(2)(b) of the CCAA. In doing so, the Ontario Court of Appeal commented on the case of *NBD Bank, Canada v. Dofasco Inc.,* (1999), 46 O.R. (3d) 514 (C.A.) which allowed a creditor to pursue a claim against a director for negligent misrepresentation. The Ontario Court of Appeal in *Metcalfe, supra*-court said the following at paras. 83 and 84:

[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 mis-

representations 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 for-

> given under a subsequent corporate proposal or arrangement. [Footnote omitted.]

37 The Ontario Superior Court of Justice in *BlueStar Battery Systems International Corp. (Re)* (2000), 25 C.B.R. (4th) 216 (QL), in considering an application by a creditor for a declaration that its claim against directors had not been compromised, said the following about s. 5.1(2) of the CCAA at para. 14:

> 14 What then if RevCan here had in fact perfected its claim against the directors? Would the directors have been able to utilize s. 5.1 of the CCAA as a safe haven? It would appear to me that the directors would have been entitled (s.5.1(1)) to have included in the Plan a compromise of their liability included in the Plan and would not be disqualified (s. 5.1(2)) from doing so. This disqualification from utilizing s. 5.1(1) as is found in s. 5.1(2) relates to (a) contractual rights of a creditor, such as a guarantee by a director for example, or (b) claims based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors. Firstly there was nothing in this case to suggest that there was any sort of a contract (including a guarantee) from any of the directors. Secondly there was no allegation of any misrepresentation by any director nor was there any allegation of wrongful or oppressive conduct by any director. It would seem to me that while the reference in s. 5.1(2) is to "directors", it would seem that the disqualification should relate to those of the directors who may fall within (a) or (b) thereof. As to the (b) category, there was no allegation against any director in the RevCan material; it appears that all of the RevCan dealing and difficulties with respect to either promises or getting information were restricted to non-directors at BSCC. However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1(2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal.

38 The law is clear that a plan of compromise and the bankruptcy court has the authority to release directors and third parties from claims of creditors, except claims which come under s. 5.1(2) of the CCAA. The claims against directors that cannot be compromised under a CCAA plan include claims that relate to contractual rights of creditors (such as guarantees by directors to a creditor), or

claims based on misrepresentations made by directors to creditors or claims for wrongful or oppressive conduct by directors.

(b) The WWP Amended Plan and Court Sanction Order

39 Here, the CCAA Amended Plan compromised the claims of creditors. Section 4.1(c) of WWP's Amended Plan states that each shareholders' claim was compromised by the shareholders receiving a combined total of 10% of the shares of NewCo. The debts owing to all secured and unsecured creditors of WWP were compromised by converting the dollar value of such debts into shares of NewCo.

40 Section 8.4 of the Amended Plan provided that the compromise under the Amended Plan was effective for all purposes. That section states:

> **8.4 Compromise Effective for All Purposes**
>
> The compromise or other satisfaction of any Claim under this Plan, if sanctioned and approved by the Court under the Court Sanction Order shall be binding on the Effective Date on all Creditors in accordance with the term of this Plan and such Creditor's heirs, executors, administrators, legal personal representatives, successors and assigns, for all purposes.

41 Under s. 6(a) of the CCAA, the effect of court approval of the Amended Plan was to make the compromise or arrangement binding on all WPP's creditors or class of creditors, whether secured or unsecured. Further, s. 4.1(i) of the Amended Plan here indicated that the issuance of the shares in New Co. settled, in full, all claims of each creditor, whether such rights were made or asserted against WWP or were capable of being asserted against any other person, including whether pursuant to a joint and several obligation with WWP, a several obligation, a guarantee obligation, an absolute obligation, a contingent obligation or any obligation of any nature derived directly or indirectly from or through or in relation to any rights. Specifically I repeat s. 4.1(i):

> **(i) Extent of Release**
>
> **For greater certainty: each of**
>
> (a) **the payments to a Creditor under subparagraph 4(1)(b)(i) above;**
>
> (b) **the issuance of shares in NewCo pursuant to subparagraph 4(1)(b)(ii) above;**
>
> (c) **the issuance of shares in NewCo pursuant to paragraph 4(1)(c) above; and**

(d) the settlement of the Employee Claims pursuant to paragraph 4(1)(d) above.

shall settle in full all claims, causes of action, demands, rights, indebtedness, obligations and liability (collectively, "Rights") of the Creditor holding such Rights whether such Rights are made or asserted against WWP or are capable of being asserted against any other Person, including whether pursuant to a joint and several obligation with WWP, a several obligation, a guarantee obligation, an absolute obligation, a contingent obligation or any obligation of any nature derived directly or indirectly from or through or in relation to any Rights, including any Rights that may be asserted under or pursuant to any livestock dealer bond or any livestock dealer regulations, whether against WWP or any other Person, other than the Rights of the DIP Lender in respect of the DIP Loan.
[Emphasis Added]

42 Section 4.12 of the Amended Plan provided that all directors were released and discharged from all claims except, (for our purposes), those that cannot be compromised under the CCAA:

4.12 Releases

Except as provided hereafter, on the Effective Date, WWP and each and every present and former shareholder, officer, director, employee, financial advisor, legal counsel and agent of WWP and the Monitor and their respective legal counsel (individually, a "Released Party") and any person claimed to be liable derivatively through any Released Party **(including any Person described in paragraph 4.1(i) above, with respect to all rights of such Person)**,shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert including, without limitation, any and all claims in respect of potential statutory liabilities of the former and present directors and officers of WWP, and any alleged fiduciary or other duty, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Date in any way relating to, arising out of or in connection with Claims or Post-Filing Claims, the business and affairs of WWP, this Plan and the CCAA Proceedings to the full extent permitted by law, and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce

WWP's obligations under the Plan or any related document), provide that nothing herein:

(a) shall release or discharge a Released Party from a Claim which cannot be compromised under the CCAA; or

(b) shall affect the rights of any Person to pursue any recoveries for a Claim against a Released Party that may be obtained against a third-party insurer or other entity not released under this Plan (but, for certainty, any such Claim to which an insurer may be subrogated shall be released hereunder); provided, further, however, that notwithstanding the foregoing releases under the Plan, any Claim asserted against WWP pursuant to Article 2.3(c) of this Plan shall remain subject to any right of set-off that otherwise would be available to WWP in the absence of such releases; or

(c) shall release the directors and former directors of WWP in respect of any claims that may be made against them by creditors pursuant to the Order of Mr. Justice D. Ball, granted on August 17, 2005 in the CCAA proceedings. [Emphasis in Original]

43 Paragraph 16 of the Court Sanction Order tracks the wording of s. 4.12 of the Amended Plan and confirms the release of all "released parties", which includes former shareholders and directors of WWP, as well as third parties. The release extended to include a release for a claim for breach of fiduciary duty. The only limitations on the release are set out in paras. 4.12(a), (b) and (c) of the Amended Plan, which I have referred to above. Paragraph 4.12(1)(a) confirms that the Amended Plan and Court Sanctioned Order does not release a party from a claim which could not be released under s. 5.1(2) of the CCAA. Paragraph 4.12(b) stated that the Amended Plan did not affect the rights of any person to proceed against a third party insurer or other entity not released under the Plan, (which is not applicable here). Paragraph 4.12(c) did not release the directors of WWP in respect of the claims of those specified creditors pursuant to the court's August 17, 2005 interim order, (which is not applicable here).

44 Following the effective date of the Amended Plan, the Monitor of WWP issued shares to all creditors of WWP in accordance with the Plan and Court Sanction Order. Cheng was issued shares in NewCo. in accordance with the order. Cheng was a shareholder and director. The Cheng Family Trust was a shareholder. The plaintiffs received shares in NewCo. under the terms of the Amended Plan.

45 In the plaintiffs' proposed amended claim the claims originally asserted by Cheng against WWP in the statement of claim are now being asserted against Ernie Donnawell, Amos Skinner and the Government. The plaintiffs proposed to assert these claims both jointly and severally against these proposed defendants, when previously they were asserted only against WWP and Kenji Nose.

46 Mr. Skinner is a former director, officer and employee of WWP. Mr. Donnawell is a former director of WWP. The Government, through AFEF and ACS, is a former shareholder of WWP. Each of these proposed defendants is a "released party" under the Amended Plan, by virtue of s. 4.12 of the Amended Plan and paragraph 16 of the Court Sanction Order.

47 It is easy to ascertain that the releases of the former shareholders and directors of WWP, were reasonably connected to the restructuring of WWP. The reason for such a broad release is obvious.

WWP was insolvent. The restructuring plan provided a method by which it might be possible for the business to continue, albeit in a new form, without the constraints of the former obligations. The Amended Plan provided a structured environment for the negotiation of compromises between WWP and its creditors, for the benefit of both. A compromise of claims provides for the successful reorganization of the company and avoids a liquidation that might yield little for creditors. Here, the creditors agreed to grant a release to WWP's officers, directors, shareholders and employees. The directors or officers who might be alleged to be liable to creditors for their actions as directors, would not be able to claim against WWP for indemnification, if they were entitled to such indemnification, because of the insolvency. Hence the releases of the directors. The creditors voted on this broad release when they approved the Amended Plan. The court assessed the fairness and reasonableness of the release, as a term of a complex restructuring arrangement, and confirmed the Amended Plan (including the release of directors) by order of the court.

48 It is clear that (with the exception of the type of claims referred to in s. 5.1(2) of the CCAA, which I will deal with in due course) the Amended Plan and Court Order conclusively settled all rights of the plaintiffs against the proposed defendants in this action. In this case the only claims against the proposed defendants which were not compromised, discharged or released are those claims which cannot be compromised under s.5.1(2) of the CCAA.

49 At this point then it is necessary to turn to the proposed amendments to determine whether or not the pleadings, as proposed to be amended, include claims which cannot be compromised by reason of paragraphs 4.12(a), (b) or (c) of the Amended Plan and s. 5.1(2) of the CCAA.

50 Firstly, it is clear that the plaintiffs' proposed amendments do not fall within the exceptions to the releases in paragraph 4.12(b) (third party insurer) or 4.12(c) (those specified creditors referred to in the August 17, 2005 order) of the Amended Plan.

51 The question is whether the plaintiffs' proposed amendments fall within paragraph 4.12(a) of the Amended Plan, which paragraph precludes a release from a claim which cannot be compromised under s. 5.1(2) of the CCAA. None of the plaintiffs' proposed amendments include claims relating to the contractual rights of a creditor (s. 5.1(2)(a) of the CCAA), such as a claim by a creditor for a guarantee executed by a director to a creditor. As a result, the only question is whether the plaintiffs' proposed amendments include a claim of the nature referred to in s. 5.1(2)(b) of the CCAA such as a claim for misrepresentation by a director to a creditor or of wrongful or oppressive conduct by a director.

(c) Do the Proposed Amendments Fall Within S. 5.1(2)(b) of the CCAA?

52 I will deal with each of the allegations in the proposed amendments, as they relate to the exceptions in s. 5.1(2)(b) of the CCAA to determine if any of the proposed amended claims fall within the exception outlined in s. 5.1(2)(b) of the CCAA.

(i) The Proposed Addition of the Government as a Defendant

53 The plaintiffs seek to add the Government as a defendant. The original pleadings, in paragraph 9, assert that the Government, through AFEF, was a shareholder in WWP. There is no assertion that

the Government, AFEF or ACS was a director of WWP. In fact, none of these entities were directors of WWP. The Government, through AFEF and ACS was a shareholder in WWP.

54 The exception under s. 5.1(2) of the CCAA relates only to claims against directors. The CCAA does not limit a release or a compromise of a claim against a shareholder. Here, the release provisions in the Court Sanction Order released all shareholders. The release applies to AFEF and ACS (the Government) as shareholders. The Government was released, as a shareholder, from any claims as a result of the Amended Plan and Court Sanction Order. The plaintiffs, as a result of the Amended Plan and Court Sanction Order, have no right to add the Government as a defendant to this action.

(ii) Paragraph 6.1 of the Proposed Amended Claim

55 Paragraph 6.1 as proposed to be amended states:

> 6.1 The Defendant, The Government of Saskatchewan, represents the Crown in right of the Province of Saskatchewan. The Plaintiffs plead and rely on *The Proceedings against the Crown Act*. The Government of Saskatchewan, is vicariously liable for the actions and inactions of its employees, agents, and principals, including the Minister and Department of Agriculture and Food of Saskatchewan, Amos Skinner, and Ernie Donnawell.

56 The claim proposed in paragraph 6.1 asserts the Government is vicariously liable for the conduct of its employees, Ernie Donnawell and Amos Skinner as well as the Minister of and Department of Agriculture and Food (who are not proposed defendants). As I stated, the Government as a shareholder was released from liability under the CCAA proceedings. Further, an allegation of vicarious liability does not come within the exception of s. 5.1(2) of the CCAA. As a result of the Amended Plan and Court Sanction Order the plaintiffs have no right to assert a claim of vicarious liability against the Government. The plaintiffs are not entitled to amend this claim as proposed in paragraph 6.1.

(iii) Paragraph 24 of the Proposed Amended Claim

57 Para. 24 as proposed to be amended states:

> 24. Furthermore, Worldwide and Nose, Ernie Donnawell and The Government of Saskatchewan have failed to commence and [sic] action against Okonomi for breach of contract or take any other action to rectify the breach of the Purchase Agreement.

58 This proposed amendment asserts a cause of action for failure to commence an action for breach of contract. As stated, the plaintiffs have no right to assert a claim against the Government, as the claims against the shareholders were compromised by the Amended Plan and Court Sanction Order.

59 This proposed amendment, as it relates to Skinner and Donnawell, does not assert a cause of action that falls within the exceptions set out in s. 5.1(2)(b) of the CCAA. The plaintiffs' right to assert this claim against Donnawell and Skinner have been compromised by the Amended Plan and Court Order. The plaintiffs are not entitled to amend their claim as proposed in paragraph 24.

(iv) Paragraph 26 of the Proposed Amended Claim

60 Paragraph 26 as proposed to be amended states :

> 26. As a director of Worldwide, Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan has not acted honestly and in good faith with a view to the best interests of the corporation.

61 The claim here asserts an action for lack of good faith and honesty to ensure the best interests of WWP. As I have stated, the Government was not a director of WWP. It was a shareholder, through AFEF and ACS. The plaintiffs have no right to assert the claim against the Government, as the claims against the shareholders were compromised by the Amended Plan and Court Sanction Order.

62 The allegation contained in the proposed amendment in paragraph 26 against Amos Skinner and Ernie Donnawell, does not allege any cause of action like misrepresentation by Skinner or Donnawell to Cheng, nor does it allege any wrongful or oppressive conduct by Skinner or Donnawell to Cheng. The plaintiffs, as a result of the Amended Plan and Court Sanction Order have no right to assert this cause of action against Skinner or Donnawell. The plaintiffs are not entitled to amend the claim as proposed in paragraph 26.

(v) Paragraph 27 of the Proposed Amended Claim

63 Paragraph 27 as proposed to be amended states:

> 27. Nose and The Government of Saskatchewan, through its agents, including Amos Skinner and Ernie Donnawell, has breached the fiduciary duties he owed to Worldwide in his capacity of director.

The pleading in paragraph 27 relates, it seems, to the proposed amended paragraph 1 which states:

> 1. This is an action for breach of contract, shareholder oppression, breach of a director's fiduciary duty to his company, and wrongful dismissal.

64 The pleadings allege that the Government is liable, for Skinner and Donnawell's alleged breach of their fiduciary duties to WWP. Again, the Government, as a shareholder, is not subject to the exception set out in s. 5.2(2) of the CCAA. The plaintiffs have no right to assert the claim against the Government.

65 Paragraph 4.12 of the Amended Plan and Court Sanction Order specifically released all parties from any claim for breach of fiduciary duty. The Amended Plan and Court Sanctioned Order extinguished all claims against Skinner and Donnawell, except those precluded from extinguishment under s. 5.1(2)(b) of the CCAA. A claim for breach of fiduciary duty to WWP does not come within the exception set out in s.5.1(2)(b) of the CCAA. The plaintiffs do not have the right to pursue this claim against Skinner and Donnawell. The plaintiffs are not entitled to amend the claim as proposed in paragraph 27 and paragraph 1.

(vi) Paragraph 35 of the Proposed Amended Claim

66 Paragraph 35 as proposed to be amended states:

> 35. The Defendants, including The Government of Saskatchewan, have failed to provide notice to Tom of both director's and shareholder's meetings. Director's meetings have been held without providing notice to Tom and Tom has received no notice of shareholder's meetings, including the annual shareholder's meeting. The Defendants, including The Government of Saskatchewan, have also failed to advise Tom of material changes to Worldwide.

67 Paragraph 35 alleges that the defendants, including the Government, failed to provide Tom Cheng with notice of directors' meetings and failed to advise him of material changes to WWP. The proposed amendment to paragraph 35 asserts these allegations against the Government, which was a shareholder. The restriction on compromise of claims contained in s. 5.1(2)(b) of the CCAA, as I have stated, does not extend to shareholders. The plaintiffs are precluded from bringing those actions against the Government. The plaintiffs may not amend paragraph 35 to add the Government.

68 If the plaintiffs are allowed to amend to add Skinner and Donnawell as defendants, both individuals would be defendants under paragraph 35 (although they were not specifically referred to in paragraph 35). The pleading here, if allowed against Skinner and Donnawell, of failure to give notice of directors and shareholders meetings is one which could, arguably, potentially, be characterized as oppressive conduct by directors. This same allegation is repeated in paragraph 36.

(vii) Paragraphs 36 and 37 of the Proposed Amended Claim

69 Paragraph 36 and 37 as proposed to be amended claim state:

> 36. Nose and Worldwide, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan have acted in an oppressive manner and unfairly disregarded the interests of Tom and Cheng Family Trust by failing to enforce the Purchase Agreement, failing to try to make any profits, failing to pay dividends, failing to provide notice of director's meetings, failing to provide notice of shareholders meetings, and failing to employ Tom.
>
> 37. As a result of the actions, inactions, and breach of fiduciary duty of Nose, Ernie Donnawell, Amos Skinner, and The Government of Saskatchewan, Worldwide and its shareholders, including Tom and Cheng Family Trust, have suffered damages, including monetary loss.

70 As stated earlier, the plaintiffs do not have a right to assert these claims against the Government as a shareholder. The plaintiffs may not add the Government as defendants in paragraphs 36 and 37.

71 The proposed amendments in paragraph 36, and the alleged damages flowing therefrom claimed in paragraph 37, again, as against Skinner and Donnawell could potentially be characterized as a claim which comes under the exception of 5.1(2)(b) of the CCAA, as allegations of oppressive conduct.

72 A more in depth analysis of the claims proposed to be asserted against Skinner and Donnawell contained in paragraphs 35 and 36 is necessary to determine if they do come within the exception (which I will turn to in due course).

(viii) Paragraph 42 of the Proposed Amended Claim

73 Paragraph 42 of the proposed amended claim asserts:

> 42. Tom had a significant interest in and expectation of management of Worldwide. Tom had a reasonable expectation of a fair management package. Nose and The Government of Saskatchewan, and Worldwide have acted in an oppressive manner and unfairly disregarded the interests of Tom by terminating his employment as President and Chief Executive Officer.

74 Again, the plaintiffs have no right to assert this claim against the Government, as shareholder, as a result of the Amended Plan and Court Sanction Order. The plaintiffs are not entitled to amend paragraph 42 to add the Government in paragraph 42.

(d) Proposed Amendments which are Claims which Could Potentially Come within the Exception in S. 5.1(2)(b) of the CCAA

75 In the end, the only proposed amendments which might come within the exception set out in s. 5.1(2)(b) of the CCAA, are contained in the proposed amendments to paragraphs 35,36 and 37 as they relate to Skinner and Donnawell. The balance of the claims, as the plaintiffs propose to amend the claim, have been compromised or extinguished by the Amended Plan and Court Sanction Order and the plaintiffs do not have leave to amend in regard to those claims.

76 As stated, a more in depth analysis of the proposed amendments to paragraphs 35, 36 and 37 needs to be undertaken to determine if the proposed amended pleadings are claims for wrongful or oppressive conduct by directors. I repeat the proposed amendments here for ease of reference.

> 35. The Defendants have failed to provide notice to Tom of both director's and shareholder's meetings. Director's meetings have been held without providing notice to Tom and Tom has received no notice of shareholder's meetings. The Defendants have also failed to advise Tom of material changes to Worldwide.
> 36. Nose and Worldwide, Ernie Donnawell and Amos Skinner have acted in an oppressive manner and unfairly disregarded the interests of Tom and Cheng Family Trust by failing to enforce the Purchase Agreement, failing to try to make any profits, failing to pay dividends, failing to provide notice of director's meetings, failing to provide notice of shareholders meetings, and failing to employ Tom.
> 37. As a result a result of the actions, inactions, and breach of fiduciary duty of Nose, Ernie Donnawell, Amos Skinner and Worldwide and its shareholders, including Tom and Cheng Family Trust, have suffered damages, including monetary loss.

77 Justice Gabrielson reviewed the law relating to oppressive conduct under s. 234 of *The Business Corporations Act*, R.S.S. 1978, c.B-10, as am. in *Smith v. Dawgs Canada Distribution Ltd.*, 2008 SKQB 219, [2008] 11 W.W.R. 342, commencing at para. 18 and said the following:

18 In the case of *Wind Ridge Farms Ltd. v. Quadra Group Investments Ltd.*, [1999] 12 W.W.R. 203, 180 Sask. R. 231 (Sask. C.A.), the Saskatchewan Court of Appeal listed a number of points to be considered when relief is requested against oppression pursuant to s. 234 of BCA. At para. 30, Vancise J.A. stated:

> 30 The primary issue on this appeal is a narrow one -- did the chambers judge, [1998] S.J. No. 876, err in finding that the conduct of the respondents was not oppressive or unfairly prejudicial or unfairly disregarded the interests of the appellants pursuant to s. 234 of the *Act*? The approach to be taken in an application under s. 234 of the *Act* was described by this court in *347883 Albert Ltd. v. Producers Pipeline Inc.* [(1991), 92 Sask. R. 81 (C.A.)]. Section 234 of the *Act* was interpreted by this court in *Eiserman v. Ara Farms Ltd. and Eiserman* [(1989), 67 Sask. R. 1 C.A.)]. Sherstobitoff, J.A., speaking for the court set out the legislative history and jurisprudential development of the remedies available under s. 234 of the *Act*. A number of points emerge from his analysis:
>
> ...
>
> 2. Oppressive conduct is at the lowest a visible departure from the standard of fair dealing and a violation of the conditions of fair play on which shareholders who entrust their money to a company are entitled to rely. See: *Elder v. Elderand Watson Ltd.*, [[1952] S.C. 49 (Scot. Sess. Ct.)]. Oppressive conduct has also been described as a lack of probity and fair dealings in the affairs of the company to the prejudice of some portion of its members. See: *Scottish Cooperative Wholesale Society Ltd. v. Mayer* [[1958] 3 All E.R. 66];
> 3. The terms "unfair" and "prejudice" are defined as conduct that is unjust and inequitable and unfairly prejudicial. See: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Miller and Miller v. Mendel (F.) Holdings Ltd. and Mitchell* [(1984), 30 Sask. R. 298 (Q.B.)];
> 4. Section 234 is remedial legislation for the relief of minority shareholders and is to be given a broad interpretation;
> 5. Relief may be given upon proof of unfair prejudice to, or disregard of a shareholder's interests. See: *Mason v. Intercity Properties Ltd.* [(1987), 22 O.A.C. 161 (C.A.)];
> 6. The section should be interpreted broadly to carry out its purpose. See: *Re Ferguson and Imax Systems Corp.*[(1983), 150 D.L.R. (3d) 718 (Ont. C.A.)];
> 7. Each case will be decided on its own facts: what is oppressive or unfairly prejudicial in one case may not necessarily be so in a different set of circumstances.

78 It can be noted from the *Smith v. Dawgs, supra* case that there is a contextual aspect to the allegation of oppressive conduct. The jurisprudence has stated, that what is oppressive in one situation may not be oppressive in another situation. Here, the claim in paras. 35, 36 and 37 were origi-

nally asserted against WWP and Kenji Nose. The plaintiffs now seek to add Skinner and Donnawell as defendants, but do not seek to amend paras. 35, 36 or 37 to add any particulars which are asserted against Skinner or Donnawell. The pleadings as presently proposed make only general and inexact allegations against all defendants and proposed defendants.

79 The pleadings are insufficient to determine whether they disclose material facts which would give rise to such a cause of action against Skinner or Donnawell under the s. 5.1(2)(b) exception. The pleadings just make broad accusations. The pleadings do not indicate when it is alleged that each or either of the proposed defendants acted in the alleged wrongful or oppressive manner. The pleadings do not indicate with sufficient particularity the material facts alleged which amount to wrongful or oppressive conduct. The pleadings do not indicate with sufficient particularity what liability, loss or prejudice it is alleged that flows from the alleged conduct of each director to Cheng.

80 I am unable to determine that the proposed amendments come within the s. 5.1(2)(b) exception of the CCAA as the pleadings are insufficient to make such a determination. They fail to provide sufficient particulars for me to conclude that the claims are claims that do come within the s. 5.1(2)(b) exception of the CCAA.

81 While it was my initial inclination to dismiss the plaintiffs' application to add Skinner and Donnawell, as I could not be satisfied that the claims against them come within the exception in s. 5.1(2)(b) of the CAA, upon reflection, I am of the view that the plaintiffs should be given an opportunity to more particularly plead the causes of action as they relate to paragraphs 35 and 36. It is possible that the insufficiency here relates to the drafting inadequacy in the pleadings, and not the substance of the claim. As such, I am of the view it would be appropriate to allow the plaintiffs to provide whatever particulars they choose in relation to paragraphs 35 and 36 before I determine whether or not the proposed causes of action come within the exception set out in s. 5.1(2)(b) of the CCAA.

(e) Conclusion

82 The plaintiffs' application to amend the statement of claim and to add Ernie Donnawell, Amos Skinner and the Government is dismissed, except in relation to the claims asserted in paras. 35 and 36 of the statement of claim.

83 In relation to the claims asserted in paras. 35 and 36 of the statement of claim and the loss allegedly flowing therefrom asserted in para. 37, the plaintiffs are not allowed to amend the pleadings or to add Amos Skinner or Ernie Donnawell in the form of the amendments as proposed.

84 However, the plaintiffs have leave to file a motion to amend and to add Skinner and Donnawell in relation to the claims asserted in paras. 35 and 36 within 60 days of the date of this judgment. The plaintiffs must attach and file the draft proposed amended pleadings which more particularly set out the proposed causes of action as they relate to Skinner and Donnawell and paras. 35 and 36 at the time of the filing of the motion.

85 In the event that the plaintiffs do not bring such a motion with the draft proposed amended pleading attached within 60 days of this judgment, the plaintiffs' application to amend the claim and to Add Skinner and Donnawell is dismissed.

2. If the plaintiffs' proposed claims were not extinguished by the

CCAA Amended Plan and Court Sanction Order, should the plaintiffs be allowed to amend their statement of claim as proposed?

86 As I have indicated earlier, the pleadings as they relate to the proposed defendants Skinner and Donnawell are inadequate to determine whether there is a claim which falls within the exception set out in s. 5.2(1)(b) of the CCAA. Further, the pleadings in paras. 35, 36 and 37 are inadequate for me to determine whether or not the proposed amendments should be allowed under Rule 38 and 165 of *The Queen's Bench Rules of Court*. As I have allowed the plaintiffs to come back within 60 days, if they choose to, with more particularized pleadings, the issue of whether or not the plaintiffs should be allowed to amend their pleadings having regard to Rule 38 and Rule 165 will be determined at that stage.

87 If the plaintiffs choose not to bring a further motion to amend the pleadings within the 60 days, the plaintiffs application will be dismissed. If the plaintiffs choose to bring a motion back before me within the 60 days, with further amendments to paragraph 35, 36 and 37, I will consider their application to amend and add defendants as it relates to Rule 38 and Rule 165 and the jurisprudence at that time.

3. Should the requested disclosure be ordered against the Government?

88 The plaintiffs seek an order pursuant to Rule 236 that the Government produce those documents in its possession that relate to WWP and the directors of WWP that the Government appointed.

89 There is nothing in the notice of motion which sets out the grounds for such relief. More importantly, there is no evidence contained in the affidavit filed in support of the application to set out the basis for the order. There is no evidence which would indicate why the documents are required, what attempts have been made to obtain them from the present parties to the litigation, and no indication whether examinations for discovery have yet occurred.

90 As no evidentiary basis has been made to order the relief requested, and as it appears to be premature having regard to the fact that neither Ernie Donnawell or Amos Skinner has yet been added as defendants, the application is dismissed at this time.

4. Should the plaintiffs be granted leave to examine the Government's officer currently in charge at AFEF?

91 The plaintiffs seek an order, pursuant to Rule 222A of *The Queen's Bench Rules of Court* for leave to examine that officer of the Government that is currently in charge of AFEF. Nothing in the affidavit filed in support of this application indicates the basis upon which the plaintiffs might be entitled to an order under Rule 222A. The Cheng affidavit states at paragraph 19 that the parties are currently at the discovery of documents stage. There is no evidence to suggest that examinations for

discovery of any of the defendants have yet occurred. Rule 222A states that an order should not be made under this Rule unless the court is satisfied that the applicant is unable to obtain the information from other persons. In *D.K. v. Miazga* 2002 SKQB 521; [2002] S.J. No. 775 (Sask. Q.B.), this Court held that where there has been no attempt to obtain information directly from a non-party, and where examinations of a party would perhaps make it possible to obtain the information, the conditions precedent for this rule have not been met and the court should not order the examination of a non-party. It is my view that the relief requested by the plaintiffs here is premature, and I decline to make the order at this time.

COSTS

92 The defendant shall have taxable costs of the application, which costs shall be paid in any event of the cause and are payable forthwith.

C.L. DAWSON J.

cp/e/qlcct/qlpwb/qlprp/qlaxw/qlced/qlcas

Tab 8

Case Name:

Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
Between
Skeena Cellulose Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corp., respondents (petitioners), and
Clear Creek Contracting Ltd. and Jasak Logging Ltd., appellants (applicants), and
The Truck Loggers' Association, intervenor

[2003] B.C.J. No. 1335

2003 BCCA 344

184 B.C.A.C. 54

13 B.C.L.R. (4th) 236

43 C.B.R. (4th) 187

123 A.C.W.S. (3d) 73

2003 CarswellBC 1399

Vancouver Registry No. CA030149

British Columbia Court of Appeal
Vancouver, British Columbia

Newbury, Hall and Levine JJ.A.

Heard: April 28 - 29, 2003.
Judgment: June 9, 2003.

(67 paras.)

Counsel:

J.S. Forstrom, for the appellants.
M.I. Buttery and S.A. Dubo, for the respondents.
M. MacLean and J.I. McLean, for the intervenor, Truck Loggers' Association.

The judgment of the Court was delivered by

1 **NEWBURY J.A.**:-- This appeal turns on the interaction of two statutory regimes - the scheme of "replaceable" or "evergreen" logging contracts established by the Province under the Forest Act, R.S.B.C. 1996, c. 157, and the scheme of judicial stays and creditors' compromises available under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended (the "CCAA"), to insolvent corporations whose indebtedness exceeds $5,000,000.

2 Both schemes are said to involve considerations of fairness and equity. In the case of the Forest Act, a detailed series of "contractual" terms is required to be incorporated in agreements between the holders of harvesting licences granted by the Crown, and the contractors they in turn retain to carry out the logging. Most aspects of the relationship are either provided for in the mandatory terms or must be resolved by arbitration, the principles and procedures of which are also regulated by the Act. Most importantly, a licence holder must agree that when such an agreement expires, it will be renewed (or in the statutory terminology, "replaced") on terms substantially the same as those of the expired contract, assuming the contractor has performed its obligations thereunder. In this way, the legislation seeks to provide contractors with a degree of "security" analogous to the security of tenure implicit in a Crown harvesting licence, and to achieve greater fairness between the licence holder and its contractors.

3 In the case of the CCAA, the fairness analysis required to be carried out by the court generally refers to fairness as between classes of creditors. That analysis is tempered by the starker realities of whether the proposal before the court offers a chance of survival to the debtor corporation and whether it will be acceptable to the requisite majority of creditors. Unlike the detailed provisions of the Forest Act and regulations thereto, the CCAA is a brief set of "broad-brush" provisions that leave wide avenues of discretion to be exercised by courts in circumstances that may not permit the fine weighing of individual interests. As observed in Re Keddy Motor Inns Ltd. (1992) 13 C.B.R. (3d) 245 (N.S.S.C., App. Div.) at 258, the legislation contemplates "rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat but on the best terms they can get."

4 The substantive question raised by this appeal is to what extent considerations of fairness between individual logging contractors who have replaceable contracts with a corporation in CCAA proceedings, should figure in the "rough-and-tumble" considerations applicable to a large corporate insolvency. Looked at another way, does the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?

FACTUAL BACKGROUND

5 The insolvent corporation in this case is Skeena Cellulose Inc. ("Skeena"). At all material times, it owned and operated a pulp mill and three sawmills, and held related forest tenures, mainly in north-western British Columbia. It was a large employer in that region and was one of the major manufacturers of bleached softwood kraft pulp in North America.

6 Skeena has experienced financial difficulties for many years. It underwent a financial restructuring under the CCAA in 1997. Although many of the positive results hoped for from that arrangement improved Skeena's long-term prospects, it appears that various other factors prevented full recovery. In August 2001, the Toronto-Dominion Bank demanded payment of more than $350,000,000 from Skeena and its subsidiaries, froze their operating lines and began to refuse to honour their cheques, including payroll cheques. Other creditors followed suit, and on September 5, 2001, Skeena and its subsidiaries petitioned the Supreme Court of British Columbia for a stay of proceedings under the CCAA.

7 The petition alleged, and it is not disputed, that Skeena owed over $409,000,000 (exclusive of interest) mainly to the Toronto-Dominion Bank and to corporations owned by the Province, which also held over 70 percent of its common shares. This debt was represented by bonds issued under a trust deed secured by charges on all of Skeena's assets, present and future. The petition stated that Skeena and its subsidiaries were insolvent and described the impact their bankruptcy could have on the provincial economy:

> 50. If the Petitioners were to totally cease operations or go into liquidation, the direct loss of jobs in British Columbia would be enormous, including the approximately 1,050 existing Skeena employees and, at least 1,000 employees of logging contractors, road building and silviculture contractors. It would also directly and indirectly impact service industries and business which rely on Skeena for a source of revenue. By the Petitioners' estimate, as many as 7,000 additional jobs in British Columbia would be affected.
> 51. A liquidation of the Petitioners would be particularly devastating to the communities of Terrace, South Hazelton, and Prince Rupert. Skeena is the largest employer in those communities, and many hundreds of families depend on Skeena for their livelihoods in those communities.
> 52. The loss of this number of jobs would also, of course, have a generally damaging effect on the British Columbia economy, given the spillover effect of lost wages and lost purchases.
> 53. Skeena is currently in good standing under its collective agreements and other employment relationships. However, if some or all of the employees would be terminated, severance claims, including payments for group termination under the Employment Standards Act, could be significant.

8 Chief Justice Brenner, who I understand heard most if not all the applications in this matter in Supreme Court, granted an initial order ex parte on September 5, 2001, staying proceedings against Skeena and its subsidiaries for 30 days and appointing Arthur Andersen Inc. as Monitor. On October 5, he granted a "Come-back Order" which extended the stay and contemplated that the petitioners would file a formal plan of compromise or arrangement (entitled the "Reorganization Plan") with their creditors on or before November 5; that they would file a formal plan of arrangement (entitled the "Plan of Arrangement") with their shareholders under the Canada Business Corporations

Act, R.S.C. 1985, c. C-44; and that meetings of their creditors would be called to vote on the Reorganization Plan. Under the heading "Post-Filing Operations", the Order stated:

> 11. The Petitioners shall remain in possession of the Assets and shall continue to carry on business in the ordinary course provided that they shall have the right with the approval of the Monitor, or this Court, to proceed with an orderly disposition of such of the Assets as they deem appropriate, either with the consent of any creditor holding security against such Assets or pursuant to an Order of this Court, in order to facilitate the downsizing and consolidation of their business and operations (the "Downsizing").
> 12. To facilitate the Downsizing, the Petitioners may:
>
> (a) terminate the employment of such of the Petitioners' employees or temporarily lay off such of the Petitioners' employees as they deem appropriate;
> (b) terminate such of the Petitioners' supplier or service arrangements or agreements as they deem appropriate;
> (c) abandon such leases, tenures, contracts, rights, authorizations, franchises, dealerships, permits, approvals, uses or consents as are deemed to be unnecessary for the Petitioners' business; . . .
>
> all without interference of any kind from third parties, including landlords and notwithstanding the provisions of any lease, other instrument or law affecting or limiting the rights of the Petitioners to remove or divest Assets from leased premises, and that any liabilities of the Petitioners arising as a result thereof shall be claims provable in these proceedings in the same manner as all creditor claims existing as at the Filing Date and provided that:
>
> (f) the Monitor shall have submitted to the Court a report of any proposed termination of any Forest Act Replacement Contract under the foregoing sub-paragraph (b) at least 21 days before such plan is implemented;
> (g) the implementation of any of the plans and procedures contemplated by the foregoing sub-paragraphs (a)-(d) including any termination or partial termination of any contract, shall be without prejudice to the claims of any counter party to such contract to file a proof of claim in such manner as may be provided for in the Reorganization Plan;
> (h) the Petitioners shall provide 3 days' written notice of any termination of any executory agreements under the foregoing sub-paragraphs (b) or (c); and
> (i) the counter party or parties to any agreements proposed by the Petitioners to be terminated in accordance with the foregoing, including the counter party or parties to any Forest Act Replacement Contracts, may during the applicable 3 day notice period, in the case of executory contracts, or within 21 days of the filing of the Monitor's

> report, in the case of the Forest Act Replacement Contracts, apply to the Court in this proceeding to show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate. [Emphasis added.]

9 The deadline for the filing of the Reorganization Plan was extended by the Court on several occasions while solutions to Skeena's difficulties were sought and potential purchasers were pursued. Finally, on February 28, 2002, a Plan was filed which proposed that an outside buyer, NWBC Timber & Pulp Ltd. ("NWBC"), would acquire the interests of the secured lenders for $8,000,000. Of this, $2,000,000 would be paid to the Monitor for distribution to the unsecured creditors, so that the secured creditors would receive $6,000,000 on debt in excess of $400,000,000. The claims of governmental bodies for property taxes would be compromised, and the holders of existing common shares would surrender them for no consideration. Skeena would then issue new common shares to NWBC. The Plan was of course subject to many conditions, including approval by the specified classes of creditors and shareholders and the passing of applicable appeal periods in respect of the Court's order. After some amendments, the Plan was approved by the Court on April 4, 2002. Once the conditions contained in the Order were met, NWBC completed its purchase of the shares and secured debt of Skeena in early May.

The Appellants' Logging Contracts

10 The appellants or their predecessors had been performing logging services under contract with Skeena or its predecessors since the 1960s. In 1991, their contracts became "replaceable logging contracts" under new provisions of the Forest Act. At the time Skeena's financial difficulties became manifest in 2001, the corporation had five such contracts. All five were due to expire on December 31, 2001, and Skeena was required to offer replacement contracts to the contractors thereunder no later than September 30 of that year.

11 Skeena did not offer replacement contracts to the appellants, but did renew those of its three other logging contractors. Mr. Veniez, the president and chief executive officer of NWBC and Skeena following the Reorganization, explained this decision by reference, at least in part, to the fact that whereas the Forest Act scheme requires a licence holder to cut at least 50 percent of its allowable annual cut ("AAC") through replaceable contracts, Skeena had entered into such contracts for approximately 65 percent of its AAC. Moreover, the change in control of Skeena contemplated by the Reorganization would result in a five percent reduction of its AAC, absent a ruling to the contrary by the Ministry of Forests. Mr. Veniez deposed in these proceedings that:

> 17. As part of its efforts to ensure the economic viability of Skeena, NWBC determined, in consultation with Skeena management at the time, that it would be desirable to reduce the amount of timber required to be harvested under replaceable contracts to the current statutory minimum of 50% of Skeena's AAC.
> 18. Because NWBC's acquisition of Skeena represents a change of control, I knew that Skeena's Terrace Woodlands' AAC would be reduced by 5% to approximately 878,000 m3. Therefore, in consultation with Skeena management, I determined that it would be appropriate to reduce the volume of

timber allocated to evergreen contractors to 439,000 m3, representing a reduction of approximately 160,000 m3.

19. I was advised by Skeena management that, until the terminations of Clear Creek and Jasak, Skeena's five evergreen contractors held the following volumes:

Contractors	Volume
Don Hull & Sons	166,239 m3
K'Shian Logging	166,239 m3
Main Logging	99,828 m3
Clear Creek	83,331 m3
Jasak	83,331 m3

20. In consultation with Skeena management and the Province, NWBC determined that it would be appropriate to terminate the Clear Creek and Jasak contracts, representing a reduction of "evergreen" volume of approximately 166,662 m3.

21. I recognize that by terminating these two contracts, Skeena will be slightly below the 50% allowable minimum under the Contract Regulation, but it is Skeena's intention to re-tender the approximately 6,000 m[3] difference in the form of new evergreen contract. The approximately 160,000 m3 balance will be tendered on the open market (as opposed to have to negotiate rates with its existing evergreen contractors). I expect that this tendering process will result in substantial savings to Skeena and significantly reduce its delivered wood costs for this 160,000 m3. (If the cost differential is $3.90/m3, the savings could be as much as $624,000 per year).

22. Moreover, a tendering process for this volume of wood will help to establish more accurate fair market values for both evergreen and non-evergreen contracts (in this regard, I am advised by Mr. Curtis that historically it has been difficult to establish these values in light of the predominance of evergreen contracts).

23. In deciding to terminate certain of Skeena's evergreen contracts, I reasoned that this would better allow Skeena to reorganise the size (volume) and equipment configurations for its different contracts. (Skeena does have the right to insist that its current evergreen contractors log by whatever methods Skeena stipulates, but historically it has been more cost-efficient for Skeena to introduce new logging methods via an open tendering process than by introducing changes to existing replaceable contracts).

24. Finally, I was advised by Skeena management that Clear Creek and Jasak had, historically, been more expensive than the three other evergreen contractors listed above. That is, through a combination of the rates charged by those two contractors, and their relative efficiency, the cost to Skeena of

logs produced by Clear Creek and Jasak was greater than for the other three evergreen contractors above.

25. With the foregoing considerations in mind, I, on behalf of NWBC, advised Skeena's management at the time that NWBC would require, as a condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts.

26. By asking Skeena to terminate those contracts, NWBC was in no way motivated to frustrate the objectives of the Forest Act. On the contrary, for the reasons set out above, NWBC perceives these terminations to be an important aspect of what I hope and fully expect will be a successful reorganization of Skeena. [Emphasis added.]

12 On or about March 1, 2002, each of the appellants received a letter from Skeena purporting to terminate its replaceable contract, effective immediately. Neither the Court nor the appellants had received prior notification from Skeena or the Monitor - even though under the terms of the Come-back Order, the Monitor was required to submit to the Court "a report of any proposed termination of any Forest Act Replacement Contract . . . at least 21 days before such plan is implemented" and even though within 21 days of the filing of the Monitor's report, the parties to such contracts were to be entitled to apply to the Court to "show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate." Two weeks later, in its Eleventh Report to the Court, the Monitor referred to the terminations as faits accomplis:

> We have been advised that the petitioner has terminated replaceable logging contracts with Jasak Logging Ltd. and Clear Creek Contracting Ltd. in accordance with the Order. Copies of the letters of termination to each of the contractors dated March 4, 2002 and March 1, 2002, respectively are attached.
>
> These replaceable logging contracts have been terminated in accordance with the terms of the Purchase Agreement between NWBC Timber & Pulp Ltd., 552513 British Columbia Ltd. and Skeena Cellulose Inc. dated February 20, 2002.

13 It is not clear to me what "plan" was being referred to in subpara. 12(f) of the Come-back Order quoted above, nor whether it was necessary to "terminate" contracts that had not been renewed. On appeal, however, Skeena acknowledged that the Monitor's report had been filed two weeks after the termination letters were issued and that the "creditors' meeting to vote on the Plan took place before the 21-day time period referred to in the Come-back Order had expired." Thus counsel did not take issue with the Chief Justice's conclusion that Skeena had not complied strictly with the Come-back Order.

14 Upon receiving the letters of termination, the appellants' solicitors wrote to the Monitor's solicitors objecting that that the Come-back Order had not been complied with. They explained:

> Our clients are in a position where they cannot file proofs of claim on March 25 as their contracts are not terminated yet and they do not know if the contracts will be terminated and, if there is a termination, what class of creditor they will be. Due to the failure to deal with this matter in a timely fashion, it appears that the

> parties have no choice but to postpone the deadline for filing claims to the middle of April with a vote of creditors to take place in early May.

The appellants asked the Monitor for information as to how the termination would result in lower costs to Skeena and requested a copy of the contract of purchase between Skeena and NWBC. The Monitor declined to provide a copy of this agreement on the basis that it was confidential. The agreement was never adduced into evidence.

15 In further correspondence, Skeena characterized its earlier letters to the appellants as having "served to clarify that the previously expired contract with Jasak and Clear Creek would not be reinstated." (My emphasis.) Again, however, since that characterization of the letters was not pursued by counsel in this court or the court below, I will proceed on the footing that the contracts were terminated, as opposed to not having been renewed. (In law, the distinction in this case may be insignificant.) The appellants were told that if they wished to vote on Skeena's Reorganization Plan, they would have to file proofs of claim by March 22. At the same time, Skeena told the appellants it was prepared to discuss future arrangements with them "for the continuation of their services to Skeena."

16 By March 22, the appellants did file conditional proofs of claim in the CCAA proceeding, claiming indebtedness in the amount of $2,925,315.14 in the case of Jasak Logging Ltd., and $2,896,680 in the case of Clear Creek Contracting Ltd. (Mr. Forstrom advised us that these amounts represented the present value of the income stream which the appellants stood to earn under their contracts over the next 50 years or so. I understand that apart from these 'future' losses, nothing was owing by Skeena to the appellants under their expired contracts.) The Monitor disallowed a portion of each claim and instead allowed a claim of $172,430.47 to Jasak and $166,670 to Clear Creek. The appellants notified the Monitor that they disagreed with its position.

17 On March 28, Jasak and Clear Creek filed a motion in Supreme Court seeking an order restraining Skeena from terminating their contracts and declaring them "in full force and effect and are binding upon the parties thereto". Alternatively, they sought the summary determination of the value of their respective claims as creditors in Skeena's plan of arrangement. However, before the motion could be heard, the meeting of Skeena's creditors took place and the Reorganization Plan was approved by the requisite numbers of each class. The appellants did not attend or vote at the meeting. On April 4, 2002 Skeena applied for and obtained court approval of the Plan. As earlier mentioned, NWBC closed its purchase of the shares of Skeena in accordance with the Reorganization Plan in early May. We are told that it has not yet resumed its logging operations.

18 The appellants' motion to have the termination of their contracts declared invalid was heard in Chambers on June 17 and was dismissed by the Chief Justice on September 4, 2002. His reasons are now reported at (2002) 5 B.C.L.R. (4th) 193.

19 After reciting the facts before him, the Chief Justice briefly summarized the purpose of the replaceable contract scheme and the nature of replaceable contracts. He noted that in Skeena's CCAA proceeding in 1997, Thackray J. (as he then was) had determined that the Court had the authority under the CCAA to allow Skeena to terminate replaceable logging contracts notwithstanding their unusual 'statutory' aspects. (See In the Matter of the Companies' Creditors Arrangement Act and In the Matter of Repap British Columbia Inc. et al., B.C.S.C., Vancouver Registry A970588, dated June 11, 1997.) Thackray J. had observed:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of the Provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the Forest Act. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts. There is no doubt that the parties are governed by the regulation and that the regulations forming part of the contract will govern many events by parties to the contracts. However the issue here is whether or not the contract is subject to the particular order that I gave under the Companies' Creditors Arrangement Act. I am of the opinion that it is subject to the order which I gave and that this Court had the jurisdiction to give that order. [para. 7]

20 The Chief Justice then turned to the questions of whether on this occasion, Skeena had complied with the "procedures and conditions" stipulated in the Come-back Order and whether the termination conformed to the "broader principles of economic necessity and fairness" underlying the Court's discretionary authority under the CCAA. In connection with the first question, he noted that the Come-back Order had authorized the termination of arrangements and agreements by Skeena only for the purpose of facilitating the "downsizing and consolidation of their business and operations (the 'Downsizing')". He noted the appellants' submission that although Skeena claimed to be "downsizing" its operations, it had maintained its timber harvesting rights and was planning to continue to harvest timber from them, presumably to the extent it always had in the past. On the other hand, there was the fact that the change in control of Skeena would result in a five percent reduction of Skeena's AAC, which Skeena proposed to reflect in a reduction in volume of timber allocated to "evergreen" contractors by approximately 160,000 cubic metres. The Chief Justice concluded that this reduction qualified as "Downsizing" for purposes of the Come-back Order. This conclusion was not specifically challenged on appeal.

21 In response to the appellants' objection that Skeena had terminated their contracts without first filing a report of the Monitor, the Chief Justice agreed that the letters of termination had been "issued untimely". He concluded, however, that since the appellants had had "clear and unequivocal notice", prior to the creditors' meeting, of Skeena's intention to terminate their contracts and to treat their claims as compromised under the Plan, they had not been prejudiced by the lack of strict compliance. (para. 41.)

22 The remaining question framed by the Chief Justice was whether Skeena's termination of two of its five replaceable logging contracts constituted an "inappropriate differentiation of treatment between the applicants and other [Skeena] creditors." (para. 42.) He noted that one of the unfortunate results of insolvency restructurings is that some persons suffer hardship. In this case, Skeena had had to terminate the employment of many individuals, its unsecured and secured creditors stood to recoup only a small fraction of their claims, and the Court had already dismissed an application brought by the Pulp, Paper and Research Institute of Canada similar to that brought by the appellants. The Court noted the comments of LoVecchio J. in Re Blue Range Resource Corp. [1999] A.J. No. 788 (Alta Q.B.), to the effect that an order authorizing the termination of a contract is appropriate in a restructuring since, like others dealing with the insolvent corporation, the contracting party will have its claim for damages. But that claim should not be elevated above those of other contracting parties; as LoVecchio J. had stated:

> A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route. [paras. 37-8]

23 Similarly in this case, the Chief Justice concluded that the applicants before him were "seeking to be put in a position superior to [Skeena's] other creditors." (para. 50.) In the result, since Thackray J. had already ruled that replaceable contracts could be terminated as part of a CCAA reorganization, and the appellants had had "full knowledge prior to the creditors' meetings that they would have claims under the Plan if their contracts were to be terminated", the Chief Justice saw no reason why the appellants should "in effect, be placed in a better position than other creditors." (para. 53.)

24 On appeal, the appellants challenged both the Court's ruling on the question of notice and its substantive ruling that the Come-back Order validly permitted Skeena to terminate the appellants' "evergreen" contracts. Since Mr. Forstrom, counsel for the appellants, focussed on the second argument in his oral submissions in this court - and rightly so in my view - I will deal with it first. It is linked to the argument made by the intervenor, the Truck Loggers' Association, which challenges the court's constitutional and statutory jurisdiction to "permit" Skeena to terminate any replaceable logging contracts, contrary to what Mr. Maclean says is the intention of the Forest Act. Mr. Maclean submits that this legislation must prevail over what he characterized as the exercise of the court's "inherent jurisdiction" under the CCAA when the court approves an arrangement which includes the termination of a lease or other contract.

25 It may be useful at this point to review in greater depth the unusual scheme of replaceable contracts imposed by the Forest Act, and then to review the CCAA and the "inherent" or 'supervisory' jurisdiction exercised by the courts thereunder.

The Forest Act Scheme

26 The Province first introduced a regime of statutorily-mandated logging contracts in 1991. The initial legislation was revised somewhat in 1996 when the present Regulation 22/96 to the Forest Act was enacted. Speaking in the Legislative Assembly in June 1991, the then Minister of Forests

stated that the purposes of the legislation were to "address logging-contractor security in British Columbia", to "improve the balance in . . . contractual relationships" between holders of timber rights and logging contractors, and to provide a quick and inexpensive system for resolving disputes between them. The Minister drew an analogy between the desire of long-term licence holders for security of tenure from the Crown, and the needs of logging contractors and subcontractors, who also make large capital investments in logging equipment, for similar security vis-à-vis the licence holders. Accordingly, the Forest Amendment Act, 1991, c. 11, permitted the imposition of a series of requirements on the holders of certain classes of timber licences with respect to logging contracts already in existence, and logging contracts entered into thereafter.

27 Most of the provisions relevant to this appeal are contained in Regulation 22/96. Part 2, headed "Written Contracts and Subcontracts Required", states that persons entering into a timber harvesting contract or subcontract must do so in writing. If the terms of a contract do not comply with the Regulation, the parties are required to make reasonable efforts to cause the contract to do so. Every "replaceable contract" (defined in s. 152 of the Act) must provide that the contractor's interest thereunder is assignable, subject to the consent of the licence holder, which consent may not be unreasonably withheld. As well, every contract must provide that all disputes between the parties in connection with the contract "will be referred to mediation and, if not resolved by the parties through mediation, will be referred to arbitration." (The Regulation leaves unsaid the apparent intention that neither party will have recourse to courts of law to resolve such disputes.) The Commercial Arbitration Act, R.S.B.C. 1996, c. 55, applies to such arbitrations, but there are also detailed rules in Regulation 22/96 for the mediation and arbitration proceedings and for the keeping of a publicly available "Register of Timber Harvesting Contract and Subcontract Arbitration Awards" by the Ministry of Forests.

28 Part 5 of the Regulation is headed "Replaceability of Contracts and Subcontracts". It requires that the holders of Crown licences carry out specified proportions of their timber harvesting operations by means of replaceable contracts. Different requirements apply to different classes of licence and to operations in the Coastal and Interior regions respectively. As I noted earlier, since Skeena operates in the Coastal region, it is required to harvest at least 50 percent of its timber by means of replaceable contracts.

29 Sections 13-15 of the Regulation deal with the commencement and expiration of replaceable contracts in the following terms:

13 (1) A replaceable contract must provide that

(a) if the contractor has satisfactorily performed its obligations under the contract, and conditional on the contractor continuing to satisfactorily perform the existing contract, the licence holder must offer a replacement contract to the contractor, and

(b) the replacement contract must

(i) be offered 3 months or more before the expiry of the contract being replaced,

(ii) provide that it commences on or before the expiry of the contract being replaced,
(iii) provide for payment to the contractor of amounts in respect of timber harvesting services as agreed to by the parties or, failing agreement, as determined under section 25, and
(iv) otherwise be on substantially the same terms and conditions as the contract it replaces.

(2) If a replaceable contract does not provide for an expiry date, the contract expires on the second anniversary of the date on which the contract commenced.

14 (1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may require, for bona fide business and operational reasons, that the contractor

(a) use different timber harvesting methods, technology or silvicultural systems,
(b) move into a new operating area, or
(c) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government.

(2) A replaceable contract must provide that if a requirement made pursuant to subsection (1) results in a substantial change in the timber harvesting services provided by the contractor, the contractor may, within 60 days of receiving notice under subsection (1), elect by notice in writing to the licence holder to terminate the replaceable contract without incurring any liability to the licence holder.
(3) A replaceable contract must provide that, if a requirement is made pursuant to subsection (1) and the contractor does not elect to terminate the replaceable contract as provided for in subsection (2), either party may, within 90 days of the contractor receiving notice under subsection (1), request a review of the rate then in effect.
(4) If, after any changes in timber harvesting services required by the licence holder under subsection (1), the parties are unable to agree upon the rate to be paid for timber harvesting services, a rate dispute is deemed to exist.

15 A replaceable contract must provide that the contract terminates, to the extent that it relates to the licence, upon the cancellation, expiry or surrender

> of a licence under which the timber harvesting services provided by the contractor are carried out. [Emphasis added.]

30 The Regulation stipulates that if a dispute arises regarding the amount of work to be specified in a replaceable contract, the matter may be referred to arbitration under s. 24. The same is true of any dispute regarding the rates chargeable by the contractor for its work. The arbitrator must determine a rate that is reasonable and competitive by industry standards and which "would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit."

31 Division 5 of the Regulation deals with reductions in work under a replaceable contract due to a reduction in AAC. If the Crown reduces the AAC under a harvesting licence, the holder "must apportion the effect of the reduction in AAC . . . proportionately among (i) all contractors holding replaceable contracts, and (ii) any company operations in respect of the licence." (s. 28(2)(d).) Alternatively, the holder may make a proposal either to reduce the AAC covered by one or more of its replaceable contracts or to terminate one or more such contracts. If the proposal is objected to by one or more of the affected contractors, a "dispute is deemed to exist" between the licence holder and the contractor(s). If not settled by mediation, this dispute must also be arbitrated in accordance with s. 32, which states in part:

> (g) an arbitrator must resolve the dispute in the manner that the arbitrator believes most fairly takes into account <u>each of the AAC reduction criteria</u>; [and]
>
> (h) for greater certainty, in making a decision with respect to the dispute
>
> > (i) an arbitrator is not restricted to choosing between any of the various AAC reduction proposals made by the parties to the arbitration, and
> >
> > (ii) <u>an arbitrator may make an award that includes the termination of one or more of the replaceable contracts</u>, or reduces the amount of work available to any contractor or company operation in a manner that is not proportionate to the reduction in AAC. [Emphasis added.]

The Regulation defines the term "AAC reduction criteria" to mean each of the following factors:

> (a) the amount of work specified in each replaceable contract to which the proposal relates;
>
> (b) the relative seniority of each contractor with a replaceable contract;
>
> (c) the economic impact of the proposal on the timber harvesting operations carried out under that licence by each contractor with a replaceable contract;
>
> (d) the impact of the proposal on employment;
>
> (e) the economic impact of the proposal on the licence holder; [and]
>
> (f) the impact of the proposal on community stability; . . .

32 As Mr. Forstrom points out, then, the statutorily-mandated terms of replaceable logging contracts "tie" them in a sense to Crown licences themselves. A licence holder must carry out a specified percentage of its logging through contractors under replaceable contracts. If the AAC under the

licence is reduced, the work committed to by the licence holder in its replaceable contracts may also be reduced. If the licence is cancelled or surrendered, any replaceable contract referable thereto also terminates. Mr. Forstrom and Mr. Maclean go further, however, and argue that the "tie" confers a "special status" on the contractor and that the status must be recognized in the event of a breach of the obligation to renew or continue the contract, and must be reflected in any CCAA arrangement. I will return below to these arguments.

The CCAA

33 Unlike the Forest Act and Regulation, the CCAA is very brief. It operates substantially through judge-made law interpreting and applying its 22 sections. For purposes of this appeal, the key ones are the following:

> 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.
>
> 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.
>
> * * *
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or 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.
>
> * * *

11. (1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

34 There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 Can. Bar Rev. 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

> Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
>
> Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.
>
> Public Interest
>
> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A. [at 592-3]

(See also Duff, C.J.C. in Reference re Companies' Creditors Arrangement Act (Canada) [1934] S.C.R. 659.)

35 In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See Re Smoky River Coal Ltd. (1999) 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) In Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990) 51 B.C.L.R. (2d) 84 (B.C.C.A.), for example, this court held that security granted under s. 178 of the Bank Act was not exempt from the CCAA provisions applicable to "security" and secured creditors, since otherwise a single creditor (in that case, a bank) could frustrate the objectives of the statute. Gibbs J.A. observed:

> 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. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. [at 88-9]

36 In connection with other "priority" issues - the power to grant priority to persons advancing debtor-in-possession ("DIP") financing and to the Monitor for the payment of its fees and disbursements before the payment of secured creditors - this court has called in aid Equity's ability to adapt to changing circumstances in order to achieve the objectives of the statute. In Re United Used Auto & Truck Parts Ltd. (2000) 16 C.B.R. (4th) 141 (B.C.C.A.), this court declined to follow an earlier case in which the Ontario Court of Appeal had ruled that the receiver of a partnership had no authority to subordinate the interests of secured creditors to liability for the receiver's disbursements, unless one of three exceptions applied. (See Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975) 21 C.B.R. (N.S.) 201.) Mackenzie J.A. commented:

> Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the Kowal statement of exceptions has been influential in subsequent cases and they were applied by this Court in Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54 (C.A.). But as Macdonald J. observed in

> Westar Mining, supra at 93-94, different considerations apply under the CCAA. The court is concerned with the survival of the debtor company long enough to present a plan of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the Kowal exceptions to serve that broader interest.
>
> Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the CCAA. In my opinion the jurisdiction under the CCAA cannot be restricted to the Kowal exceptions. [paras. 21-22; emphasis added.]

In conclusion, he stated:

> In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the CCAA. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and CCAA orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgement for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.
>
> In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge. [paras. 30-31; emphasis added.]

(I understand that leave to appeal United Used Auto was granted by the Supreme Court of Canada, but that the case settled before the appeal was heard, [2000] S.C.C.A. No. 142.)

37 In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in Re Dylex Ltd. (1995) 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in Dylex, at para. 8; Re T. Eaton Co. (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; Smoky River Coal; supra, and Re Armbro Enterprises Inc. (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Ltd [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence

shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

38 But in approving and implementing compromises and arrangements under the statute, courts are concerned with more than the efficacy of the plans before them and their acceptability to creditors. Courts also strive to ensure fairness as between the unsecured, secured and preferred creditors of the corporation and as between the debtor and its creditors generally. In the article from which I have already quoted, Stanley Edwards also wrote:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest. If small groups are placed in too strong a position they become capable of acquiring a nuisance value which will make it necessary for the reorganizers to buy them off at a high price in order to effectuate the plan successfully. However, care should be taken that this statutory power of binding minorities should not be utilized to confiscate the legitimate claims of those minorities or of any class of creditors or shareholders. [at 595; emphasis added.]

39 This theme has been repeated and refined in various cases over the years as CCAA courts have struggled with increasingly complex forms of debt and security and with increasingly complicated plans of arrangement. In current terms, the principle of equity is expressed as a concern to see that a plan of arrangement is fair and reasonable and represents an attempt to "balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights". (Per Farley J. in Re Sammi Atlas Inc. (1998) 3 C.B.R. (4th) 171 (Ont. Ct. (Gen. Div.)), at 173.) Elsewhere, it has been said that one measure of what is "fair and reasonable" is the "extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in a non-intrusive and as non-prejudicial a manner as possible." (Per Blair J. in Olympia & York Developments Ltd. (1993) 12 O.R. (3d) 500, at 513.) At the same time, fairness and reasonableness are not "abstract notions, but must be measured against the available commercial alternative." Thus in Re Canadian Airlines Corp. [2000] A.J. No. 771, [2000] 10 W.W.R. 269 (Alta. Q.B.), the Court summarized the interaction between the objectives of a CCAA arrangement and the principles of fairness and reasonableness as follows:

> 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., supra, 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.

> 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.).

> 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 [the debtor]; and
> f. The public interest. [paras. 94-96]

40 Of course, there are also statutory and constitutional limitations on the court's exercise of its authority under the CCAA. The Supreme Court of Canada's decision in Baxter Student Housing Ltd. v. College Housing Cooperative Ltd. [1976] 2 S.C.R. 475 confirmed that it is beyond the authority of a CCAA court to provide for a priority that runs contrary to the express terms of a statute (in that case, the Mechanics Lien Act of Manitoba.) Thus in Baxter, the fact that the provincial legislation created a lien having priority over "all judgments, executions, assignments, attachments, garnishments and receiving orders", precluded an order granting CMHC priority for new advances over and above all prior registered liens. Dickson J. (as he then was) stated for the Court:

> . . . the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expres-

> sion of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a Court simply cannot do. [at 480; emphasis added.]

41 Baxter continues to be applied today: see Re Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Ct. (Gen. Div.)) and Re Westar Mining Ltd. (1992) 70 B.C.L.R. (2d) 6 (B.C.S.C.). However, the Court in United Used Auto distinguished Baxter on the basis that the former did not involve an express statutory priority that could not be overcome by the Court's equitable jurisdiction. Mackenzie J.A. noted that the receiver's jurisdiction originates in the "equitable jurisdiction of the Court of Chancery and [that] while that jurisdiction cannot be exercised contrary to a statute, nothing precludes its exercise to supplement a statute and effect a statutory object." (para. 18.)

42 It may be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail. The only case brought to our attention which, on its face at least, applied the doctrine of paramountcy in the CCAA context was Re Sulphur Corp. of Canada Ltd. [2002] A.J. No. 918 (Alta. Q.B.). In addressing the question of whether the Court had the authority to permit DIP financing ranking in priority to liens registered under the Builders' Lien Act of British Columbia, LoVecchio J. distinguished Baxter and Royal Oak, supra, on the basis that the discretion to grant priority for DIP financing was grounded in s. 11 of the CCAA rather than purely in the court's inherent jurisdiction. (This, at least, is what I draw from the Court's comments at paras. 35-37.) Seeing the case before him as involving a conflict between a federal statute and a provincial statute, LoVecchio J. ruled that the former prevailed and that in exercising its jurisdiction under the CCAA, the Court could grant priority for DIP financing. (See also Pacific National Lease Holding Corp. v. Sun Life Trust Co. (1995) 10 B.C.L.R. (3d) 62 (B.C.C.A.).)

The Issues in this Case

43 Against this background, I turn at last to the substantive questions raised by the intervenor and the appellants respectively - did the Chambers judge have the jurisdiction to include in the Comeback Order provisions which contemplated the termination of any replaceable logging contracts; and if so, did he err by failing to consider whether the appellants would be treated fairly in relation to Skeena's other replaceable contractors or by failing to consider whether the termination of the appellants' contracts was, in their words, "a necessary or justifiable part of [Skeena's] reorganization plan at all"?

Jurisdiction

44 On behalf of the Truck Loggers' Association, Mr. Maclean contended that the Chambers judge had strayed outside his jurisdiction because nothing in s. 11 of the CCAA (which permits the granting of a stay) extends to the termination of a contract. On this view, any authority to sanction a termination must originate not in the statute, but in the Court's inherent jurisdiction. Based on the authority of Baxter, Royal Oak and Westar, the intervenor submits that the court's inherent jurisdiction cannot be used to override legislation such as the Forest Act and Regulation 22/96.

45 It is true that in "filling in the gaps" or "putting flesh on the bones" of the CCAA - for example, by approving arrangements which contemplate the termination of binding contracts or leases - courts have often purported to rely on their "inherent jurisdiction". Farley J. did so in Dylex, for example, at para. 8, and in Royal Oak, supra, at para. 4, the latter in connection with the granting of a "superpriority"; and Macdonald J. did so in Westar, supra, at 8 and 13. The court's use of the term "inherent jurisdiction" is certainly understandable in connection with a statute that confers broad

jurisdiction with few specific limitations. But if one examines the strict meaning of "inherent jurisdiction", it appears that in many of the cases discussed above, the courts have been exercising a discretion given by the CCAA rather than their inherent jurisdiction. In his seminal article, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems, Sir J.H. Jacob, Q.C., writes that the inherent jurisdiction of a superior court of law is "that which enables it to fulfill itself as a court of law." The author explains:

> On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by the ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticized as being "metaphysical," but I think nevertheless it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. . . . The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. [at 27-28; emphasis added]

The author also notes that unlike inherent jurisdiction, the source of statutory jurisdiction "is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition." (at 24.)

46 Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. (As to the meaning of "discretion" in this context, see S. Waddams, "Judicial Discretion", (2001) 1 Cmnwth. L.J. 59.) This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

47 In saying this, I leave to one side the jurisdiction of the court to make special provision for the payment of the fees and expenses of a monitor appointed under the CCAA. The monitor's functions are of course analogous to those of a receiver - traditionally a creature of Equity. I suspect that this particular power may be properly described as both an equitable jurisdiction and a statutory discretion. As this court said in United Used Auto, nothing precludes the exercise of the equitable jurisdiction of the Court of Chancery to "supplement a statute and effect a statutory object." (para. 18.)

In any event, the distinction between these two sources of authority is one that, in my mind at least, 'eludes definition'.

48 Returning, then, to the intervenor's argument, the first question posed by it must in my view be revised to whether the Chief Justice erred in purporting to exercise the statutory discretion given by the CCAA in a manner that conflicts with the Forest Act. But the second branch of the question also incorporates an assumption that is problematic. Can it be said that the Come-back Order conflicts with the Forest Act or the scheme created thereby? It is true that the Act and Regulation contemplate a perpetual series of contracts (provided the contractor fulfils its obligations thereunder) and contemplate the termination of a replaceable contract only in the event of a reduction in AAC or the expiration or surrender of the licence. But nothing in the legislation to which we were referred purports to invalidate a termination of a replaceable logging contract by the licence holder or to require that a court make an order for specific performance in the event of such a termination. (In a CCAA context, such an order would be very unlikely, as well as futile.) The licence holder will of course be liable in damages for breach of contract, giving rise to a "claim" against the debtor corporation under the CCAA. The licence holder may also be in breach of one or more of its obligations under the Act; but ultimately, a logging contract is still a "contract" at law, notwithstanding that many of its terms are dictated by the legislation for the protection and security of the contractor.

49 Thus I disagree with the intervenor's assertion that the effect of the Come-back Order was to "eliminate" the licence holder's "statutory obligation under the Forest Act to replace the contract and to eliminate the other conditions that are required by the Regulation to be included in the contract." In fact, the renewal of the appellants' contracts was not required by the Act per se; what the Act required was that each of their contracts contain a clause requiring renewal. It was those contractual terms which were breached. The licence holder's obligations, mandated by the scheme, were not "eliminated" by the Come-back Order or even by Skeena: having been breached, the obligations are recognized as giving rise to claims against the corporation either for specific performance or for damages.

50 It follows in my view that in approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. The breach of contract is recognized as a matter of fact by the court, but is not "permitted" in the sense that the licence holder is somehow immunized from the usual consequences of its breach at law or in Equity. Finally, even if the Forest Act or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.

The Exercise of the Court's Discretion

51 The appellants and the intervenor argued that even if the Court did have the authority to grant the Come-back Order on the terms it did, the Chief Justice erred in failing to exercise his discretion so as to achieve "fairness" between the appellants and Skeena's three other logging contractors, whose contracts were, in theory at least, unaffected by the Reorganization Plan. As I mentioned earlier, both the appellants and the intervenor contend that contractors under replaceable contracts have "special status" as persons entitled to share in the benefits of a Crown resource (timber) and that the Forest Act scheme is predicated on fairness between them, and between them and the holders of Crown licences. They note that the Chief Justice referred in his "fairness" analysis only to the ques-

tion of whether the Order differentiated inappropriately "between the applicants and other [Skeena] creditors" and made no reference to fairness as between the appellants and the other three contractors or as between the appellants and Skeena itself. In Mr. Forstrom's submission, it is unfair that his clients should suffer the loss of their very significant income streams under the replaceable contracts when the other three contractors will suffer no such loss, and when the licence holder itself suffers only the loss of five percent of its AAC under the Forest Act. (In fact, it is possible the Minister may revoke that reduction upon application by Skeena under s. 56.1 of the Act.) In essence, the argument of the appellants is "Why us?"

52 It is trite law that the scope of review open to an appellate court in respect of the exercise of discretion of a CCAA court (or any other court) is narrow. In Re Pacific National Lease Holding Corp. (1992) 72 B.C.L.R. (2d) 368, Macfarlane J.A. (in Chambers) observed that this court should exercise its powers "sparingly" when asked to intervene in this context. In his words:

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. . . . In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. [para. 32]

Macfarlane J.A.'s comments were echoed by the Alberta Court of Appeal in Smoky River Coal, supra, where Hunt J.A. noted at para. 61 that ". . . Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases."

53 Another principle informing the court's task flows from the fact that a plan of arrangement approved by the court is not the plan of the court. It is a compromise arrived at by the debtor company and the requisite number of its creditors. The court should not readily interfere with their business decision, especially where the plan has been approved by a high percentage of creditors. As observed by Blair J. in Re Olympia & York, supra, "[I]t is not my function to second guess the business people with respect to the 'business' aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas." (at 510.) (See also Re Sammi Atlas Inc., supra, at para. 5, and Re Northland Properties Ltd. (1989) 73 C.B.R. (N.S.) 195 (B.C.C.A.), at 205, per McEachern C.J.B.C.)

54 In this case, the chief executive officer of NWBC and Skeena provided the Chambers judge below with an explanation as to why they chose to reduce the volume of timber allocated to Skeena's evergreen contractors, and why they chose to terminate the contracts of the appellants rather than to terminate all five contracts or reduce the work allocated to all five. I have already mentioned Mr. Veniez's affidavit evidence (see para. 11 above) that the cost to Skeena of logs produced by each of the appellants was greater than those produced by the other three contractors and that NWBC made it a "condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts."

55 In this court, Mr. Forstrom asked us to discount Mr. Veniez's evidence, contending that since the appellants' objections to the Come-Back Order had been known to NWBC when it completed its purchase of the Skeena shares, NWBC must be taken to have effectively "waived" this condition. I am not persuaded that such an inference necessarily follows from NWBC's completion of the Plan.

At that time, the Come-back Order clearly authorized the termination of replaceable logging contracts, and the validity of a similar order had been upheld by Thackray J. in 1997. It may be that in deciding to proceed, NWBC undertook a risk that the appellants would be successful either before the Chief Justice or on appeal, but we have no evidence as to what concessions NWBC may have obtained to protect against that risk.

56 As for the argument that the appellants' contracts were no less costly to Skeena than those of the other three contractors (since the rates chargeable under all five contracts were subject to arbitration), Mr. Veniez deposed:

> 13. I acknowledge that the Contract Regulation dictates that any rates determined according to this process must be determined according to what a licence-holder and a contractor acting reasonably in similar circumstances would agree is a rate that is competitive by industry standards. However, this provides little comfort to licence-holders such as Skeena, because ultimately rates under the Contract Regulation are determined on a cost-plus reasonable profit for replaceable contractors basis which, in my view, acts as a significant disincentive for replaceable contractors to be cost effective on an ongoing basis.
> 14. On the contrary, the Contract Regulation in my view creates a legislated disincentive for evergreen contractors to control their cost structures, because volumes under these contracts are guaranteed. This results in high costs being passed on to Skeena.
> 15. Prior to NWBC's acquisition of Skeena, and the termination of the replaceable contract that has given rise to this application, I was advised that Skeena, on average, paid approximately 10% more for work done under replaceable contracts than work done pursuant to contracts issued after a competitive bid process. Indeed, I am advised by Derrick Curtis, Skeena's Terrace Woodland's Manager, that in March 2001 Skeena put out to tender a harvesting contract (Setting S83303), consisting of roughly 20,000 m3, and received tenders from both evergreen and non-evergreen contractors. The latter offered significantly lower rates ($23.95/m3 vs. $27.85/m3, a difference of $3.90/m3), resulting in a 14% reduction in costs to Skeena. [Emphasis added.]

57 There was, then, a "business case" for the actions taken by Skeena and NWBC vis-à-vis the appellants. Clear Creek and Jasak did not apply to cross-examine Mr. Veniez on this evidence, and did not bring anything to our attention which would cast doubt on his statements. In these circumstances, the Chambers judge was entitled to take seriously the assertion that the termination of the appellants' contracts would save Skeena a considerable sum per year and that that fact was important to the only purchaser willing to make an offer acceptable to the requisite number of creditors. In the terminology used by Mr. Forstrom, there was a "causal link" between the terminations and the chances of success of the Reorganization Plan. For this reason, I do not agree with his submission that Dylex is different in principle from the case at bar: the appellants' contracts in particular were said to be too costly for Skeena to continue operating under them, in the same way the terminated leases were said to be too costly for Dylex to continue leasing under them. And, weighing Dylex's precarious financial position against that of the landlord (which was described as "less than

robust"), the Court 'gave the nod' to the insolvent corporation, rejecting the proposition that Dylex should have to prove that without the three proposed closures (of leases), its proposal would not be viable. (supra, para. 10.)

58 In this case, the appellants deposed that the evergreen contracts were important to them, particularly for financing purposes. Mr. Rigsby, the controller of Clear Creek, for example, deposed:

> 26. Clear Creek requires its Replaceable Contract in order to obtain financing for capital costs. Lending institutions require that Clear Creek has a replaceable contract when considering lending money to, or financing equipment for, Clear Creek. Within the logging industry, it is very difficult to obtain financing without the security of a replaceable contract.
>
> * * *
>
> 30. Clear Creek remains capable of properly capitalising itself, and maintaining its own equipment and other capital investments in good working order, provided that it has a replaceable contract. If Clear Creek's replaceable contract remains in place, Clear Creek will be able to provide competitive, cost-effective, and efficient services and rates to [Skeena] . . . .

59 This evidence brings us squarely to the question of fairness. As already noted, for purposes of the CCAA, the court must be satisfied that the arrangement proposed is "fair, reasonable and equitable." Courts have made it clear that "equity" is not necessarily "equality"; in the words of Farley J. in Re Sammi Atlas Inc.:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights . . . . [para. 4]

60 I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis in this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the deferral and settlement of more than $400,000,000 in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period

to save Skeena from bankruptcy was NWBC's acquisition of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims. As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

61 As has been seen, the purchaser required as a condition of proceeding with the Reorganization Plan that the appellants' contracts be terminated. In the absence of evidence that Skeena or the purchaser was motivated by anything other than a desire to improve the debtor corporation's financial prospects for survival post-arrangement, it cannot in my view be said that the Chambers judge erred in ruling that the termination of the appellants' replaceable contracts was a valid part of the Reorganization Plan in this case.

Procedural Question

62 The second ground of appeal advanced by the appellants was that since Skeena had failed to comply strictly with the requirements of the Come-back Order in relation to the termination of their contracts, the terminations were null and void. In response to the Chief Justice's conclusion that the appellants had not been prejudiced by the failure to give timely notice, the appellants submitted that the terminations could not have been effective until 21 days after they received the Monitor's Eleventh Report. In the meantime, the creditors' meeting took place. The appellants contend that since there was uncertainty as to whether their contracts had been validly terminated or would be terminated, it was unclear whether they were entitled to vote at the meeting. Accordingly, they submit that they:

> . . . were effectively disenfranchised in the CCAA proceeding. The Come-Back Order contemplates that the effectiveness of any proposed termination of a replaceable logging contract will be determined in a timely way, before the Plan of reorganisation is submitted to the creditors for approval. By failing to give proper notice, [Skeena] created uncertainty about both when and if the Appellants' contracts would be terminated. The Appellants were only entitled to vote in relation to the Plan if they acknowledged that the termination of their contracts was effective when the initial (and clearly invalid) notice was given on March 1, 2002.
>
> This placed the Appellants on the horns of a dilemma. Had the Appellants exercised the right to vote on April 2,2002, based on the premise that their contracts had been terminated, they would be guilty of approbation and reprobation in relation to their position that no valid notice of termination had yet been given and that their contracts remains in force. [Skeena] structured the approval process in such a way that the Appellants would effectively be required to waive their right to proper notice of termination under the Come-Back Order in order to vote on the Plan.

63 In response, Skeena emphasizes that the appellants did file proofs of claim with the Monitor prior to the creditors' meeting. Skeena says the Chief Justice was correct in concluding that the appellants were not prejudiced in fact, since if it is ultimately determined that the replaceable logging contracts were not validly terminated, the appellants will be free to withdraw their proofs of claim;

and if the contracts were validly terminated, the appellants will share pro rata under the Plan with Skeena's other unsecured creditors once the amounts of all claims have been finally determined.

64 As for the proposition that the appellants could not both reprobate and approbate, Skeena notes that "conditional voting" was permitted by the Monitor in light of the time pressures attendant upon the approval of the Plan. These led the Monitor to allow voting even by those claimants whose claims it had disallowed. The Monitor noted their particular ballots as "objected to" in case the votes cast by them ultimately had an impact on the outcome of the vote for the applicable class. Mr. Zuk, the chair and claims officer for the meeting, deposed that even if all of the disallowed claims were reversed and the appellants' votes were counted, the result would not have been affected. This statement was not challenged by the appellants.

65 In these circumstances, I cannot agree with the appellants that the delay in their receipt of notice of the terminations of their contracts and the delay in the processing of their proofs of claim were prejudicial to them. It is certainly unfortunate that these delays occurred, but there is no evidence (as opposed to speculation) that the delays were the result of bad faith or deliberate omission. On the other hand, the appellants could have had little doubt that they faced major difficulties once the initial CCAA order was granted (September 5, 2001) and once the "replacement" deadline of September 30 passed. Ultimately, the effect of the delay in their receipt of formal notice made no difference to the appellants' position and did not influence the approval of the Reorganization Plan one way or the other, especially given the small amount allowed by the Monitor in respect of the appellants' claims in relation to Skeena's indebtedness. The appellants chose not to attend the meeting and not to vote, even on a conditional basis. In these circumstances, the Chief Justice correctly recognized that, as stated by Rowles J.A. for the Court in Cam-Net Communications v. Vancouver Telephone Co. (1999) 71 B.C.L.R. (3d) 226, a supervising court under the CCAA must be alert to the incentive for creditors to "avoid the reorganization compromise" and must "scrutinize carefully any action by a creditor which would have the effect of giving it an advantage over the general body of creditors." (para. 20.)

66 Moreover, the arguments which the appellants would have made at the show cause hearing have now been made in the Supreme Court and in this court. If my analysis is correct, they would have failed even if the Court's approval of the Reorganization Plan had been delayed in accordance with the apparent intent of the Come-back Order.

67 I cannot say the Chief Justice was wrong in concluding that Skeena's failure to give timely notice was anything other than a procedural error without prejudicial consequences. I would dismiss this ground of appeal, as well as the substantive grounds, for the reasons I have given.

NEWBURY J.A.
HALL J.A.:-- I agree.
LEVINE J.A.:-- I agree.

cp/i/qw/qlrds/qlsng/qlbrl/qlesm

Tab 9

Currie v. McDonald's Restaurants of Canada Ltd. et al. [Indexed as: Currie v. McDonald's Restaurants of Canada Ltd.]

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[2005] O.J. No. 506

Dockets: C41264, C41289 and C41361

Court of Appeal for Ontario,

Sharpe, Armstrong and Blair JJ.A.

February 16, 2005

Conflict of laws -- Foreign judgments -- Class proceedings -- Plaintiff bringing proposed class action in Ontario for damages arising out of alleged wrongdoing by defendants in relation to promotional games offered to customers -- Judgment in Illinois class action arising out of alleged wrongdoing not barring plaintiff's action in Ontario -- Ontario courts should not recognize and enforce Illinois judgment against plaintiff and proposed Canadian class members, despite existence of real and substantial connection linking cause of action to Illinois, as inadequate notice was given to non-resident class members -- Right to opt out being of vital importance to jurisdiction of foreign court in international class action litigation -- Right to opt out must be made clear and plain to non-resident class members -- Notice being written in obscure and technical language and reaching only small proportion of class members in Canada -- Inadequate notice violating rules of natural justice.

McDonald's sponsored a number of promotional contests at its restaurants in North America, retaining the services of S Inc. to organize and operate the contests. A senior employee of S Inc. and others were subsequently indicted for embezzling prizes allocated to the contests. A class action in Illinois (the "B action") on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada, was settled. The Illinois court directed that notice of the class action be given to Canadian class members by means of an advertisement in Maclean's magazine. The settlement agreement provided that the settlement was binding on all class members who did not opt out of the class by the specified date. The releases covered all claims relating to McDonald's promotional games under common law or statute. The plaintiff did not participate in the B action. He brought a proposed class action in Ontario against McDonald's, McDonald's Canada and S Inc. alleging wrongdoing in relation to the McDonald's promotional contests. Another

proposed class action was commenced by P, who had intervened in the B proceedings to object to the settlement of that action. The defendants moved to dismiss or stay the actions on the ground that the claims had been finally disposed of in the B action. The motion judge dismissed the P action on the basis that, by appearing in the Illinois court to object to the settlement, P had attorned to the jurisdiction of the Illinois court and that the B judgment should be recognized and enforced against him. The motion judge refused to stay or dismiss the plaintiff's action, holding that the plaintiff was not bound by the B judgment or by P's attornment despite the fact that the claims were identical and that the plaintiff and P were both represented by the same law firm. The motion judge found that the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members but that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The defendants appealed the refusal to stay or dismiss the plaintiff's action.

Held, the appeal should be dismissed.

Rules with respect to the recognition and enforcement of foreign judgments should take into account certain unique features of class action proceedings. Before enforcing a foreign class action judgment against Ontario residents, the [page322] court should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected. The principal connecting factors linking the cause of action asserted in the plaintiff's proposed class action to Illinois were that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. That factor was a real and substantial connection in favour of Illinois jurisdiction. On the other hand, the principles of order and fairness required that careful attention be paid to the situation of ordinary McDonald's customers whose rights were at stake. These non-resident class members would have no reason to expect that any legal claim they might wish to assert against McDonald's Canada as a result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers were residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The plaintiff class members did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from t hose proceedings. The right to opt out is of vital importance to the jurisdiction of the foreign court in international class action litigation. There was no basis for interfering with the motion judge's finding that the notice given to the non-resident class members was inadequate. As the unnamed plaintiffs were not afforded adequate notice of the B proceedings, the Ontario courts should not recognize and enforce the B judgment against the plaintiff and the non-attorning Canadian class members he sought to represent. Accordingly, the plaintiff and the unnamed members of the class he sought to represent were not bound by the B judgment.

It was open to the motion judge to conclude that the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out. Moreover, the mode of notice was inadequate, as the notice was published in a publication that is not ordinarily

used in English Canada for these purposes and there was evidence that the notice reached only a small proportion of the members of the plaintiff class. While the motion judge apparently did not assess the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions, this did not amount to an error. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard may have some bearing upon that issue, it is not conclusive, particularly in light of the importance of notice to jurisdiction. The motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. The motion judge did not err in holding that the notice to the Canadian class members did not satisfy the requirements of natural justice.

The plaintiff was not precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario. The action was not an attempt to avoid the effect of an adverse ruling against P. The plaintiff took no part in the B proceedings and McDonald's Canada was not named as a defendant in that action. The plaintiff's allegations specifically related to Canadian patrons were [page323] made by P in objecting to the settlement, but they did not form part of the claim advanced by B. The plaintiff and P were not privies. There was no evidence that the plaintiff was even aware of the proceedings in the United States until shortly before his own action was commenced. It would be inappropriate to analyze the issue on the basis that the law firm which represented both P and the plaintiff was the real litigant, or that the link provided by the law firm to both P and the plaintiff was sufficient to make them privies.

Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, 234 D.L.R. (4th) 1, 314 N.R. 209, 113 C.R.R. (2d) 189, 2003 SCC 72, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 52 B.C.L.R. (2d) 160, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, consd

Other cases referred to

Adams v. Cape Industries plc., [1990] Ch. 433 (C.A.); Bank of Montreal v. Mitchell, [1997] O.J. No. 2848, 151 D.L.R. (4th) 574 (C.A.), affg [1997] O.J. No. 602, 143 D.L.R. (4th) 697 (Gen. Div.); Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53, 195 D.L.R. (4th) 308, 2 C.P.C. (5th) 1 (C.A.); Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536; Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014, 196 D.L.R. (4th) 344, 1 C.P.C. (4th) 62, 11 B.L.R. (3d) 1 (C.A.), revg (1999), 46 O.R. (3d) 315n, [1999] O.J. No. 5114, 6 B.L.R. (3d) 82, 1 C.P.C. (5th) 82 (Div. Ct.), affg (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662, 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43 (S.C.J.) (sub nom. 3218520 Canada Inc. v. Bre-X Minerals Ltd.); Chadha v. Bayer Inc., [1999] O.J. No. 3621, 43 C.P.C. (4th) 91 (S.C.J.); Hunt v. T & N plc, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125, 85 B.C.L.R. (2d) 1, 109 D.L.R. (4th) 16, [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269; Mondor v. Fisherman, [2002] O.J. No. 1855, [2002] O.T.C. 317, 26 B.L.R. (3d) 281, 22 C.P.C. (5th) 346 (S.C.J.) (sub nom. Royal Trust Corp. of Canada v. Fisherman, YBM Magnex International Inc. v. Bogatin, Deloitte & Touche v. YBM Magnex International, Inc., CC&L Dedicated Enterprises Fund (Trustee of) v. Fisherman); Muscutt v. Courcelles (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128, 213 D.L.R. (4th) 577, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206 (C.A.), supp. reasons [2002] O.J. No. 2734, 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (C.A.); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985); Robertson v.

Thomson Corp. (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 30 C.P.C. (4th) 182 (Gen. Div.), supp. reasons (1999), 43 O.R. (3d) 389, [1999] O.J. No. 908, 43 C.P.C. (4th) 166 (Gen. Div.); Shaw v. BCE Inc., [2004] O.J. No. 3109, 49 B.L.R. (3d) 1, 189 O.A.C. 9, affg [2004] O.J. No. 5481, O.T.C. 28, 42 B.L.R. (3d) 107 (S.C.J.); Tolofson v. Jensen, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, 100 B.C.L.R. (2d) 1, 120 D.L.R. (4th) 289, 175 N.R. 161, [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202; Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2003] O.J. No. 868, 223 D.L.R. (4th) 445, 23 C.P.R. (4th) 454, 30 C.P.C. (5th) 107 (C.A.), affg [2002] O.J. No. 1400, 212 D.L.R. (4th) 563, 18 C.P.R. (4th) 267, 20 C.P.C. (5th) 65 (Div. Ct.), affg [2001] O.J. No. 237, 11 C.P.R. (4th) 230, 6 C.P.C. (5th) 245 (S.C.J.); Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389, [1999] O.J. No. 2268, 45 C.C.E.L. (2d) 165, 99 C.L.L.C. 210-038, 36 C.P.C. (4th) 99 (S.C.J.), supp. reasons (1999), 45 O.R. (3d) 425, [1999] O.J. No. 3285, 46 C.C.E.L. (2d) 293, 43 C.P.C. (4th) 26 (S.C.J.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere); Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, 49 C.P.C. (4th) 233, 24 C.P.C. (5th) 175 (S.C.J.); [page324] Wilson v. Servier Canada Inc., [2002] O.J. No. 3856, 220 D.L.R. (4th) 191, 23 C.P.C. (5th) 1 (C.A.), quashing (2002), 59 O.R. (3d) 656, [2002] O.J. No. 2032, 213 D.L.R. (4th) 751 (S.C.J.)

Statutes referred to

Class Actions Act, S.N.L. 2001, c. C-18.1, ss. 7(2), 17(2)-(5)

Class Actions Act, S.S. 2001, c. C-12.01, ss. 8(2), 18(2)

Class Proceedings Act, 1992, S.O. 1992, c.6, ss. 17, 20

Class Proceedings Act, C.C.S.M. c. C130, s. 6(3)

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 16(2)

Class Proceedings Act, R.S.O. 1990, c. 6, ss. 17, 20

Class Proceedings Act, S.A. 2003, c. C-16.5, ss. 7(1),(3), 17(1)(b)

Authorities referred to

Bassett, D.L., "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham L. Rev. 41

Dixon, J.C.L., "The Res Judicata Effect in England of a U.S. Class Action Settlement" (1997) 46 I.C.L.Q. 134

Monaghan, H.P., "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 98 Columbia L. Rev. 1148

APPEAL from the judgment of Cullity J. of the Superior Court of Justice, reported at [2004] O.J. No. 83, 45 C.P.C. (5th) 304 (S.C.J.), dismissing a motion to stay or dismiss an action.

Ronald Slaght, Q.C. for McDonald's Restaurants of Canada Limited.

Joel Richler and J.A. Prestage, for McDonald's Corporation.

Glenn Zakaib, for Simon Marketing Inc.

Chris G. Paliare, Martin Doane and John Phillips, for Greg Currie.

The judgment of the court was delivered by

[1] **SHARPE J.A.**:-- The plaintiff Greg Currie brings a proposed class action alleging wrongdoing in relation to promotional games offered to customers of McDonald's Restaurants of Canada Ltd. ("McDonald's Canada"). He is met with an Illinois judgment approving the settlement of a class action brought on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada (the "Boland judgment"). The Illinois court directed that notice of the class action to Canadian class members be given by means of an advertisement in Maclean's magazine. Currie did not participate in the Illinois proceedings but Preston Parsons, the named plaintiff in another Ontario class proceeding, represented by the same law firm and purporting to represent the same class, appeared in the Illinois court to challenge the settlement. [page325]

[2] The central issue on this appeal is whether the Boland judgment is binding so as to preclude Currie's proposed class action in Ontario.

Facts

[3] I adopt the following summary of the essential facts from the reasons of the motion judge [at para. 5].

1. In the period between January 1, 1995 and December 31, 2001 -- and earlier -- McDonald's sponsored numerous promotional games, or contests, of chance -- or chance and skill -- at its restaurants in North America. Some, but not all, of these were made available in the Canadian restaurants. Prizes of different kinds and amounts were to be awarded. Participation in the games was, to a large extent, tied to the purchase of food at the restaurants. Simon Marketing Inc. -- a corporation based in California that provided businesses with marketing services involving the provision and operation of promotional games -- was retained for that purpose by McDonald's.
2. On August 21, 2001, Jerome Jacobson -- a senior employee of Simon Marketing -- and a number of other individuals were indicted for embezzling prizes allocated to McDonald's games.
3. The proceedings in Boland were commenced on the following day. The class-action complaint alleged that Jacobson had directed prizes to specific individuals and claimed damages against McDonald's and Simon Marketing Inc. for consumer fraud and unjust enrichment. The plaintiffs sued on behalf of themselves and "all customers of McDonald's who paid money for McDonald's food products in order to receive a subject contest game piece for subject contest promotions between 1995 and the present".

4. Settlement discussions in the Boland action were conducted from October 2001 and culminated in a settlement agreement between the plaintiffs and McDonald's on April 19, 2002.
5. The settlement agreement provided that the parties would apply to the Circuit Court of Cook County, Illinois for preliminary certification of the proceedings as a class action and for preliminary approval of the settlement as "fair, reasonable and adequate to the class and to members of the public". Further orders were to be requested to approve the terms of a notice to class members -- and the manner in which it was to be disseminated -- to provide class members with an opportunity to opt out of the class and the settlement by a date to be specified and to make the settlement -- and the releases to be provided to McDonald's and its subsidiaries -- binding on those who did not do so. The terms of the releases were broad. They covered all claims -- referred to in the settlement agreement as "Released Claims" -- relating to McDonald's promotional games under common law or statute, and specifically for breach of the consumer protection laws of any jurisdiction, contract, unjust enrichmen fraud, negligent misrepresentation, breach of fiduciary duty, strict liability and unfair or deceptive trade practices. The Released Claims would have covered each of the claims subsequently pleaded in the Parsons and Currie actions even though not all of the material facts on which they were [page326] based had been pleaded in Boland. The original Complaint was amended to extend the class to persons who had participated, or attempted to participate, in promotional games sponsored by McDonald's since 1979.
6. On May 8, 2002, the application for the above orders was heard by Judge Stephen Schiller in Chicago and, on June 6, 2002, he granted the preliminary relief requested with some modifications to the proposed notice to class members. August 28, 2002 was designated as the final date for members to opt out and a final fairness hearing was to be held on September 17, 2002.
7. The manner in which notice was to be given to customers in Canada was specifically addressed at the preliminary hearing on May 8, 2002, and the order of the court provided for the approved form of notice to be published in each of three French-language newspapers in Quebec on July 15, 2002 and in Maclean's magazine on July 15 and July 22 as well as in two US publications that had circulation in Canada.
8. Jacobson had pleaded guilty to the criminal charges and, at the trial of his alleged conspirators, he gave evidence on August 19, 2002 that McDonald's had instructed Simon Marketing Inc. that the "random" selection of winners of "high value" prizes was to be manipulated to ensure that no such prizes would be awarded to contestants in Canada. No such allegation had been -- or was ever -- made in the Boland action.
9. After a US attorney had notified the firm of Paliare Roland in Toronto, the firm placed information about the US proceedings on its website and was subsequently contacted by the plaintiff, Preston Parsons. The Parsons action was commenced by statement of claim on September 13, 2002. As I

have indicated, the causes of action that were pleaded were based on allegations that reflected those made by Jacobson, to which I have just referred, as well as those in the Complaint filed in Boland.

10. On September 16, 2002, a group of Canadians, including Mr. Parsons, moved for leave to intervene in the Boland proceedings to object to the settlement of that action. The documents filed in the court in Illinois named Paliare Roland as solicitors for Mr. Parsons although members of the firm did not -- and could not -- represent him in proceedings in that jurisdiction.
11. At the Final Fairness Hearing on September 17, 2002, submissions were made by a US attorney on behalf of the Canadian objectors. The hearing was adjourned to October 10, 2002 to permit written submissions. It continued on that date after written submissions of the objectors and responding submissions on behalf of the plaintiffs in Boland had been filed.
12. The Currie action was commenced on October 28, 2002 with Paliare Roland as solicitors of record.
13. On January 3, 2003, Judge Schiller released his decision dismissing the objections of the Canadian objectors. The terms of the settlement were given final approval and the certification order was made final. On April 8, 2003, the formal order of the court was entered containing, [page327] among other things, the release of McDonald's and its subsidiaries by the members of the class and a declaration that all members of the class who had not opted out were bound by the terms of the order.
14. An appeal by Mr. Parsons from the decision of Schiller J. was dismissed on July 31, 2003 on the ground that the order of the learned judge was not then a final order as the question of costs had not been dealt with.

Judicial proceedings

[4] The appellants moved to dismiss or stay both the Parsons and Currie actions on the ground that the claims asserted in both actions had been finally disposed of in the Boland action.

[5] The motion judge dismissed the Parsons action on the basis that by appearing in the Illinois court to object to the settlement, Parsons had attorned to the jurisdiction of the Illinois court and that the Boland judgment should be recognized and enforced against him and the other Canadian objectors who appeared to contest the Boland settlement.

[6] The motion judge refused to stay or dismiss the Currie action. He found that Currie was not bound by the Boland judgment or by Parsons' attornment despite the fact that the claims were identical and that Parsons and Currie were both represented by the same law firm. The motion judge found that under the applicable conflict of law rules, the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members. However, he further found that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The motion judge concluded, accordingly, that the Boland judgment should not be recognized and enforced so as to bind Currie and those he sought to represent in his proposed class action.

[7] McDonald's Corp., McDonald's Canada and Simon Marketing appeal the motion judge's refusal to dismiss or stay the Currie action. Parsons did not appeal the dismissal of his action.

Issues

[8] The following issues arise on this appeal.

(1) Should the Ontario courts recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent?
(2) Did the notice to the Canadian class members satisfy the requirements of natural justice? [page328]
(3) Is Currie precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario?

Analysis

1. Should the Ontario courts recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent?

[9] It is common ground on this appeal that if the Boland judgment should be recognized in Ontario under the applicable conflict of laws principles, Currie and the members of the class he seeks to represent are bound by it and that Currie's proposed class action would be precluded. It is also common ground that the issue of whether the Ontario courts should recognize and enforce the Illinois judgment approving the settlement turns upon the application of the principles enunciated by the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135 and Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77.

[10] In Morguard, the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" for the assessment of the propriety of conflict of laws jurisdiction. As La Forest J. explained at p. 1102 S.C.R., "order and justice militate in favour of the security of transactions", an interest fostered in the modern world of increased trans-border activity by freer recognition and enforcement of judgments from other jurisdictions. But embedded in the principles of order and fairness is also the notion of jurisdictional restraint. The interest of security of transactions gained by the party seeking enforcement must be balanced with the need for fairness to the party against whom enforcement is sought. As La Forest J. put it at p. 1103 S.C.R.: "it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit ... Thus, fairness to the [party against whom enforcement is sought] requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."

[11] The "real and substantial connection" test serves to control the assertion of jurisdiction. It is described variously in Morguard, at pp. 1104-09, as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the [page329] forum province", "with the transaction or the parties", and "with the action". The real and substantial connection test is a flexible one, "a term not yet fully defined" (Tolofson v. Jensen, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, at p. 1049 S.C.R.), and there is no strict or rigid test to be applied (Hunt v. T&N plc, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125, at p. 325 S.C.R.).

[12] Morguard dealt with the recognition and enforcement of inter-provincial judgments. In Beals, those same principles were adapted and applied to international judgments. Writing for the

majority, at para. 37, Major J. described real and substantial connection as "the overriding factor in the determination of jurisdiction". He stated at para. 32:

> The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

[13] The novel point raised on this appeal is the application of the real and substantial connection test and the principles of order and fairness to unnamed, non-resident plaintiffs in international class actions.

[14] Ontario residents frequently engage in cross-border activities that may become the subject of class action litigation in Ontario, in another province or in a foreign jurisdiction. Several Ontario trial courts have authorized national and international classes: Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280 (Gen. Div.) (international class); Carom v. Bre-X Minerals Ltd. (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (S.C.J.) (national class) and Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.) (national class). In Mondor v. Fisherman, [2002] O.J. No. 1855, [2002] O.T.C. 317 (S.C.J.), Cumming J. approved a settlement in a class action where the class included American and other foreign plaintiffs. Legislation in several provinces specifically contemplates the inclusion of non-resident class members: Class Proceedings Act, S.A. 2003, c. C-16.5, ss. 7(1), (3) and 17(1)(b); Class P roceedings Act, R.S.B.C. 1996, c. 50, ss. [6(2)] and 16(2); Class Proceedings Act, C.C.S.M. c. C130, s. 6(3); Class Actions Act, S.N.L. 2001, c. C-18.1, ss. 7(2) and 17(2) - (5); Class Actions Act, S.S. 2001, c. C-12.01, ss. 8(2) and 18(2).

[15] There are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation: [page330] Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2001] O.J. No. 237, 6 C.P.C. (5th) 245 (S.C.J.), at para. 27, affd [2002] O.J. No. 1400, 20 C.P.C. (5th) 65 (Div. Ct.), affd [2003] O.J. No. 868, 30 C.P.C. (5th) 107 (C.A.); Wilson v. Servier Canada Inc., supra, at pp. 243-44 O.R. (S.C.J.); Wilson v. Servier Canada Inc. (2002), 59 O.R. (3d) 656, [2002] O.J. No. 2032 (S.C.J.), at pp. 664-70 O.R. Conflict of law rules should recognize, in appropriate cases, the importance of having claims finally resolved in one jurisdiction. In some cases, Ontario courts will render judgments affecting the rights of non-residents and in other cases, Ontario residents will be affected by class action proceedings elsewhere. Ontario expects its judgments to be recognized and enforced, provided its courts assert jurisdiction in a proper manner and comity requires that, in appropriate cases, Ontario law should give effect to foreign class action judgments.

[16] Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non-resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court's jurisdiction.

The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.

[17] Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them. Henry Paul Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 98 Columbia L. Rev. 1148, at pp. 1155-56, warns of the need to guard against potential abuses by settling class action defendants who "welcome class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices". Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.

[18] To determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought. In many cases, the actions of the non-resident class member will assist in determining jurisdiction. [page331] Take, for example, the case of an Ontario resident who orders goods from a foreign mail order merchant or who buys securities on a foreign stock exchange. The Ontario resident has engaged in a cross-border transaction with a foreign entity. The cause of action arises at least in part in the foreign jurisdiction. It would not be unreasonable, from the perspective of the Ontario resident, to expect that legal claims arising from the transaction could be properly litigated in the foreign jurisdiction. Nor is it unreasonable, whether from the perspective of the foreign defendant or from that of the Ontario plaintiff, to ex pect that class action litigation in the foreign jurisdiction should dispose finally of the Ontario plaintiff's claim.

[19] In this case, however, the unnamed, non-resident class members have done nothing to invite or invoke Illinois jurisdiction. The respondents offer this analogy: would Ontario law recognize the jurisdiction of Illinois to entertain a suit by the appellants for a declaration of non-liability against the respondents? That is the legal and practical effect of the Illinois judgment so far as they are concerned. If a judgment of non-liability by the foreign court would be recognized and enforced in Ontario, so too should the courts of Ontario recognize and enforce the foreign class action settlement. However, if the foreign non-liability judgment would not be recognized and enforced, an Ontario court should hesitate to recognize and enforce the foreign class action settlement against the non-resident plaintiff.

[20] This analogy is of some assistance, but I am not persuaded that a model entirely based upon the position of the defendant in a traditional two-party lawsuit can adequately capture the legal dynamics and complexity of the situation of an unnamed plaintiff in modern cross-border class action litigation. The position of the class action plaintiff is not the same as that of a typical defendant. Rules for recognition and enforcement of class action judgments should reflect those differences. The class action plaintiff is not hauled before a foreign court and required to defend him or herself upon pain of default judgment. As stated by Rehnquist J. in the leading American decision, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985), at p. 809, "[un]like a defendant in a civil suit, a class-action plaintiff is not required to fend for himself". Class action regimes typically impose upon the court a duty to ensure that the interests of the plaintiff class members are adequately re presented and protected. This is a factor favouring recognition and enforcement against

unnamed class members: see John C.L. Dixon, "The Res Judicata Effect in England of a U.S. Class Action Settlement" (1997) 46 I.C.L.Q. 134, at pp. 136, 150-51. [page332]

[21] On the other hand, I accept the respondent's basic point that it would be wrong simply to approach the issue of jurisdiction by asking whether the Illinois court would have jurisdiction over the respondents at the suit of Canadian plaintiffs. The court must have regard to the rights and interests of unnamed plaintiffs who did not participate in the Boland proceedings. The question of jurisdiction should be viewed from the perspective of the Ontario client of a McDonald's Canada restaurant, participating in a promotional prize giveaway presented by McDonald's Canada, who has done nothing to invoke or submit to the jurisdiction of the Illinois court.

[22] The principal connecting factors linking the cause of action asserted in Currie's proposed class action to the state of Illinois are that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. The alleged wrongful conduct, manipulating the "random" selection of winners of "high value" prizes to ensure that no such prizes would be awarded to contestants in Canada, occurred in the United States. This factor is a "real and substantial connection" in favour of Illinois jurisdiction. While constitutional arrangements may put interprovincial suits on something of a different plain, as noted by Cumming J. in Wilson v. Servier Canada Inc. (2000), above at p. 241 O.R., Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment".

[23] On the other hand, the principles of "order and fairness" require that careful attention be paid to the situation of ordinary McDonald's customers whose rights are at stake. These non-resident class members would have no reason to expect that any legal claim they may wish to assert against McDonald's Canada as result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers are residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The Currie plaintiffs themselves did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here.

[24] The locus of the alleged wrong indicates a real and substantial connection with Illinois, but recognizing Illinois jurisdiction could be unfair to the ordinary McDonald's customer who would have no reason to suspect that his or her rights are at stake in a foreign lawsuit and who has no link to or nexus with the Boland action. [page333]

[25] To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the Boland action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the Boland action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings.

[26] In the circumstances of this case, it is not necessary for me to consider the issue of adequacy of representation in detail. I note, however, that American commentators have raised the "race-to-the bottom" concern: see Monaghan, above. A sophisticated defendant may persuade plaintiffs' counsel to accept a sharply discounted recovery rate for non-resident (including Canadian or Ontario) plaintiffs. The foreign representative plaintiff's interests may conflict with those of the Ontario class, or not fully encapsulate the interests of the Ontario class. Recognition and enforcement rules must be attentive to these possibilities and retain sufficient flexibility to address concerns of this nature.

[27] On the other hand, provided the interests of non-resident class members were adequately represented, recognition and enforcement of foreign class proceedings would seem desirable. Recognition of the judgment would encourage the defendant to extend the benefits of the settlement to non-residents. Non-resident class members would receive a benefit without resorting to litigation and the defendant would buy peace from further litigation.

[28] The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right [page334] to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389, [19

99] O.J. No. 2268 (S.C.J.), at p. 404 O.R. It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff.

[29] The respondent submits that recognition should be withheld absent an order requiring non-resident plaintiffs to opt in: see D.L. Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham L. Rev. 41. In some provinces (Alberta: Class Proceedings Act, S.A. 2003, c. C-16.5, s. 17(1)(b); British Columbia: Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 16(2); Saskatchewan: Class Actions Act, S.S. 2001, c. C-12.01, s. 18(2); Newfoundland and Labrador: Class Actions Act, S.N.L. 2001, c. C-18.1, s. 17(2)), legislation requires out of province plaintiffs opt in to class proceedings. There may well be cases where the nature of the rights and interests at stake would make such a requirement appropriate as a prerequisite to recognition and enforcement, but I do not accept the suggestion that unnamed plaintiffs should always be required to opt in as a prerequisite to recognition. In my view, the case at bar doe s not fall into the category where an "opt in" order should be required. Here, the interest of each individual plaintiff is nominal at best. An order requiring members of the plaintiff class to opt in would, as a practical matter, effectively negate meaningful class action relief.

[30] In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out.

In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by La Forest J. in Hunt v. T&N plc, supra, at p. 325 S.C.R., "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly appliedö as ôno court has ever been able to anticipate" all possibilities. Second, it may be easier [page335] to justify the assumption of jurisdiction in interprovincial cases than in int ernational cases: see Muscutt v. Courcelles (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (C.A.), at paras. 95-100.

[31] The motion judge determined that the notice given to the non-resident class members was inadequate. He observed that traditional conflict of laws doctrine treats adequacy of notice as an element of natural justice that can be raised as a defence to enforcement, once the jurisdiction of the foreign court has been established. He did not find it necessary to decide, on the facts of this case, whether or not the notice issue had a bearing on jurisdiction. As I have already explained, it is my opinion that the notice issue does bear upon jurisdiction. I consider the motion judge's ruling on the adequacy of notice below and conclude that there is no basis upon which I would interfere with that ruling. I would apply it to the question of jurisdiction and hold that as the unnamed plaintiffs were not afforded adequate notice of the Boland proceedings, the Ontario courts should not recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent.

[32] I would add this observation. Even if the Boland judgment is not accorded recognition and enforcement, it may still have some impact upon Currie's proposed class action in Ontario because of the principle against double recovery. As a result of the Boland judgment, certain benefits were conferred upon Canadian McDonald's patrons. If the Currie action succeeds on the merits, then the trial judge will likely take into account the benefits already received by the plaintiff class in order to determine the appropriate remedy and prevent over-compensation.

[33] Accordingly, I conclude that Currie and the unnamed members of the class he seeks to represent (excluding the Parsons group) are not bound by the Boland judgment.

2. Did the notice to the Canadian class members satisfy the requirements of natural justice?

[34] In the Boland action, the Illinois court ordered that notice be given in Canada by means of two advertisements in Maclean's magazine for English Canada and in La Presse, Le Journal de Québec and Le Journal de Montréal for Quebec. Notice was also published in three U.S. publications with circulation in Canada, People Magazine, USA Today and four copies of TV Guide.

[35] The respondents rely upon the evidence of Todd Hilsee, an individual with experience in developing notice programs for class actions. In Hilsee's opinion, the notice to Canadian members of the plaintiff class in Boland was inadequate. Relying on [page336] "net-reach" analysis, he asserts that the notice had reached only 29.9 per cent of Canadian adults who frequent burger restaurants. The notice approved in the United States, meanwhile, would have reached 72 per cent of American fast food patrons.

[36] In response to Hilsee's evidence, the appellants filed the affidavit of Wayne Pines, who prepared the Boland notice plan. He stated that Maclean's readership, in addition to circulation figures, should be considered, as should the impact of the notice in the U.S. publications with circulation in

Canada. Pines also swore that the notice to Canadians in Boland was more effective and broader than the notice approved in Chadha v. Bayer Inc., [1999] O.J. No. 3621, 43 C.P.C. (4th) 91 (S.C.J.).

[37] The motion judge made the following findings at para. 58 with respect to the adequacy of the notice in the Boland action:

> I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in Boland had received adequate notice of the proceedings and of their right to opt out. Quite apart from the form and contents of the notice -- Mr. Hilsee's reference to "wall to wall legalese" conveys no more than a hint of its eye-glazing opaqueness -- I believe that its dissemination in Canada was so woefully inadequate that the decision should be held to offend the rules of natural justice recognized in this court and, on that ground, to be not binding on the Canadian members of the putative class in Boland, other than those whom I have found to have submitted to the jurisdiction of the court in Illinois. It would not, in my judgment, be at all reasonable to consider publication in two issues of Maclean's magazine as adequate notice to unilingual English-speaking Canadians -- or, indeed, to French-speaking Canadians outside Quebec -- who were customers of McDonald's. Nor, as the question is governed by the laws of this jurisdiction, do I believe it would be helpful to speculate whether the decision of Schiller J. on the adequacy of the notice plan would have been the same if, at the preliminary hearing, he had been provided with the true circulation of Maclean's magazine or if the mistake in the initial declaration had been drawn to his attention at the final hearing.

[38] I am not persuaded that we should interfere with the motion judge's findings. They are essentially factual in nature and therefore entitled to deference on appeal to this court.

[39] It was open on the evidence for the motion judge to conclude that the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out. As I have already indicated, that right is of vital importance to the jurisdiction of the foreign court in international class action litigation. The right to opt out must be made clear and plain to the non-resident class members and I see no basis upon which to disagree with the motion judge's assessment of this notice.

[40] Nor would I interfere with the motion judge's finding that the mode of notice was inadequate. The appellants opted to publish [page337] the notice in a publication that is not ordinarily used in English-Canada for such purposes and there was evidence that this notice reached only a small proportion of the members of the plaintiff class. It was open on the evidence for the motion judge to conclude that such notice was inadequate.

[41] The appellants argue that the motion judge erred in law by applying a higher standard to the notice than would be applied in an Ontario class action. They point out that under Ontario law, there is no absolute requirement for effective notice in class actions and, where the stake of an individual class member is extremely low, notice requirements may be tailored accordingly. In the present case, the individual class member could assert no more than a mathematical chance to win a prize and given the low value of such a claim, Ontario law sets a very low standard. The Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 17 and 20 direct the Ontario courts making directions regarding

notice to consider, inter alia, the cost of notice, the size of the class and the nature of the relief sought. The Act specifically permits the court, having regard to these matters, to dispense with notice where appropriate (s. 17(2)). In consumer class actions involving large plaintiff classes asserting cla ims that are essentially insignificant on an individual basis, Canadian courts have approved notice arguably less effective than that approved in the case at bar: Chadha v. Bayer, above; Wilson v. Servier Canada Inc. (2002), above.

[42] I agree that the motion judge appears not to have assessed the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions. I disagree, however, that he erred [in] so doing. In assessing the fairness of the foreign proceedings, "the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles" (Adams v. Cape Industries plc., [1990] Ch. 433 (C.A.), at p. 559. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard may have some bearing upon that issue, I do not agree that it is conclusive, particularly in light of the importance of notice to the jurisdictional issues discussed above.

[43] In my view, the motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. American and Canadian class members had similar if not identical interests at stake and there was no relevant basis upon which the Illinois court could have concluded that one standard [page338] of procedural fairness was appropriate for the American class and another for the Canadian. In the result, the Illinois court applied a different and lower standard in determining what notice should be given to the Canadian plaintiffs. I would not interfere with the motion judge's conclusion that there was a denial of natural justice. Natural justice surely requires that similarly situated litigants be accorded equal (although not necessarily identical) treatment.

3. Is Currie precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario?

[44] The appellants argue that Currie should be bound by [the] Boland judgment on the basis that he is in the same interest as or a privy to Parsons. Parsons did not appeal the motion judge's finding that he attorned to the jurisdiction of the Illinois court; therefore, he is bound by it. The allegations in the Currie action are the same as those advanced by Parsons. The Currie action was brought as a protective measure to preserve the right to bring an action in Canada on behalf of the same class of plaintiffs in the event of an adverse ruling against Parsons in Illinois. The same law firm that represented Parsons commenced the Currie action after Parsons' appearance in the Illinois court.

[45] The appellants submit that the Currie action should be dismissed on the basis of res judicata or as an abuse of process. They argue that Currie makes essentially the same allegations as were made by Parsons and that the Currie action is nothing more than a deliberate attempt to avoid the effect of an adverse ruling against Parsons. Currie and Parsons are, the appellants submit, alter egos of each other, neither having any significant personal interest in their claims and both making the same allegations. The real plaintiff, and the only entity with a real stake in the claim, is the law firm that represents both Currie and Parsons. The appellants urge us to look to the practical realities of class actions. We are asked to focus on the centrality of the lawyers to a process in which the representative plaintiffs play what is at best a nominal role.

[46] I am not persuaded that res judicata applies here or that there are grounds for this court to interfere with the motion judge's refusal to apply the abuse of process doctrine. The parties are not the same -- Currie took no part in the Boland proceedings and McDonald's Canada was not named as a defendant in that action. Further, Currie's allegations specifically related to the Canadian patrons were made by Parsons in objecting to the [page339] settlement, but they did not form part of the claim advanced by the representative plaintiff in Boland.

[47] The appellants say that Currie and Parsons are privies, relying on the extended definition of privity identified by Farley J. in Bank of Montreal v. Mitchell, [1997] O.J. No. 602, 143 D.L.R. (4th) 697 (Gen. Div.), at p. 739 D.L.R., affd [1997] O.J. No. 2848, 151 D.L.R. (4th) 574 (C.A.) and applied in Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53 (C.A.), at p. 171 O.R.:

> For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding ... [W]here that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have a battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision . . .

[48] The motion judge rejected this submission. He found that there was no evidence that Currie deliberately stood by while the battle was being fought elsewhere. There was no evidence that Currie was even aware of the proceedings in the United States until shortly before his own action was commenced. Currie refused, on his counsel's advice, to provide any information that he had received from his counsel about the Boland and Parsons proceedings. The motion judge found, at para. 82, that even if he were to draw from Currie's refusal the adverse inference that the Currie [action] was tainted by Parsons' attornment, that still did not provide a basis for finding Currie to be a privy of Parsons or the Currie action to be an abuse of process. The motion judge found that protection of the interests of the putative class was a legitimate tactic (at para. 83):

> There is nothing to suggest that Mr. Currie's decision to commence the Currie action -- and any involvement of his solicitors in that decision -- was motivated by any consideration other than a desire to protect the interests of members of the putative class in the Parsons action who had not participated in the Boland proceedings. Such members could not then be compelled to participate in the Parsons action. I have found that Mr. Parsons had no authority to submit their rights to the jurisdiction of the court in Illinois and, in view of the inadequacy of the notice of the Boland proceedings given in Canada, I cannot assume that any of the members of the putative class in the Currie action, other than the objectors, were aware of the proceedings in Illinois or of the Parsons action. In these circumstances, I decline to find that they -- or Mr. Currie -- were privies of Mr. Parsons or that the commencement and continuation of the Currie action should be considered to be an abuse of process.

[49] I agree with the motion judge and I reject the submission of the appellants that we should analyze this issue on the basis [page340] that the law firm was the real litigant, or that the link pro-

vided by the law firm to both Parsons and Currie was sufficient to make them privies. No doubt from a purely financial perspective, the law firm had a greater stake in the outcome than Parsons, Currie or any individual member of the proposed class. However, the financial stake of the class as a whole exceeded that of the law firm. In any event, I am not persuaded that the legal rights of the parties are to be assessed on the basis of their lawyers' pecuniary interest in the outcome. The legal claims that are being advanced belong to Parsons, Currie and to the members of the proposed class, not to the law firm.

[50] Lawyers are not ordinarily considered to be in privity of interest with their clients: see Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536, at pp. 910 and 937 A.C. The propriety of the procedures taken in the presentation of legal claims should be assessed from the perspective of the clients' legal rights. The law firm's job was to protect the legal interests of its individual clients and the legal interests of the proposed class. Currie had no contact with Parsons; nor, it would seem, did he know anything about the Parsons action or the steps that Parsons was taking to pursue it in Ontario and in Illinois. The same can be said for the unnamed members of the class Currie proposes to represent. In that light, it is difficult to see how Currie or those unnamed class members can be said to be bound under the Bank of Montreal v. Mitchell principle because they have adopted a tactical "stand by" position, rather than participating in the Illino is proceedings.

[51] This case is distinguishable from Shaw v. BCE Inc., [2004] O.J. No. 5481, O.T.C. 28 (S.C.J.). In Shaw, Farley J. struck out the statement of claim in a proposed class proceeding only to be met with another claim, substantially similar to the one he struck out, advanced by another representative plaintiff represented by the same law firm. Farley J. found that the new statement of claim failed to disclose a cause of action and he struck it out on that basis. He added that, in any event, the representative plaintiff fell within the extended definition of privity from Bank of Montreal v. Mitchell. An appeal to this court was dismissed on the ground that the new statement of claim failed to disclose a cause of action: [2004] O.J. No. 3109, 189 O.A.C. 9. This court declined to comment on the res judicata issue. In Shaw, the case for application of res judicata was significantly stronger than in the present case. There had been a determination on the merits that the claim lacked validity and that the new claim did not differ in substance from the claim that had been struck out. The merits of significant aspects of the Parsons claim, those [page341] specifically pertaining to Canadian customers, have never been considered. In any event, as I have already found that the expanded Bank of Montreal v. Mitchell definition of privity does not apply here, and as Shaw rests on that same principle, Shaw has no application here.

Conclusion

[52] For these reasons, I would dismiss the appeal.

[53] If the parties are unable to agree as to the costs of this appeal, brief written submissions may be filed. Respondent's submissions to be delivered within ten days after the release of these reasons; appellants' submissions to be delivered five days thereafter.

Appeal dismissed.

Tab 10

Case Name:

Doman Industries Ltd. (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. 1996, c. 62
AND IN THE MATTER OF the Canada Business Corporations Act R.S.C. 1985, c. C-44
AND IN THE MATTER OF the Partnership Act R.S.B.C. 1996, c. 348
AND IN THE MATTER OF Doman Industries Limited, Alpine Projects Limited, Diamond Lumber Sales Limited, Doman Forest Products Limited, Doman's Freightways Ltd., Doman Holdings Limited, Doman Investments Limited, Doman Log Supply Ltd., Doman - Western Lumber Ltd., Eacom Timber Sales Ltd., Western Forest Products Limited, Western Pulp Inc., Western Pulp Limited Partnership, and Quatsino Navigation Company Limited, petitioners**

[2003] B.C.J. No. 562

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14 B.C.L.R. (4th) 153

41 C.B.R. (4th) 29

121 A.C.W.S. (3d) 276

2003 CarswellBC 538

Vancouver Registry No. L023489

British Columbia Supreme Court
Vancouver, British Columbia

Tysoe J.

(In Chambers)

Oral judgment: March 7, 2003.

(36 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Stay of proceedings against debtor -- Meetings, authorization by court -- Arrangement, judicial approval.

Application by Doman Industries for an order to authorize the calling of creditor meetings to consider its plan of arrangement under the Companies Creditors Arrangement Act. Application by the senior secured noteholders of Doman for an order to invalidate Doman's plan proposed and to file its own plan. Doman's creditors consisted of the senior secured noteholders, unsecured noteholders, a lender who provided it with an operating line of credit and unsecured trade creditors. The plan provided that the unsecured trade creditors would be paid in full. The unsecured noteholders would receive new notes plus shares in Doman. The new notes would be secured in second position against the senior notes. The plan did not seek to compromise the indebtedness owed to these noteholders. Doman sought a stay under the Act to prevent the senior noteholders from relying upon events of default, contained in their trust indenture, to allow them to accelerate repayment of indebtedness owed under their notes. Doman also sought a stay of the provision in the indenture that entitled the noteholders to require Doman to purchase their notes in the event of a change of control.

HELD: Both applications were allowed in part. Doman was granted one of its stays. The court had jurisdiction to grant a stay to prevent the senior noteholders from using the default events to accelerate repayment. The stay power in the Act could not be interpreted to allow Doman to be relieved of its purchase obligation. The Act was to be interpreted liberally. This request went beyond a liberal interpretation of the Act. The court would also not grant this request because the absence of a permanent injunction would not frustrate Doman's restructuring efforts. It was not certain that the senior noteholders would accept Doman's purchase offer. The court would not authorize the calling of the meeting. Doman's plan would not be sanctioned by the court. Doman was entitled to file a revised plan for approval. The senior noteholders were not allowed to file their own plan. Approval would constitute an improper unilateral variation of the indenture without Doman's approval. It would also give the noteholders a veto power over Doman's restructuring efforts.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, 11(4), 11.2.

Counsel:

M.A. Fitch, Q.C., S. Martin and R. Millar, for the petitioners.
G. Morawetz, R. Chadwick and J.J.L. Hunter, Q.C., for the ad hoc Committee of Senior Secured Noteholders.
J.F. Dixon, for Wells Fargo, National Association.
G.K. Macintosh, Q.C., and R.P. Sloman, for Herb Doman.
D.J. Hatter and R. Butler, for Her Majesty the Queen in Right of British Columbia.

R.D. Leong, for the Attorney General of Canada.
W.C. Kaplan, Q.C., and P.L. Rubin, for CIT Business Credit Canada Inc.
J.I. McLean, for the monitor, KMPG Inc.
D.I. Knowles, Q.C., M. Buttery and I. Nordholm, for Brascan Financial, Merrill Lynch and Oppenheimer Funds.
P. Macdonald and G. Gehlen, for Toronto Dominion Asset Management Inc., TD Securities Inc. and Tordom Company.
K. Zimmer, for Petro-Canada.
W. Skelly, for Pulp, Paper and Woodworkers of Canada, Locals 3 and 8.

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1 **TYSOE J.** (orally):-- There are two competing motions before the Court in these proceedings under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The first is a motion of the Petitioners (the "Doman Group") for an order authorizing the calling of creditor meetings to consider a plan of compromise or arrangement prepared by the Doman Group (the "Reorganization Plan" or the "Plan"). The second motion is an application by a group of secured creditors called the Ad Hoc Committee of Senior Secured Noteholders (the "Senior Secured Noteholders Committee") for numerous orders, including orders relating to the invalidity of the Reorganization Plan, allowing the Senior Secured Noteholders to vote on the Plan and authorizing the Senior Secured Noteholders Committee to file its own secured creditor Plan.

2 One of the arguments which the Senior Secured Noteholders Committee wished to advance related to the constitutionality of the Court varying the terms of a contract in the absence of enabling provincial legislation. The Senior Secured Noteholders Committee applied to adjourn all of the applications so that the necessary notice for constitutional questions to the Attorneys General of British Columbia and Canada could expire. I refused the adjournment on the basis that the constitutional question can be argued upon the expiry of the notice periods if it is still necessary to do so. Accordingly, my rulings at this stage are subject to the constitutional challenge by the Senior Secured Noteholders Committee and nothing I say in these Reasons for Judgment should be construed as a determination of the constitutional validity of such rulings.

3 The Doman Group has the following four principal types of creditors:

(a) the Senior Secured Noteholders which are owed US$160 million and who hold security over most, but not all, of the fixed assets of the Doman Group;
(b) the Unsecured Noteholders which are owed US$513 million;
(c) the lender which provides the Doman Group with an operating line of credit and which holds security against its current assets; and
(d) unsecured trade creditors which are owed in the range of $20 to $25 million.

4 The Reorganization Plan seeks to compromise only the indebtedness of the Unsecured Noteholders and the unsecured trade creditors. It is proposed that the unsecured trade creditors will be paid in full up to an aggregate ceiling or cap amount of $23.5 million. The Reorganization Plan provides that the Unsecured Noteholders are to receive US$112,860,000 Junior Secured Notes plus

85% of the shares in the Doman Group (with the existing shareholders retaining the remaining 15% of the shares). The Junior Secured Notes are to be secured in second position against the assets subject to the security of the Senior Secured Noteholders.

5 The Senior Secured Notes were issued pursuant to a Trust Indenture dated as of June 18, 1999 (the "Trust Indenture"). The principal amount of the Senior Secured Notes is due on July 1, 2004. The Doman Group is in default of the payment of the interest due on the Senior Secured Notes but it is intended that the overdue interest be paid upon implementation of the Reorganization Plan. The Trust Indenture has the usual types of events of default, including the commencement of proceedings under the CCAA, non-payment of principal or interest on indebtedness owed by the Doman Group to the Senior Secured Noteholders or to other parties and the failure to remedy a breach of any of the provisions of the Trust Indenture within 30 days after notice of the breach has been given to the Doman Group. It also has the usual provision enabling the Trustee under the Trust Indenture or a specified percentage of the holders of the Senior Secured Notes to accelerate payment of the indebtedness upon the occurrence of an event of default and to thereby make all monies owing on the notes to be immediately due and payable.

6 Sections 4.13 and 4.16 of the Trust Indenture are also relevant to the present applications. Section 4.13 reads as follows:

> (a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired, or any income or profits therefrom or assign or convey any right to receive income therefrom, except Permitted Liens (provided that Liens on Note Collateral or any portion thereof shall be governed by clause (b) of this Section 4.13) unless (i) in the case of Liens securing Indebtedness which is subordinated to the Notes and the Guarantees, the Notes and the Guarantees are secured by a Lien on such property, assets, income, profits or rights that is senior in priority to such Liens and (ii) in all other cases, the Notes and the Guarantees are equally and ratably secured.
>
> (b) The Company shall not, and shall not permit of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired that constitutes Note Collateral, any income or profits from any Note Collateral or to assign or convey any right to receive income from any Note Collateral, except for Permitted Note Collateral Liens.

Section 4.16 reads, in part, as follows:

> Upon the occurrence of a Change of Control, each Holder of Notes shall have the right to require the Company to repurchase all or any part (equal to U.S. $1,000 or an integral multiple thereof) of such Holder's Notes pursuant to the offer described below (the "Change of Control offer") at an offer price in cash equal to 101% of the aggregate principal amount thereof plus accrued and unpaid interest, if any, and Liquidated Damages, if any, to the date of purchase (the "Change of Control Payment"). Within 10 days following any Change of Con-

> trol, the Company shall mail a notice to each Holder stating: (1) that the Change of Control offer is being made pursuant to the covenant entitled "Change of Control" and that all Notes tendered will be accepted for payment; (2) the purchase price and the purchase date, which will be no earlier than 30 days nor later than 40 days from the date such notice is mailed and which shall be the same date as the Change of Control Payment Date with respect to the 1994 Notes and the 1997 Notes (the "Change of Control Payment Date"); ...
>
> On the Change of Control Payment Date, the Company shall, to the extent lawful, (1) accept for payment Notes or portions thereof tendered pursuant to the Change of Control Offer, (2) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions thereof so tendered and (3) deliver or cause to be delivered to the Trustee the Notes so accepted ...

7 The Reorganization Plan does not seek to compromise the indebtedness owed to the Senior Secured Noteholders. However, the Senior Secured Noteholders maintain that they are affected or prejudiced by the Reorganization Plan. They point to sections 4.12, 6.2 and 6.3 of the Reorganization Plan, the relevant portions of which read as follows:

> 4.12 Waiver of Defaults and Permanent Injunction
>
> From and after the Effective Date:
>
> (a) all Creditors and other Persons (including Unaffected Creditors) shall be deemed to have waived any and all defaults of the Doman Entities then existing or previously committed by the Doman Entities or caused by the Doman Entities, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Doman Entities, including a default under a covenant relating to any other affiliated or subsidiary company of Doman other than the Doman Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded;
>
> (b) a permanent injunction shall be pronounced on the terms of the Final Order against Creditors and all other Persons (including Unaffected Creditors) having contractual relationships with any of the Doman Entities with respect to the exercise of any right or remedy contained in the instruments evidencing such contractual relationships or at law generally, which might otherwise be available to such Creditors or other Persons as a result of the filing of the CCAA Proceedings, the content of the Plan, implementation of the Plan, any action taken by the Doman Entities or any third party pursuant to the Plan or the Final Order either before or after the Plan Implementation Date, or any other matter whatsoever relating to the CCAA Proceedings, the Plan, or the transactions contemplated by the Plan; and

(c) the Doman Entities may in all respects carry on as if the defaults, non-compliance, rights and remedies referred to in this section 4.12 had not occurred.

6.2 Effect of Final Order:

In addition to sanctioning the Plan, the Final Order shall, among other things:

...

(f) confirm that all executory contracts, security agreements and other contractual relationships to which the Doman Entities are parties are in full force and effect notwithstanding the CCAA Proceeding or this Plan and its attendant compromises, and that no Person party to such an executory contract, security agreement or other contractual relationship shall be entitled to terminate or repudiate its obligation under such contract or agreement, or to the benefit of any right or remedy, by reason of the commencement of the CCAA Proceeding or the content of the Plan, the Change of control of Doman resulting from the Plan, the compromises extended under the Plan, the issuance of the Junior Secured Notes, or any other matter contemplated under the Plan or the Final Order; and

(g) confirm and give effect to the waivers, permanent injunctions and other provisions contemplated by section 4.12 of the Plan.

6.3 Conditions Precedent to Implementation of Plan:

The implementation of this Plan shall be conditional upon the fulfilment of the following conditions:

(a) Court Approval

Pronouncement of the Final Order by the Court on the terms contemplated by Section 6.2 and otherwise acceptable to the Doman Entities.

The term "Unaffected Creditors" used in Section 4.12 includes the Senior Secured Noteholders.

8 The application of the Doman Group is relatively limited in scope because it simply seeks authorization to hold creditor meetings to consider the Reorganization Plan. However, it is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.

9 Counsel for the Doman Group submitted that the sole issue is whether the Court has the jurisdiction to grant a stay under s. 11(4) of the CCAA in the form of the permanent injunction specified under clause (b) of the Section 4.12 of the Reorganization Plan. I do not agree. In particular, clause (a) of Section 4.12 purports to bind Unaffected Creditors, which include the Senior Secured Noteholders, by deeming them to have waived all defaults under instruments between them and the Do-

man Group. I agree with the counsel for the Senior Secured Noteholders Committee that creditors of debtor company under the CCAA cannot be bound by the provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: see Menegon v. Philip Services Corp., [1999] O.J. No. 4080 (Ct. Jus.) at para. 38. It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it.

10 However, my conclusion in this regard does not mean that I should accede to the request of the Senior Secured Noteholders Committee for the right to vote on the Reorganization Plan. In view of the submission made by the counsel for the Doman Group that the Plan was not intended to affect the rights of the Senior Secured Noteholders, I believe that the Doman Group should first be given the opportunity to propose a revised Reorganization Plan which does not include reference to Unaffected Creditors in clause (a) of Section 4.12 or any other provision which purports to bind parties who are not given the opportunity to vote on the Plan.

11 I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

12 The Court is given the power to grant stays of proceedings by s. 11(4) of the CCAA, which reads as follows:

> (4) A court may, on an application in respect of a company other than an initial application, make an order on such term as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

13 Since the re-emergence of the CCAA in the 1980s, the Courts have utilized the stay provisions of the CCAA in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., (1988) 72 C.B.R. (N.S.) 1 (Alta. Q.B.), where the Court stayed the ability of a joint venture

partner of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement.

14 Two other prominent examples are Re T. Eaton Co. (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and Re Playdium Enterprises Corp. (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. Sup. Ct. Jus.). In the T. Eaton case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the Playdium decision, the Court approved an assignment of an agreement in conjunction with a sale in a failed CCAA proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the Playdium case relied on s. 11(4) of the CCAA, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236, where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

15 The law is clear that the court has the jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in Playdium:

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

16 Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 676, is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

17 Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the court would decline to exercise its

jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the Notes upon implementation of the Reorganization Plan.

18 The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term "potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

19 I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

20 The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

21 The language of s. 11(4) of the CCAA, on a literal interpretation, is very broad and the case authorities have held that it should receive a liberal interpretation in view of the remedial nature of the CCAA. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

22 In my view, there are numerous purposes of stays under s. 11 of the CCAA. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementa-

tion of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

23 In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

24 Section 11(4) utilizes the verbs "staying", "Restraining" and "prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

25 Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

26 There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

27 Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in Woodward's, prior to the enactment of s. 11.2 of the CCAA, to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the CCAA or to "flesh out the bare bones" of the CCAA in order to give effect to its objects: see Re Westar Mining Ltd. (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) at p. 93 and Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 (Ont. Ct. Jus.) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the CCAA during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the CCAA.

28 In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a permanent injunction in relation to Section 4.16 will not necessarily frustrate the restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of

their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

29 Although I have agreed with the reasoning of Spence J. at para. 32 of the Playdium decision, I should not be interpreted as agreeing with the correctness of the conclusion in Playdium. I have some reservations with respect to its conclusion but, as Playdium is clearly distinguishable from the present case, it is not necessary for me to decide whether or not it should be followed.

30 For these reasons, I conclude that the court does not have the jurisdiction to grant the permanent injunction contemplated by Section 4.12 (b) of the Reorganization Plan, at least as it relates to Section 4.16 of the Trust Indenture. Hence, it would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan in its present form because the condition precedent contained in section 6.3(a) of the Plan cannot be satisfied. I dismiss the application of the Doman Group, with liberty to re-apply in respect of a revised Reorganization Plan.

31 In addition to seeking an order allowing them to vote on the Reorganization Plan, the Senior Secured Noteholder Committee applied for an order authorizing it to file a secured creditor plan of arrangement or compromise and an order directing the Doman Group to pay all of its costs.

32 The form of the proposed secured creditor plan was attached to one of the affidavits. In essence, it includes the terms upon which the Senior Secured Noteholders represented by the Committee are prepared to waive breaches of the Trust Indenture occasioned by the restructuring of the Doman Group and to amend the Trust Indenture to allow the restructuring. One of these terms is the payment of a fee equal to 3% of the face value of the Senior Secured Notes (approximately US$5 million).

33 I am not prepared to allow the Senior Secured Noteholders Committee to file its own plan. If such a plan were filed and approved by the Senior Secured Noteholders, they would accomplish the same thing which they are complaining that the Doman Group was endeavouring to achieve through the permanent injunction; namely, a unilateral variation of the terms of the Trust Indenture without the agreement of the other party to the Trust Indenture. Such a plan may also have the effect of giving the Senior Secured Noteholders a veto power in respect of the Doman Group's restructuring.

34 The Senior Secured Noteholders Committee has not demonstrated a basis for the requested order that the Doman Group should pay all of its costs. The committee was presumably formed so that the Noteholders could act to protect or advance their own interests. It is not a committee requested by the Doman Group or constituted by the Court. The Noteholders may be entitled to some or all of such costs pursuant to the provisions of the Trust Indenture but that issue is not before me. As to the costs of these applications in the context of the Rules of Court, there has been divided success and I direct that each party bear own costs.

35 I dismiss the applications of the Committee for an order in relation to a secured creditor plan and an order in relation to its costs.

36 If the Senior Secured Noteholders Committee still wishes to pursue the constitutional question, arrangements for a hearing may be made through Trial Division. However, as I am not granting the application of the Doman Group for an order authorizing the calling of creditor meetings to consider the Reorganization Plan in its present form, it would seem to me that any such hearing should await the issuance of a revised form of the Plan.

TYSOE J.

cp/i/qw/qldrk/qlsng/qlbrl

Tab 11

Case Name:

Fischer v. IG Investment Management Ltd.

Between
Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba, Plaintiffs (Respondents), and IG Investment Management Ltd., CI Mntual Funds Inc., Franklin Templeton Investments Corp., AGF Funds Inc. and AIC Limited, Defendants (Appellants)

[2012] O.J. No. 343

2012 ONCA 47

287 O.A.C. 148

15 C.P.C. (7th) 81

109 O.R. (3d) 498

346 D.L.R. (4th) 598

211 A.C.W.S. (3d) 785

2012 CarswellOnt 635

Dockets: C53852, C53853

Ontario Court of Appeal
Toronto, Ontario

W.K. Winkler C.J.O., G.J. Epstein J.A. and G.I. Pardu J. (ad hoc)

Heard: December 6, 2011.
Judgment: January 27, 2012.

(84 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Appeal by mutual fund managers from order of Divisional Court allowing respondents' appeal and granting certification of proposed class action dismissed -- Respondent investors sued appellants for damages for permitting market timing that caused significant losses to respondents -- Securities Commission had investigated appellants and required them to pay $205,600,000 to investors -- Courts below erred by focusing on substantive outcome of Commission proceedings -- Motions judge erred in failing to consider that Commission lacked jurisdiction to decide liability and damages issues raised in action and that class members had no standing in Commission proceedings.

Securities regulation -- Securities commissions -- Investigations and examinations -- Appeal by mutual fund managers from order of Divisional Court allowing respondents' appeal and granting certification of proposed class action dismissed -- Respondent investors sued appellants for damages for permitting market timing that caused significant losses to respondents -- Securities Commission had investigated appellants and required them to pay $205,600,000 to investors -- Courts below erred by focusing on substantive outcome of Commission proceedings -- Motions judge erred in failing to consider that Commission lacked jurisdiction to decide liability and damages issues raised in action and that class members had no standing in Commission proceedings.

Appeal by the defendants from an order of the Divisional Court allowing the respondents' appeal and granting certification of the proposed class action. The appellants were mutual fund managers. The respondent investors alleged that the appellants permitted market timing in certain mutual funds that they managed, causing long-term investors in the affected mutual funds to suffer losses in the value of their investments of several hundred million dollars. All of the appellants had been investigated by the Securities Commission and had entered into settlement agreements with the Commission requiring them to pay $205,600,000 to investors in the relevant mutual funds. The appellants argued that the Divisional Court erred in finding that the proposed class action was the preferable procedure. The motion judge found that the action did not satisfy the preferable procedure requirement because the completed Commission proceedings and settlement agreements fulfilled the judicial economy, access to justice and behaviour modification purposes of the Class Proceedings Act. The Divisional Court held that the Commission proceedings could not be the preferable procedure for recovering damages, because the action was for significant monetary damages beyond the amount that had been recovered through the Commission proceedings. The court was satisfied that the class action was the only viable procedure for recovering these substantial additional damages.

HELD: Appeal dismissed. The courts below erred by focusing on the substantive outcome of the Commission proceedings, which was not a relevant factor in the comparative analysis under s. 5(1)(d) of the Act. The courts ought instead to have considered the regulatory nature of the Commission's jurisdiction and its remedial powers, as well as the lack of participatory rights afforded to affected investors by the Commission proceedings. A consideration of these two particular characteristics compelled the conclusion that the Commission proceedings would not fulfill the Class Proceedings Act's goal of providing class members with access to justice in relation to their claims. The jurisdiction of the Commission under s. 127 of the Securities Act was protective and preventative, not compensatory. The remedial powers available to the Commission under s. 127 were thus insufficient to enable it to fully address the respondents' claims in the proposed class proceeding. The Commission proceedings did also not provide comparable rights of participation to the respondents as the procedural rights enshrined in the Class Proceedings Act or any participatory rights. The

Commission proceedings could thus not constitute a preferable procedure to the proposed class action for purposes of the Class Proceedings Act.

Statutes, Regulations and Rules Cited:

<LEGISLATION/>
Class Proceedings Act, 1992, S.O. 1992, c. 6

s. 5(1)(d)

Securities Act, R.S.O. 1990, c. S.5, s. 127, s. 128

Appeal From:

On appeal from the order of the Divisional Court (Anne M. Molloy, Katherine E. Swinton and Thea P. Herman J.J.), dated January 31, 2011, with reasons reported at 2011 ONSC 292, 104 O.R. (3d) 615, allowing an appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated January 12, 2010, with reasons reported at 2010 ONSC 296, 89 C.P.C. (6th) 205.

Counsel:

Benjamin Zarnett, Jessica Kimmel and Melanie Ouanounou, for the appellant CI Mutual Funds Inc.

James D.G. Douglas, David Di Paolo and Heather Pessione, for the appellant AIC Limited.

Joel Rochon, Peter Jervis and Sakie Tambakos, for the respondents.

The judgment of the Court was delivered by

W.K. WINKLER C.J.O.:--

I. Introduction

1 This appeal raises the question whether a class action by investors against certain mutual fund managers is the preferable procedure for resolving the class members' claims. The statement of claim alleges that the five defendant mutual fund managers, including the two appellants, CI Mutual Funds Inc. ("CI") and AIC Limited ("AIC"),[1] permitted securities market conduct referred to as "market timing"[2] in certain mutual funds that they managed. Market timing is alleged to have caused long-term investors in the affected mutual funds to suffer losses in the value of their investments of several hundred million dollars.

2 Before the class action was started, the Ontario Securities Commission ("OSC") conducted a lengthy investigation into the practice of market timing in the mutual fund industry. The investigation led the OSC to bring enforcement proceedings against the five mutual fund managers who were named as defendants in the proposed class action. The enforcement proceedings concerned the same market timing conduct that the investors complain about in the present action.

3 All of the defendant fund managers entered into settlement agreements with the OSC staff. The terms of the settlements required the five defendants to pay $205.6 million to investors in the relevant mutual funds. For purposes of the OSC settlement agreements, the defendants admitted that:

they entered into arrangements with third-party investors, who engaged in market timing; the market timing conduct had occurred; the market timers made profits that adversely affected investors in the relevant mutual funds; and the defendants earned commissions from their arrangements with the market timers. These factual admissions were made on the basis that they were "without prejudice" to the defendants in "any civil or other proceedings which may be brought".

4 Hearings were then held before a panel of the OSC for the purpose of deciding whether to approve the settlement agreements as being in the public interest pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S. 5. These hearings, which led to the approval of the settlements, were conducted *in camera.*

5 After the settlements were approved, the plaintiffs brought a motion for certification of a class action. The central contentious issue on the motion was whether the proposed class action met the preferable procedure criterion in s. 5(1)(d) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). The motion judge concluded that although the action otherwise satisfied the criteria for certification, it did not satisfy the preferable procedure requirement. This was because, in the motion judge's view, the completed OSC proceedings and settlement agreements fulfilled the judicial economy, access to justice and behaviour modification purposes of the *CPA*.

6 The Divisional Court disagreed. Writing for the court, Molloy J. held that the OSC proceedings could not be the preferable procedure for recovering damages because the investors' action was for significant monetary damages *beyond* the amount that had been recovered through the OSC proceedings. The court was satisfied that the class action was the only viable procedure for recovering these substantial additional damages. The court went on to grant the motion for certification on certain specified conditions.

7 The appellant mutual fund managers appeal, with leave of this court, from the Divisional Court's order granting certification of the class action. The appellants submit that the Divisional Court erred in concluding that the class action is a preferable procedure to the OSC proceedings.

8 I cannot accede to this submission. As will be explained further, in considering whether an alternative means of resolving the class members' claims is preferable to the mechanism of a class action, a court must examine the fundamental characteristics of the proposed alternative proceeding, such as the scope and nature of the jurisdiction and remedial powers of the alternative forum, the procedural safeguards that apply, and the accessibility of the alternative proceeding. The court must then compare these characteristics to those of a class proceeding in order to determine which is the preferable means of fulfilling the judicial economy, access to justice and behaviour modification purposes of the *CPA*. In a given case, certain characteristics will drive the preferability analysis more than others.

9 In this case, the OSC commenced investigatory and enforcement proceedings into the market timing conduct in question. The OSC staff reached agreements with the defendants to settle the proceedings, and those settlement agreements were then approved by the OSC. The investors did not participate in the proceedings before the OSC and, quite properly, the OSC in approving the settlements did not purport to settle the claims of the investors in a full and final manner. In the circumstances, it would not have been empowered to do so. The essence of the OSC initiative was that of a parallel or complementary proceeding to any civil action brought by the investors.

10 In my view, the courts below erred by focusing on the substantive outcome of the OSC proceedings, which is not a relevant factor in the comparative analysis under s. 5(1)(d) of the *CPA*. The

courts ought instead to have considered the regulatory nature of the OSC's jurisdiction and its remedial powers, as well as the lack of participatory rights afforded to affected investors by the OSC proceedings. A consideration of these two particular characteristics compels the conclusion that the OSC proceedings would not fulfill the *CPA* goal of providing class members with access to justice in relation to their claims. Thus, the OSC proceedings cannot constitute a preferable procedure to the proposed class action for purposes of the *CPA*. The Divisional Court came to the same conclusion, albeit for different reasons, and I would therefore dismiss the appeal.

II. Background

i) OSC Investigation and Enforcement Proceedings Concerning Market Timing

11 In November 2003, the OSC launched an investigation into the practice of market timing in the mutual fund industry. "Market timers" seek to take advantage of the fact that the value of mutual funds - unlike other traded securities - is calculated only once a day (at 4:00 p.m. EST). As a result of time zone differences, the prices of securities principally traded on foreign exchanges may be as much as 12-15 hours old at the time the daily mutual fund valuation is done. As a result, the daily value of a fund may be, for a short period of time, artificially low. Market timers purchase mutual funds they believe are undervalued for a short-term turnaround, unlike the vast majority of unit holders who invest in mutual funds as long-term investments.

12 Although market timing is not an illegal activity, the profit made by market timers is at the expense of long-term investors. Also, market timing activity in a fund impedes the efficient operation of the fund in a number of ways. The OSC, in launching its investigation, was concerned that some managers of mutual funds were not taking steps to control market timing and were therefore not acting in the best interests of the relevant mutual funds.

13 At the conclusion of its investigation, the OSC initiated enforcement proceedings against the five defendant mutual fund managers for failing to act in the public interest in relation to market timing activity in the affected funds. The OSC staff entered into settlement agreements with the defendant managers, pursuant to which the defendants agreed to pay a total of $205.6 million to their investors.

14 Two separate hearings were held before a panel of the OSC to consider whether to approve these settlement agreements as being in the public interest pursuant to s. 127 of the *Securities Act*. The OSC issued general public notices that the hearings were being held, but gave no direct notice to investors.[3]

15 The first hearing occurred on December 16, 2004, and involved CI, AIC, IG Investment Management Inc. and AGF Funds Inc. These four parties jointly requested that the matter proceed on an *in camera* basis. The Chair of the OSC agreed to this request, stating:

> We will now go *in camera*. So I would ask those persons in the hearing room who are not associated with any of the four parties, their counsel, or the two Commissions [the Ontario and the Manitoba Securities Commissions] or the MFDA [the Mutual Fund Dealers Association], please, leave.

16 A second hearing was held on March 3, 2005, to consider the settlement agreement between the OSC staff and Franklin Templeton Investments. It was also conducted *in camera*.

17 The OSC approved the settlement agreements with the five defendants. All of the agreements specified that the "agreement of facts" are "without prejudice" to the parties in "any civil or other proceedings which may be brought by any other person or agency."

ii) Class Proceedings Commenced Against the Defendants

18 Shortly after the settlements were approved, several investors in mutual funds managed by the defendants commenced a class action on behalf of investors in the funds. The amended statement of claim alleges that the defendants are liable to class members for breach of a fiduciary duty and/or breach of a duty of care owed to class members for failing to take appropriate steps to stop market timing in the affected funds. The plaintiffs seek declaratory and restitutionary relief, as well as general and special damages.

19 The plaintiffs allege that, by permitting the market timing to occur, the defendants failed to act in the best interests of the fund and all investors in the fund. They assert that market timing caused an annual loss in the value of the affected mutual funds of several hundred million dollars. In addition, they allege that market timing led to the imposition of increased transaction costs on long-term investors, as well as other transaction costs arising from inefficiencies caused by the market timing conduct. The plaintiffs further assert that the amount paid by the defendants to investors under the OSC settlement agreements falls well short of providing full reparation to investors and fails to account for management and transaction costs associated with market timing activity.

iii) Certification Motion

20 The plaintiffs' motion to certify the proposed action was heard in December 2009. They filed expert evidence on the motion in support of the assertion that the OSC settlements do not constitute full compensation to investors. According to this evidence, the settlement with CI represents only 1/7 of the actual loss of CI investors and the AIC settlement represents only 1/3 of the total harm to AIC investors.

21 The defendants' primary argument in opposing the certification motion was that the action does not satisfy the preferable procedure criterion in s. 5(1)(d) of the *CPA* because the completed OSC proceedings were the preferable procedure for resolving the investors' claims. Section 5(1)(d) states:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> ...
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues ...

22 The motion judge agreed with the defendants' position and refused to certify the action. He concluded that the other four criteria for certification in s. 5(1) were satisfied: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims raise common issues; and (e) there are appropriate representative plaintiffs who could produce a workable litigation plan. Nevertheless, the plaintiffs' failure to satisfy the preferable procedure criterion was fatal to the motion for certification.

iv) Appeal to the Divisional Court

23 The plaintiffs appealed the motion judge's decision to the Divisional Court. By the time the appeal was argued, three of the five defendants had entered into settlements of the class proceedings with the plaintiffs and only CI and AIC remained (and still remain) as defendants.

24 In reasons delivered on behalf of the court, Molloy J. allowed the plaintiffs' appeal and granted a certification order. The court concluded that the motion judge's analysis of the impact of the OSC settlements on the preferable procedure assessment was "fundamentally flawed" and held that the preferable procedure criterion was satisfied.

25 Given that this appeal turns on the preferable procedure issue, I now describe in more detail the reasons of the motion judge and the Divisional Court on this issue.

III. Reasons of the Courts Below

i) The Motion Judge's Preferable Procedure Analysis

26 The motion judge described, at paras. 195-200, the general principles regarding the preferable procedure criterion in s. 5(1)(d) of the *CPA*. He noted, citing *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 69, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346, and *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 27, that the preferability inquiry is to be conducted through the lens of the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.

27 As recognized by the motion judge, at paras. 221-22, there are two core elements of the preferable procedure inquiry: see *Hollick*, at para. 28; *Markson*, at para. 69. The first element is whether the class action would be a fair, efficient and manageable method for advancing the claim. The second element is whether a class action would be preferable to other reasonably available means of resolving the class members' claims. This question of preferability turns not only on whether a class action would be preferable to individual civil actions, but also on whether a class action would be preferable to "all reasonably available means of resolving the class members' claims": *Hollick*, at para. 31.

28 The motion judge concluded, at para. 210, that if the OSC proceedings had not taken place, a class action would have been the preferable procedure. And he observed, at para. 221, that even when the availability of the OSC proceedings is considered, a class action would meet the first element of the *Hollick* inquiry because it constitutes a fair, efficient and manageable method for resolving the claims of the class members. However, the motion judge went on to conclude that the proposed class action does not meet the second element of the *Hollick* inquiry because the action is not preferable to other reasonably available means of resolving the class members' claims. In his view, the OSC proceedings were the preferable procedure for resolving these claims.

29 In reaching this conclusion, the motion judge found that the OSC proceedings accomplished the *CPA* goals of behaviour modification, judicial economy and access to justice: see paras. 235-60. In his view, behaviour modification was achieved by penalizing the defendants for their failure to respond to the market timing conduct (para. 236); judicial economy was achieved by securing compensation for all investors in "an efficient, principled, and consistent way" (para. 238); and access to justice was accomplished because the OSC settlements included the same form of remedy sought by

the class action (*i.e.*, monetary relief), and in reaching the settlements, the OSC staff took an adversarial stance towards the defendants in a manner akin to the role of class counsel, demanding concessions from the defendants and the payment of compensation for the investors (paras. 246-48).

30 The motion judge further observed, at para. 252, that the debate over whether the OSC proceedings were the preferable procedure could not be "converted into a settlement approval hearing" under the *CPA*. However, he was of the view that the criteria that a court applies when deciding whether to approve a negotiated settlement of a class action are relevant "when a court considers the issue of preferable procedure and the issues of behaviour modification, judicial economy and access to justice" (at para 252). After setting out the settlement approval criteria, the motion judge held, at para. 254, that, with one exception, the application of these criteria "favour the conclusion that the OSC proceeding was the preferable procedure."

31 Finally, before leaving the discussion of access to justice - which he saw as the definitive issue weighing against certification - the motion judge considered the plaintiffs' argument that the quality of the access to justice provided by the OSC proceedings was "in doubt because the OSC may have left the investors' money on the table" (para. 255). The motion judge refused to give effect to this argument and instead accepted the defendants' submission that, once the court is satisfied that the OSC's purpose was to obtain restitutionary compensation for the harm suffered by the investors and that the process to do so was adequate, the court should not "second-guess" the access to justice provided by the OSC proceedings (at paras. 256-57).

ii) The Divisional Court's Preferable Procedure Analysis

32 The Divisional Court allowed the plaintiffs' appeal from the motion judge's order refusing certification. In doing so, Molloy J. described three errors in the motion judge's preferable procedure analysis, at para. 33:

1) he failed to apply the low evidentiary burden on the plaintiffs at the certification stage;
2) he improperly found that the "completed OSC proceeding was a preferable proceeding for the remaining portion of the plaintiffs' claims going forward"; and
3) he erred in law by considering the criteria for approval of a settlement at the certification stage.

33 Molloy J. explained that the first two errors are closely related. On the one hand, the motion judge found that there was "some basis in fact" to support the investors' assertion that the OSC settlement only represented part of the total damages claimed by the investors. However, in Molloy J.'s view, the motion judge went on to disregard this finding in his analysis of the preferable procedure.

34 According to Molloy J., at para. 8, the plaintiffs' action "does not seek the recovery of the $205 million already paid; it seeks recovery of the damages not recovered through the OSC proceeding." In her opinion: "Unless it can be said that the plaintiffs have achieved full, or at the very least substantially full, recovery, they are entitled to maintain this action. There is no other viable alternative for recovering the shortfall after the OSC settlement".

35 Molloy J. went on to conclude, at para. 41, that the key point indicating that a class action is the preferable procedure is that "it is ... illogical to characterize the OSC proceeding as a preferable

procedure for recovering that money which the OSC proceeding failed to recover in the first place. It is by definition not a preferable procedure in those circumstances."

36 Molloy J. held, at para. 47, that the motion judge further erred by applying the test for approval of a settlement in the context of a certification motion. She explained, at paras. 48-57, why these criteria should not be taken into account at the certification stage.

IV. Analysis

37 On appeal to this court, the appellants contend that the Divisional Court committed two errors:

1) the Divisional Court applied the incorrect standard of review to the motion judge's decision; and
2) the Divisional Court erred in its preferable procedure analysis.

38 I will first briefly deal with the standard of review issue and then turn to the issue of the preferable procedure analysis.

1) Standard of Review Applied by the Divisional Court

39 The appellants submit that the Divisional Court failed to accord the "special deference" owed to the motion judge's exercise of discretion in deciding that the preferable procedure requirement was not met, citing *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 43, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. As stated in their factum, the motion judge "was sensitive to the applicable legal principles to be brought to bear in the preferable procedure analysis."

40 I agree with the appellants that substantial deference must be accorded to motion judges in certification proceedings and that a reviewing court should only intervene with a motion judge's certification decision when the judge makes a palpable and overriding error of fact or otherwise errs in principle. This standard of review is well-established in the jurisprudence: see *Pearson*, at para. 43; *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15; *Markson*, at para. 33; *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 39, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50.

41 In my view, however, the Divisional Court did not err in its application of the standard of review. The court identified, at para. 58, errors in principle in the motion judge's approach to the preferable procedure inquiry, which provided the basis for appellate intervention. Among the errors in principle identified by the Divisional Court were the motion judge's application of "the wrong test in his consideration of the preferable procedure test for certification" and the motion judge's error in considering factors relevant to the approval of a settlement at the certification stage. Deference cannot shield errors in principle.

42 I agree with the Divisional Court's holding that the motion judge erred in principle in reaching the conclusion that the OSC proceedings provided the preferable procedure for resolving the class members' claims. However, as I will now discuss, my reasons for reaching this conclusion differ from those expressed by the Divisional Court.

2) The Preferable Procedure Inquiry

43 Turning to the merits of the Divisional Court's preferable procedure analysis, in my view, the error in principle that led to the motion judge's incorrect conclusion on preferability was more fundamental than his alleged failure to recognize that a substantial amount of the monetary damages claimed by investors went uncompensated in the completed OSC proceedings. The question whether the OSC settlements provided investors with all or substantially all of the monetary relief that they seek in the class action is not the proper focus of the preferable procedure inquiry.[4] In other words, the Divisional Court did not ask itself the right question.

44 The second element of the preferability inquiry described in *Hollick* requires a comparative analysis as to whether a class action would be preferable to other reasonably available means of resolving the class members' claims.[5] The preferability inquiry must necessarily take into account the central characteristics of the proposed alternative proceeding as a means of resolving the claims. This exercise includes, but is not limited to, considering the following characteristics of the alternative proceeding: the impartiality and independence of the forum; the scope and nature of the alternative forum's jurisdiction and remedial powers; the procedural safeguards that apply in the alternative proceeding, including the right to participate either in person or through counsel and the transparency of the decision-making process; and the accessibility of the alternative proceeding, including such factors as the costs associated with accessing the process and the convenience of doing so.

45 These characteristics must be considered in relation to the type of liability and damages issues raised by the class members' claims against the defendants in the putative class action and the manner in which they are addressed, if at all, in the alternative proceeding. The court must then compare these characteristics to those of a class proceeding through the lens of the goals of the *CPA*: judicial economy, access to justice and behaviour modification.

46 Not all of the characteristics outlined above will be material in a given case. Each case will of course turn on its own facts. The requisite comparative analysis in the instant case, however, reveals the following important differences between the OSC proceedings and the class proceeding, which support a conclusion that a class proceeding is preferable for resolving the class members' claims:

i) The jurisdiction of the OSC under s. 127 of the *Securities Act* is regulatory (*i.e.*, protective and preventative), not compensatory. Accordingly, the remedial powers available to the OSC under the section are insufficient to enable it to fully address the class members' claims in the proposed class proceeding.

ii) The OSC proceedings did not provide comparable rights of participation to the affected investors as the procedural rights enshrined in the *CPA*, or any participatory rights for that matter.

47 I will now elaborate on the significance of these distinctions, particularly in relation to the second element of the preferable procedure inquiry as described in *Hollick* (*i.e.*, whether a class action would be preferable to other reasonably available means of resolving the class members' claims). While I agree with the motion judge that the critical question in this regard is whether the OSC proceedings met the objective under the *CPA* of providing the proposed class members with access to justice, in my view, a comparative examination of the key characteristics of the OSC proceedings with the proposed class action reveals that the OSC proceedings did not provide class members with access to justice and thus cannot be the preferable procedure for resolving their claims.

1. The Essential Differences Between the OSC Proceedings and the Proposed Class Action

i) The Scope and Nature of the OSC's Jurisdiction and Remedial Powers

48 In arguing that the preferable procedure requirement was met, the plaintiffs provided evidence about the scope and purpose of the OSC's jurisdiction and remedial powers in the form of an affidavit from Professor Poonam Puri, an Associate Professor at Osgoode Hall Law School and Head of Research and Policy at the Capital Markets Institute of the Rotman School of Management. In her affidavit, Professor Puri explained:

> Public enforcement by securities regulators and criminal enforcement by criminal law authorities, as well as private enforcement by investors through private suits and class action proceedings all play an important role in ensuring that public company managers and mutual fund managers act in the best interests of shareholders and unit holders, respectively. None of these mechanisms is mutually exclusive. [Footnote omitted.]

49 Professor Puri's evidence outlined the essential purposes of the OSC enforcement proceedings as well as the role of private enforcement, including class action litigation, in regulating the behaviour of capital market participants such as the defendants. As Professor Puri explained in her affidavit, the OSC's regulatory jurisdiction over the defendants under s. 127 of the *Securities Act* was exercised in a different context and for a different purpose than the court's jurisdiction to adjudicate class actions and other civil claims concerning the defendants' conduct.

50 For ease of reference, s. 127 of the *Securities Act* provides in part as follows:

> 127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> 1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
> 2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.
>
> ...
>
> 3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
> 4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
>
> ...
>
> 6. An order that a person or company be reprimanded.
> 7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

...

8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.
10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

...

(4) No order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act*.

51 The decision of the Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, illustrates the distinction referred to by Professor Puri. In this decision, Iacobucci J. described the scope and purpose of the OSC's jurisdiction under s. 127 of the *Securities Act*. At para. 42, he cited with approval the following statement by Laskin J.A. in the decision under appeal: "The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets". Iacobucci J. elaborated on the nature and extent of the OSC's jurisdiction under s. 127 as follows, at para. 45:

> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

52 These passages from *Asbestos Minority Shareholders* make it clear that s. 127 is not intended to serve as a compensatory or remedial provision with respect to harm done to individual investors. Rather, this provision empowers the OSC to regulate capital markets in a way that protects investors and the efficiency of capital markets. For example, s. 127 permits the OSC to make orders to: cease trade; prohibit an individual from becoming an officer or director of a public company; issue reprimands; levy an administrative penalty of up to $1 million for each failure to comply with Ontario

securities law; and make an order for disgorgement to the OSC of any amounts obtained as a result of non-compliance with Ontario securities law. Section 127 does not empower the OSC to make orders requiring a party to make compensation or restitution or to pay damages to affected individuals.

53 In contrast, s. 128 of the *Securities Act* allows the OSC to apply to a judge of the Superior Court to make a variety of orders, including orders requiring compensation or restitution to the aggrieved person or company, and requiring payment of general or punitive damages to any person or company. The OSC did not bring a s. 128 application in relation to the market timing conduct in issue here.

54 The OSC proceedings and the civil action in the form of the proposed class proceeding are intended as parallel, not mutually exclusive, proceedings. It is worth noting, for purposes of analogy, that a court may make an order under s. 128 (including an order for restitution or punitive damages) despite the existence of any order made by the OSC under s. 127.

55 Unlike enforcement proceedings under s. 127 of the *Securities Act*, the purpose of the proposed class proceeding is to obtain relief for investors - monetary or otherwise - who claim to have suffered losses from the defendants' impugned conduct. While the OSC in this case approved settlement agreements that included a compensatory element for investors arising from the same impugned conduct, such voluntary payments by the defendants cannot alter the regulatory purpose of the OSC proceedings for purposes of the preferability analysis under the *CPA*. The role of the OSC proceedings was not to assess the liability issues raised in the statement of claim, such as the alleged breaches by the defendants of a fiduciary duty or a duty of care owed to the investors, or to quantify the harm allegedly caused by such breaches.

56 The disparate purpose of the OSC proceedings and the proposed class action is emphasized by comments made by Commission counsel during the settlement approval hearing. In response to a request by the Chair of the OSC for an explanation of the basis upon which the settlement quantum was determined, counsel stated:

> We didn't include a formula for the calculation in the Settlement Agreement because there are different ways of determining the amount and different legitimate theories as to what the proper method of calculation would be. And it would be quite possible that the Respondents [the defendant mutual fund managers] would have chosen a different method that was also justified, or Staff could have chosen a different method that was also justified if this had been a contested proceeding. So the method that was used was the parties tried to relate it to the standard that would have been expected of the fund managers at the time of trading.

These comments by Commission counsel reflect that the OSC did not attempt to quantify the payment arrived at in the settlement agreements in a manner analogous to the way in which damages might be calculated in a civil action brought by investors.

57 This comment also demonstrates another important distinction between the OSC proceedings and the proposed class action. As discussed next, the procedure adopted by the OSC was characterized by the marked lack of access - both participatory and informational - that was provided to the investors.

ii) Lack of Participatory Rights of Investors in the OSC Proceedings

58 In contrast to the procedure underpinning a class proceeding, which is premised on facilitating transparency and participation on a class-wide basis, the OSC proceedings provided little to no basis for investor participation.

59 While a general notice of the settlement hearings was posted on the OSC's website, there was no attempt to notify the affected investors that the hearings were being held. Neither the investors nor their counsel attended the hearings or made submissions. Moreover, the substantive portions of the hearings took place *in camera* and were thus closed to anyone but counsel for the defendants and the relevant regulatory commissions.

60 Similarly, the procedure by which the settlements were arrived at did not facilitate investor participation. The amount of compensation that the defendants agreed to pay to the affected investors as a term of the settlement agreements was calculated without any opportunity for the investors to participate and without any details in the record of the OSC proceedings as to how this amount was calculated.

61 In contrast, the purpose of the procedural vehicle of the class action is to allow for the appointment of a representative plaintiff who shares a sufficient common interest with members of the class. The representative plaintiff conducts the litigation on behalf of class members under court supervision[6] and within the presumptive principle of an open court.

62 The observations about the accessibility of the OSC proceedings are not meant to suggest that the elements of confidentiality and lack of participation by the investors made the hearings and settlement agreements somehow inappropriate or nefarious. On the contrary, the point is that the OSC proceedings were not intended or designed to provide the investors with access to justice for purposes of adjudicating the claims advanced in the proposed class proceeding. In short, the investors were not, and were not intended to be, parties to the OSC process.

63 Indeed, it is worth repeating that the settlement agreements signed by the defendants expressly contemplated that they could face civil law suits in relation to the conduct that gave rise to the settlements. The OSC settlements simply resolved the proceedings taken by the OSC against the defendants. The settlements did not finally resolve the claims of the investors as against the defendants, nor did they purport to do so.

64 I will now explain how the courts below failed to consider these essential differences between the OSC proceedings and the class proceeding in the preferable procedure analysis.

2. Errors in the Preferable Procedure Analysis of the Courts Below

65 The motion judge's reasons, at paras. 57-69, for dismissing the plaintiffs' argument that they would be denied access to justice if the class proceeding were not certified reflect his failure to properly consider the defining characteristics of the OSC proceedings in his preferability analysis. The motion judge, at para. 60, dismissed the evidence and argument concerning the different and, indeed, complimentary purposes of the OSC regulatory proceedings and the proposed class proceeding as "largely irrelevant to the objective issues that I must decide". He classified this discussion as a debate about procedural fairness and gave three reasons for concluding that the issue of procedural fairness "is not material or is subsumed by the debate about access to justice":

1) The OSC proceedings did not bind the investors, who are free to commence a proposed class proceeding and seek its certification (para. 61).
2) The investors did not have the right to opt out of the OSC proceedings and they would have the right to opt out of class proceedings. Nevertheless, it is unlikely any member of the class would opt out, because a class proceeding would be the only viable means for them to exercise their private rights. Moreover, "it would be a pointless argument to suggest on behalf of the investors that a class proceeding provides procedural fairness and is the preferable procedure because one has the opportunity to opt out of it" (para. 62).
3) Procedural fairness considerations must include the fact that class members will not have their "day in court" in the conventional sense because it is only the representative plaintiff and class counsel who have a truly participatory role. The procedural fairness that justifies binding the class members to the outcome of the common issues trial or a negotiated settlement is only provided by proxy (para. 67).

66 These three factors - when properly analyzed - support, rather than militate against, a finding that a class action would be the preferable procedure for resolving the common issues raised by the class members' claims.

67 The fact that the OSC proceedings did not bind investors is a reflection of why it cannot be said that the investors have had access to justice. In the words of the motion judge, at para. 61: "the Defendants are not denying an investor's ability to seek private recourse through the court system." The only conclusion that could be drawn is that even the defendants contemplated the prospect of civil proceedings. The reasons for this are clear: no settlement on compensation was ever agreed to by the class members; nor was the matter of compensation adjudicated by any body of competent jurisdiction, such as might have the effect of limiting juridical recourse.

68 The motion judge's second reason also contains the recognition that a class action is the preferable procedure in light of the principle of access to justice. He observed that an individual action is not a viable process "given the small size of the individual claims and the difficulties of forensic proof" (para. 62). However, the motion judge concluded that because no one would want to opt out of the class action, the right to opt out is irrelevant to access to justice considerations.

69 While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. It is not an illusory right that should be negated by speculation, judicial or otherwise. Further, on a practical level, the fact that the economics of judicial recourse is a potential barrier to proceeding individually is an argument in favour of - not against - certification of a class proceeding.

70 The motion judge's third reason for dismissing the plaintiffs' argument regarding procedural fairness misconstrues the very rationale for and approach to class proceedings in this province. According to the motion judge, at paras. 67-69, even if a class action were to be certified, investors would not truly have their day in court unless individual assessment trials were required. In support of this conclusion, the motion judge noted that class action litigation is prosecuted by representative plaintiffs and class counsel and, accordingly, investors "would be non-participants in the resolution of the common issues" (at para. 69). The motion judge then equated the non-participation by inves-

tors in the OSC proceedings with the so-called non-participation by investors in a class action, at para. 69:

> In my opinion, the issue in this case is not whether the investors *who were non-participants in the OSC proceedings and who would be non-participants in the resolution of the common issues* had or would have procedural fairness. The issue is whether they have had access to justice and whether the other important values of the *Class Proceedings Act, 1992* have been satisfied. The considerable power of the subjective and emotive plea that the investors have not had their day in court misdirects the analysis from the access to justice and other policy issues that inform the preferable procedure debate ... [Emphasis added.]

71 The notion that class members would not have their day in court unless individual assessment trials were to take place is contrary to the very essence of a class proceeding. Were it to be accepted as a general principle, it would serve to defeat every certification motion. The fundamental purpose of the class proceeding is to provide access to justice, not to deny it. Equating the *total* lack of participation by investors in the OSC proceedings with their alleged non-participation in resolving the common issues in the class proceeding ignores the underlying representative structure of a class proceeding. The purpose of ensuring that there is an adequate representative plaintiff is to ensure that the rights of each class member are protected and the claims of each are advanced vigorously.

72 As stated in *Hollick*, at para. 15: "by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own". This economy is achieved, in part, by appointing a representative plaintiff who shares a sufficient common interest with other members of the class and by allowing the representative plaintiff, under court supervision, to conduct the litigation on behalf of class members. The notion of representation that is inherent in the procedural mechanism of a class proceeding is a very far cry from the complete absence of participation by investors in the OSC proceedings. The motion judge erred in dismissing this critical distinction as simply a "subjective and emotive plea" that has nothing to do with access to justice.

73 Moreover, the above passage clearly reveals the motion judge's failure to properly consider the accessibility of the OSC proceedings insofar as the class members are concerned. To repeat, in his view, "the issue in this case is not whether the investors ... had or would have procedural fairness. The issue is whether they have had access to justice". Yet access to justice by the investors surely could not be achieved through the completion of a process that was not made accessible to them.

74 By ignoring the essential differences between the scope of the OSC's jurisdiction and remedial powers and by treating as irrelevant the lack of participation in those proceedings by class members or their representatives, the motion judge viewed the OSC proceedings as if they were a reasonable alternative to a class proceeding. He then analyzed the motion before him as though the key issue were the propriety of the settlements attained through the s. 127 proceedings. Thereafter, he applied the settlement approval criteria under the *CPA* to the settlements flowing from the OSC proceedings as a basis for finding that those proceedings were a reasonable alternative to the proposed class proceeding. This circular analysis compounded the initial error in principle.

75 The Divisional Court properly identified the motion judge's error in applying the test for approval of a settlement to the preferable procedure question under s. 5(1)(d) of the *CPA*. Molloy J.

explained in detail, at paras. 48-57, why these criteria are not applicable at the certification stage. I would add that settlement criteria relative to a class action settlement cannot be applied to an OSC settlement for the simple reason that those criteria are based on a certification order appointing a representative plaintiff to represent the absent class members. An OSC proceeding lacks this fundamental quality.

76 However, at para. 44, Molloy J. made the observation: "There may even be situations where it would be appropriate to consider the appropriateness of a class action in light of a prior settlement that resulted in substantial compensation for the plaintiffs, even if not reaching 100 cents on the dollar." In my view, this observation reflects the same error that the motion judge committed. In order to assess if a settlement reached through an alternative procedure resulted in "substantial compensation" to the plaintiffs, it would be necessary to consider some of the same criteria that a court takes into account in deciding whether to approve a settlement, such as the likelihood of recovery, the recommendation and experience of counsel, and the future expense, likely duration of the litigation and risk. Yet, as Molloy J. explained, these criteria should not be applied when deciding the issue of preferable procedure.

77 Moreover, because "substantial compensation" is a relative term, in order to determine if an amount was "substantial" it must be contextualized. This requires measuring the compensation awarded in the alternative forum against some other amount, such as the potential amount of damages available in the proposed class action lawsuit. However, at the certification stage, in most instances, no reliable yardstick is available because the amount recoverable in the proposed class proceeding would be as yet unknown. Put another way, the preferability analysis should not be reduced to an *ex post facto* assessment of the adequacy of the award arrived at through the alternative procedure.

78 An even more fundamental reason why the preferability analysis should not be conducted in this way is the fact that a certification motion is a procedural matter. It is not a determination of the merits of the dispute: see s. 5(5) of the *CPA*. An evaluation of the adequacy of a prior settlement as a basis for reaching a decision on preferability would require a determination that is tantamount to making a finding on the merits of the dispute. An evaluation of this sort would be a marked departure from the stipulation in *Hollick* that there need only be "some basis in fact" to ground the conclusion that a class proceeding is the preferable procedure. Indeed, as McLachlin C.J. stated in *Hollick* at para 16: "the certification stage is decidedly not meant to be a test of the merits of the action."

79 In my view, as stated above, the preferable procedure inquiry must instead focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding. The court must assess the capacity of the alternative procedure to adequately resolve the claims raised by the class members. The *CPA* mandates that this must be a procedural discussion. Hence the wording of the s. 5(1)(d), which provides "a class proceeding would be the preferable procedure for the resolution of the common issues".

V. Conclusion

80 In summary, the motion judge erred in principle by treating the negotiated payments that were made to investors in the OSC settlements as somehow eliminating the need to compare the purely regulatory function served by the OSC proceedings with the private remedial function to be played by the proposed class action. This fundamental error led the motion judge to wrongly dismiss as ir-

relevant important access to justice considerations, including that the OSC lacked the jurisdiction under its enabling provision of s. 127(1) of the *Securities Act* to decide the liability and damages issues raised in the private law action, as well as the consideration that the class members had no standing in the OSC proceedings and those proceedings were conducted behind closed doors.

81 Had the motion judge taken these considerations into account in his preferability analysis, it is clear from the balance of his reasons that he would have granted the order to certify the class action. As he said, at para. 273, "had the action been the preferable procedure, the appropriate thing to do would have been to certify the class action conditionally on the court approving a revised litigation plan."

82 Finally, I note that Molloy J. stated, at para. 58, that the motion judge "also erred by concluding that the test for preferable procedure could be met by a proceeding that had already been concluded. This was a fundamental error in principle." I do not agree with Molloy J. on this point as a general proposition.[7] It seems to me that the analysis of whether an alternative proceeding is preferable to a class proceeding will depend on a thorough consideration of the central characteristics of the alternative proceeding, rather than on whether the other proceeding has concluded, is pending or remains ongoing.

VI. Disposition

83 For these reasons, I would dismiss the appeal from the Divisional Court's order granting certification of the proposed class action, on the condition that the motion judge approves a revised litigation plan.

84 The parties may make written submissions on costs to be delivered within 10 days of the release of these reasons.

W.K. WINKLER C.J.O.
G.J. EPSTEIN J.A.:-- I agree.
G.I. PARDU J. (ad hoc):-- I agree.

cp/ln/e/qlacx/qljxr/qlmll/qlced/qlhcs/qlgpr/qlcas

1 As indicated in the reasons below, at para. 23, the three other defendants, IG Investment Management Ltd., Franklin Templeton Investments Corp. and AGF Funds Inc., entered into settlements with the plaintiffs after the motion to certify the class action was denied at first instance.

2 Market timing, as discussed further, at para. 11, involves short-term trading of mutual fund securities to take advantage of short-term discrepancies between the "stale" values of securities in a mutual fund's portfolio and the current market value of the securities.

3 Four days' notice was given for the first hearing and three days' notice was given for the second hearing.

4 I will explain this specific point in more detail, at paras. 75-79.

5 McLachlin C.J. noted in *Hollick*, at para. 29, that s. 5(1)(d) of the *CPA* requires that a class action be the preferable procedure for "the resolution of the *common issues*" (emphasis added), rather than the preferable procedure for the resolution of the class members' claims. However, as she went on to explain, at para. 30, the question of preferability "must take into account the importance of the common issues in relation to the claims as a whole."

6 See *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767, at paras. 44-47.

7 As Molloy J. herself went on to note, at para. 59, she did "not wish to be taken as having ruled that the existence of a past settlement or a concluded proceeding relating to the same claims can never be taken into account at the certification stage."

Tab 12

Case Name:

Indalex Ltd. (Re)

**RE:IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canadian Inc. and Novar Inc., Applicants**

[2009] O.J. No. 3165

55 C.B.R. (5th) 64

2009 CarswellOnt 4465

79 C.C.P.B. 104

179 A.C.W.S. (3d) 267

Court File No. CV-09-8122-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: July 2, 2009.
Judgment: July 2, 2009.
Released: July 24, 2009.

(18 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Application by members of a supplemental executive retirement plan for the reinstatement of their pension benefits, dismissed -- Benefits ceased when the company sought protection under the Act -- These benefits were pre-filing unsecured obligations -- Applicants did not establish that they were entitled to any priority with respect to these benefits -- Operators of the company were authorized to pay all reasonable expenses incurred by them in carrying on business in the ordinary course -- Benefits did not qualify as such payments.

Application by members of the Indalex Supplemental Executive Retirement Plan for an order requiring the Indalex applicants to reinstate the payment of supplemental pension benefits retroactive to April 2009. The applicants had a contractual entitlement to pension benefits under the Supplemental Plan. The Plan was an unfunded and non-registered supplemental pension plan. Benefits under the Plan were paid out of the general revenues of the Indalex applicants. After the Indalex applicants filed for protection under the Companies' Creditors Arrangement Act on April 3, 2009 they informed the members of the Plan that their supplemental pension benefits were being stopped.

HELD: Application dismissed. The payments were based on services provided to Indalex prior to April 2009. These obligations were pre-filing unsecured obligations. The applicants did not establish that they were entitled to any priority with respect to their benefits. There was no basis to treat them differently from any other unsecured creditors of the Indalex applicants. The reinstatement of such payments would represent an improper re-ordering of the existing priority regime. The Indalex applicants were authorized to pay all reasonable expenses incurred by them in carrying on business in the ordinary course. The benefits did not qualify as such payments.

Statutes, Regulations and Rules Cited:

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

Counsel:

Linc Rogers, Katherine McEachern and Jackie Moher, for the Applicants.

Ashley Taylor and Lesley Mercer, for FTI Consulting Canada ULC, Monitor.

Paul Macdonald and Jeff Levine, for JPMorgan (DIP Lender).

Kenneth D. Kraft, for SAPA Holding AB.

Andrew Hatnay and Demetrios Yiokaris and Andrew Mckinnon, for Keith Carruthers and SERP Retirees.

B. Empey, for Sun Indalex Finance LLC.

John D. Leslie, for the U.S. Unsecured Creditors' Committee.

G. Finlayson, for U.S. Bank as Trustee for the Noteholders.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- I heard argument in this matter on July 2, 2009 at the conclusion of which I dismissed the motion with reasons to follow. These are those reasons.

2 Members of the Indalex Supplemental Executive Retirement Plan or "SERP", (referred to collectively as the "SERP Group") brought this motion for an order requiring the Indalex Applicants to reinstate payment of supplemental pension benefits retroactive to April 2009.

3 The motion is opposed by the Indalex Applicants, the Noteholders and by the DIP Lender. Counsel to the DIP Lender submits that if these payments are made, they would constitute an event

of default under the DIP Agreement. Such payments would need the consent or waiver from the DIP Lender which counsel submits, is not forthcoming.

4 The SERP Group have a contractual entitlement to pension benefits under the Supplemental Retirement Plan for executive employees of Indalex Limited and associated companies (the "Supplemental Plan").

5 The Supplemental Plan is an unfunded and non-registered supplemental pension plan. Benefits under the Supplemental Plan are paid out of the general revenues of the Indalex Applicants.

6 Immediately after filing for CCAA protection on April 3, 2009, the Indalex Applicants informed the SERP Group that their supplemental pension benefits were being stopped.

7 The situation confronting members of the SERP Group is very similar to that faced by certain former employees of Nortel Networks ("Former Nortel Employees") who recently brought a motion requesting an order requiring the Applicants in Nortel's CCAA proceedings (the "Nortel Applicants") to make payments which the Nortel Applicants were contractually obligated to pay to Former Nortel Employees, relating to the Transitional Retirement Allowance and any pension benefit payments Former Nortel Employees were entitled to receive in excess of the pension plan. The motion was dismissed. (See *Nortel Networks Corp., Re*, [2009] O.J. No. 2558, 2009 CarswellOnt 3583).

8 The reasons provided for the dismissal of the motion of the Former Nortel Employees are applicable to this case.

9 SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.

10 The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.

11 The Amended and Restated Order authorizes the Indalex Applicants to pay all reasonable expenses incurred by the Indalex Applicants in carrying on their business in the ordinary course. SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized to pay the monthly SERP payments.

12 In certain CCAA proceedings, the court has granted relief to permit payment of pre-filing unsecured debt. However, in these cases, such payments have for the most part, been considered to be crucial to the ongoing business of the debtor company. In this case, the Indalex Applicants are seeking a going concern solution for the benefit of all stakeholders and their resources should be used for such purposes. I have not been persuaded that the SERP payments are crucial to the ongoing business of the Indalex Applicants and such payments offer no apparent benefit to the Indalex Applicants. (*Re Nortel, supra,* at paragraphs 80 and 86.)

13 The SERP Group submits that there are hardship issues that should be taken into account. In Nortel, a hardship exception was made. However, the Nortel exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the Former Nortel Employees. The Nortel hardship exception recognizes that any distribu-

tion would represent an advance on the general distribution. The situation facing the Indalex Applicants is different. The Indalex Applicants have significant secured creditors and unlike the situation in Nortel, it is premature to comment on the prospects of any meaningful distribution to unsecured creditors.

14 Counsel to SERP Group also submitted that CCAA protection in this case had been obtained for a company that was liquidating its assets. Counsel for the SERP Group submitted that Indalex had put itself up for sale and commenced a "marketing process" and as such it was not restructuring, rather, it was selling itself. This led to the submission that the cutting of benefits payable to the SERP Group was not necessary or justified for the sale of the company under the CCAA.

15 I fail to see the relevance of this submission. At the present time, the Applicants are properly under CCAA protection. No motion has been brought to challenge the appropriateness of the CCAA proceedings and, in my view, nothing in the CCAA precludes the ability of a debtor applicant to sell its assets. See *Re Nortel Networks Corporation* - endorsement released July 23, 2009 on this point.

16 Finally, counsel to SERP Group placed emphasis on the fact that the amount required to satisfy the obligations to SERP Group is not significant. While this submission may be attractive on the surface, to give effect to this argument would violate a fundamental tenet of insolvency law, namely, that all unsecured creditors receive equal treatment. In my view, there is no basis to prefer the SERP Group or, indeed, any retired executive who is entitled to SERP payments in priority to other unsecured creditors.

17 Counsel to SERP Group also relied upon *Doman Industries et al*, 2004 B.C.S.C. 7333 for the proposition that, the fact that a company can reduce its costs if it can terminate contracts, is not sufficient for a CCAA court to authorize the termination of the contract. In *Doman, supra,* the point at issue concerned licences under the *Forest Act* which created the concept of replaceable contracts. Doman held certain licences. As noted by Tysoe J. (as he then was), at paragraph 7, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the licence holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. That is not the situation in this case. The contractual situation in *Doman, supra,* is not, in my view, comparable to this case. *Doman* is clearly distinguishable on the facts.

18 For the forgoing reasons, the motion of SERP Group for reinstatement of SERP benefits is dismissed.

G.B. MORAWETZ J.

cp/e/qllxr/qlpxm/qlaxw/qlaxr/qlhcs/qlcal

Tab 13

Case Name:
Liberty Oil & Gas 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 Liberty Oil & Gas Ltd. and 3860337 Canada Ltd. (0201-090057)
IN THE MATTER OF Section 192 of the Canada Business Corporations Act, R.S.C. 1985, C. C-44, as amended;
AND IN THE MATTER OF an arrangement involving Lexxor Acquisition Company Ltd., Lexxor Energy Inc., Liberty Oil & Gas Ltd. and their respective shareholders, defendant

[2002] A.J. No. 1302

2002 ABQB 949

38 C.B.R. (4th) 227

117 A.C.W.S. (3d) 862

2002 CarswellAlta 1364

Action No. 0201-03299

Alberta Court of Queen's Bench
Judicial District of Calgary

Hart J.

Heard: October 9, 2002.
Judgment: October 28, 2002.

(12 paras.)

Counsel:

Josef G.A. Kruger, for the applicants.
Larry B. Robinson and Michael D. Aasen, for Lexxor Acquisition Company Ltd. and Lexxor Energy Inc.

Frances Dearlove, for Richter, Allan & Taylor.
Peter S. Jull, Q.C., B.A.R. Smith, Q.C. and David LeGeyt, for Liberty Oil & Gas Ltd.
Geoffrey D. Baker, for Rick Martin.
G. Brian Davison, Davison Worden Sloan LLP.

REASONS FOR DECISION

1 **HART J.**:-- The issue raised on this application is whether or not the stay granted in my order of June 28, 2002 was too broad vis-a-vis directors by reason of the failure to expressly limit it in accordance with section 5.1(2)(b) of the Companies Creditors Arrangement Act.

2 Section 5.1 was added to the Act in 1997. Before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief to certain claims against directors of the petitioning company.

3 The section reads as follows:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> (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.

4 In the case at bar, a draft Statement of Claim has been placed before the court wherein the prospective Plaintiffs, two shareholders of the petitioning company, claim financial loss and damage caused by alleged reliance upon fraudulent or negligent misrepresentations as to the value of the shares of the company by the proposed Defendant, a director.

5 While there may be room for argument as to whether the prospective Plaintiffs are "creditors" within the meaning of sub-section (b), it seems clear that the claims are based upon allegations of wrongful or oppressive conduct, to wit, fraudulent or intentional misrepresentation. On my reading of the section in the context of the Act as a whole, claims against directors based upon allegations of such conduct are not to be included in the compromise or arrangement, whether brought by a "creditor" or any other party. Parliament has clearly excluded them.

6 It follows, therefore, that the order of June 28, 2002 should be amended to reflect the exclusion set out in Section 5.1(2) and I direct accordingly. A similar conclusion was reached by Paperny J. of this court (as she then was) in Canadian Airlines Corps. (Re) [2000] A.J. No. 771; 2000 ABQB 442, Action No. 0001-05071 (para.90).

7 It was argued by the Respondents that the Applicants should not be permitted to pursue their proposed action in any event. They take this position for a variety of reasons including an alleged failure to show that the claims are "prima facie meritorious", a lack of jurisdiction in the court to set aside or vary the entered order and the Applicants' filing of an appeal which allegedly makes the chambers judge "functus" with respect to the order appealed from.

8 With respect, I am unable to agree with these positions. In my view, the appropriate test to apply to the draft pleading is the well-known "plain and obvious" test which is applied on applications to strike under rule 129. See Hunt v. Carey Canada Inc. [1990] 2 S.C.R. 959. On this test I find that the proposed Statement of Claim must be allowed to stand. It is trite to observe that the merits of the proposed action are not before the Court at this juncture. Similarly, I am not persuaded that I lack jurisdiction to deal with the June 28, 2002 order either because it deals with substantive rights and has been entered or because an appeal has been taken from some parts of the order.

9 In the result, the Applicants' claims are allowed to proceed notwithstanding the stay against directors in the June 28 Order and counsel are directed to collaborate upon suitable changes in wording to amend that order to reflect the exclusion in Section 5.1(2) of the Act. In the event that consensus cannot be reached without delay, the matter can be brought back before me.

10 If necessary, costs of this application may be spoken to.

HART J.

cp/i/nc/qlmmm

Tab 14

Indexed as:

Mangan v. Inco Ltd.

Between
James Mangan, plaintiff, and
Inco Limited, defendant

[1998] O.J. No. 551

38 O.R. (3d) 703

55 O.T.C. 161

27 C.E.L.R. (N.S.) 141

16 C.P.C. (4th) 165

77 A.C.W.S. (3d) 709

Court File No. C-1923/96

Ontario Court of Justice (General Division)
Sudbury, Ontario

Poupore J.

February 11, 1998.

(28 pp.)

[Ed. note: A Corrigendum was released by the Court February 12, 1998 and the correction has been made to the text.]

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class or representative actions, members of class -- Settlements -- Breach, what constitutes -- Barristers and solicitors -- Relationship with client -- Confidential communications.

Motion by the defendant for relief from alleged violations of minutes of settlement. Sulphur dioxide gas escaped from the defendant's premises, and an action was commenced under the Class Proceedings Act. Extensive negotiations and mediation resulted in detailed minutes of settlement. Under the settlement the defendants were required to establish a telephone hotline to provide information to

claimants, and were required to publish notices in newspapers and on radio broadcasts. Class counsel retained a marketing firm to design, produce and distribute a large number of "claim form kits" to potential claimants. Most of the kits were mailed, but some were left at distribution points together with a leaflet advertising the services of the class counsel's firm. The defendant argued that the provisions of the Act prohibited any notice not first approved by the Court, and that the class counsel's tactics violated the spirit of the settlement. Class counsel stated that they had good reason to believe that many class members were not aware of their rights under the settlement after receiving the court-approved notice. They also argued that communications with potential class members were protected by privilege.

HELD: Motion granted. It was not for the court to rule on the spirit of the settlement. However, the Act required all notices to be approved by the Court. The solicitation campaign did not constitute privileged solicitor-client communication, as there was no intention of confidentiality or confidentiality in fact and no element of litigation strategy involved. Class counsel was restrained from further attempts at giving unapproved notice and was required to provide the defendant with copies of all notices of claim received after the mailing of the claim form kits. The defendant was entitled to as many additional peremptory challenges, pursuant to the terms of settlement, as there were notices of claim obtained under the unauthorized notice. Class counsel was responsible for the defendant's solicitor and client costs in exercising its additional peremptory challenges. Class counsel was prohibited from recovering its costs of providing the unauthorized notice, either from the defendant or from the class. Class counsel was liable for the defendant's costs in respect of any claims found to be fraudulent.

Statutes, Regulations and Rules Cited:

Act Respecting Champerty.
Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(b).
Class Proceedings Act, 1992, ss. 17, 17(4), 17(5), 17(6), 17(6)(c), 17(6)(d), 20, 33(1).

Counsel:

James M. Young and Michael McGowan, for the plaintiff.
Larry P. Lowenstein, for the defendant.

POUPORE J.:--

THE FACTS

1 Sulphur dioxide and/or other gases were released from Inco Limited's Copper Cliff plant on November 16, 1995. As a result, a potentially large number of persons living within the gases plume area may have been adversely affected.

2 This action was commenced under the Class Proceedings Act, 1992 (The Act) on March 8, 1996. Lengthy and difficult settlement negotiations ensued, including mediation. Detailed Minutes of Settlement were executed on the 16th day of September, 1997.

3 The within class proceeding was certified on the 25th day of November, 1997. The Order certifying the proceeding specified in part:

> NOTICE
>
> 23. THIS COURT ORDERS that notice be provided to the Class by:
> (a) the defendant's causing notices substantially in the dorm attached hereto as Schedule "G" to be published in the Sudbury Star and in Northern Life on 2 occasions each, one week apart;
> (b) the defendant's causing notices in the form of a French language translation of schedule "G" to be published in the Le Voyageur on 2 occasions, one week apart;
> (c) the defendant's causing notices substantially in the form attached hereto as Schedule "H" to be read on each radio station located in Sudbury on 2 occasions each between 7 and 9 a.m. or between 5 and 7 p.m. A french language translation of Schedule "H" shall be used on french language stations; and
> (d) the plaintiffs establishing a telephone hotline for claimants to call to request information.
>
> 24. THIS COURT ORDERS that the plaintiff and defendant shall coordinate the notice efforts and agree on the timing and incidental details of the notices. Any disputes shall be summarily determined by this court.

4 The Minutes of Settlement and Order provided for a compensation chart, breaking claims down into categories. Category 1 dealt with claimants whose symptoms were not confirmed by clinical notes and records or medical reports (subjective classification of the symptoms). Damages for Category 1 claimants who chase not to opt out of the Class, pursuant to the provisions of the court approved notice, could be randomly audited by a referee, challenged by Inco and/or assessed by a mediator or arbitrator. As part of the arbitration process, the arbitrator was given the discretion to award solicitor and client costs against any claimant who made a fraudulent misrepresentation or omission and also may be required to pay the arbitrator's costs. 20% of the amount awarded was to be deducted for legal fees with an additional 10% deducted for the Class Proceedings Fund. Compensation for successful claimants in this category was fixed at a flat rate depending on the severity of the symptoms; $250 for mild, $1,000 for moderate and $1,250 for severe symptoms.

5 In March, 1997, Class counsel commissioned a survey to obtain statistical evidence for possible use under s. 23 of the Act. Based on information received, counsel formed the opinion that possibly between 5,000 and 10,000 people may have suffered symptoms from the gas release. Prior to the execution of the Minutes of Settlement, Class counsel obtained a list of names, addresses and telephone numbers of people who lived in the plume area in 1995 as well as people who moved out of the area after the release.

6 On or before October 28, 1997 (prior to court approval for Notice of Certification) Class counsel retained the services of a marketing firm to design, produce and eventually mail a large number of what is described as "claim form kits". These kits consisted of an envelope, a covering letter, an 8-page class action settlement guide, a 4-page detailed claim form, a notice of claim coupon and a return envelope with Class counsel's address and a prepaid postage stamp thereon. To demonstrate the nature and effect of the claim form kits, a front and back view of the envelope together with the covering letter are attached to this judgment as Appendix "A".

7 On December 18, 1997, prior to the date set in the November 25, 1997 Order for potential claimants to opt out of the Class Proceedings (opt out date December 29, 1997), the marketing firm mailed, by bulk mail, approximately 8,632 claim form kits to anyone who lived in the plume area. A further 2,072 kits were bulk mailed to people who appeared to have moved from the plume area since the gas release. Where someone appeared to have moved from the plume area to one of two addresses, the marketing firm mailed kits to both addresses.

8 Class counsel also left claim form kits (up to 99) at several distribution points in the plume area. These distribution points included businesses, convenience stores, a coffee shop and Lotto 649 counter. The kits contained the same before described material together with a leaflet advertising their law firm personnel and services in connection with wills and powers of attorney.

9 Beginning December 23, 1997 (prior to opt out date), and continuing on December 29, December 30, December 31, 1997 to the date of this motion, law students employed by Class counsel telephoned addressees of the bulk mail kits. A script was followed by the students. They were also given a list of sample questions and answers in case issues arose during the calls.

10 On December 16, 17, 18, 19 and 22, 1997 (prior to opt out date) and on December 31, 1997, Class counsel entered into various business premises and inquired whether an owner or manager was available. Class counsel would then inform that individual about the gas release and the general nature of the Class Action. If the response indicated that customers or staff were affected, Class counsel would engage in a discussion. Where prospects of claims appeared most promising, Class counsel left a "Notice to All Persons Exposed" at the premises for posting and claim forms.

11 On December 17, 1997 (prior to opt out period), Class counsel also wrote to contacts at several institutions in the plume area. These letters sought assistance in locating persons present at the institutions at the time of the gas release.

12 The evidence discloses Class counsel's efforts have been extremely successful in increasing the number of claim forms submitted.

13 On January 6, 1998, defendant's counsel faxed this Court an "urgent message" with a copy to Class counsel. This motion resulted.

Argument

14 Inco argues that the provisions of the Act prohibit any notice within a class proceeding that is not first approved by the Court. It attempts to demonstrate the necessity for this position by stating that while the Court approved notice complied with s. 17(6) of the Act, the material disseminated by Class counsel failed to mention the provisions for opting out of the Class, Class counsel's fees, Class Proceedings Fund fees and Inco's rights of challenge and/or for random assessments. The impropriety of Class counsel promoting their firm members and the firm itself with respect to wills and powers of attorney under the auspicious of what could be considered court proceedings was mentioned as well.

15 Inco further states that the settlement arrived at after long and difficult negotiations, including mediation prohibited Class counsel's actions.

16 Class counsel on the other hand state that the provisions of the Act respecting notice are cumulative. They do not prevent vigorous counsel from issuing their own notice in a form of their choosing.

17 Class counsel state they had good reason to believe many Class members did not know of or understand their rights under the settlement after receiving, if at all, the Court approved notice. Mr. McGowan, for the plaintiff, went so far as to state that he was of this opinion even at the time of seeking court approval of the settled upon Court notice of certification.

18 Further, it was argued that Class members are entitled to untrammelled legal advice and the Court ought not to shackle the scope of Class counsel's work except where there has been a clear and objectionable excess. Class counsel go on to raise the question of privilege with respect to their communications with potential Class members. They particularly object to Inco's request to know who responded to these communications and to view the claim forms filed.

19 Also, Class counsel state that they, no less than any other citizen, have a constitutionally protected right of free expression. They go on to quote Sections 1 and 2(b) of the Canadian Charter of Rights and Freedoms Act.

THE ISSUES:

20

1. Does notice within a Class Proceeding require prior Court approval: before certification; after certification but before the opting out period; and after the opting out period expires?
2. To what extent may Class counsel communicate with both potential and actual Class members
3. Does the settlement arrived at by the parties in this proceeding impact on No. 1 and/or No. 2 above?

THE LAW:

Issue #1 - Notice

21 Class actions are very powerful devices that multiply the stakes of ordinary litigation many fold. Consequently, the parties to a class action and counsel for the class are driven by very strong incentives which do not necessarily coincide with the interests of absent class members or tend to promote fairness to the other side. The Court's review of notices to the class is designed to provide a check on the tendency of a class action to be turned into an instrument of oppression or unfairness through the dissemination of misleading, incomplete, one-sided or otherwise inappropriate notices. "Notice is available fundamentally for the protection of the members of the class or otherwise for the fair conduct of the action and should not be used merely as a device for the undesirable solicitation of claims."

> Advisory Committee Notes, 1966 Amendment, Subdivision (d)(2), U.S. Fed. R. Civ. P. 23

22 American courts have recognized that notice in a class action is a powerful instrument that carries with it a great potential for abuse. For example, various parties will have a strong interest in the decisions of Class members to opt out or not. Court supervision of any attempt to systematically notify the class about the case is essential if the opt-out decision is to be informed, balanced and independent:

It is essential that class members' decisions to participate or to withdraw be made on the basis of independent analysis of their own self interest, and the vehicle for accomplishing this is the class notice. See Impervious Paint Ind. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky.), appeal dismissed without op., 659 F.2d 1081 (6th Cir. 1981). Accordingly, it is essential that the district court closely monitor the notice process and take steps necessary to ensure that class members are informed of the opportunity to exclude themselves or to participate in the judgment. Id. at 1202; see Fed. R. Civ. P. 23(c)(2).

The notice disseminated to class members is "crucial" to the entire scheme of Rule 23. See Kleiner 751 F.2d at 1202 ("In view of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action."). Notice "sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected." Erhardt v. Prudential Group, Inc., 629 F. 2d 843, 846 (2d Cir. 1980); Impervious Paint Ind., 508 F. Supp. at 723.

"It is the responsibility of the court to direct the 'best notice practicable' to class members, Rule 23(c)(2), and to safeguard them from unauthorized, misleading communications from the parties or their counsel." Erhardt, 629 F.2d at 846. Misleading communications to class members concerning litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally. In re School Asbestos Litigation, 842 F.2d at 680. "Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable." Kleiner 751 F.2d at 1203. Here, I find that unilateral communications with class members by various attorneys were misleading and made it unlikely that class members, who received these communications or were informed of their contents, made an informed choice to exclude themselves from the class.

...

I find that the misleading aspects of the communications of counsel were self-evident. These communications undermined the spirit of the notice plan approved by this Court.

...

I approved the notice plan because it apprised prospective class members of the terms of the proposed settlement in a neutral fashion that would enable class members to make an informed choice. Id.; see In re Corrugated Container Antitrust Litig., 643 F.2d 195, 223 (5th Cir. 1981). I now conclude that the mislead-

ing letters and advertisements of counsel opposed to the settlement interfered with the careful balance that the notice package achieved. Instead of providing class members with documents that would enable a reasonable person to make an informed, intelligent decision whether to opt out or remain a member of the class, some counsel have now exposed class members to one-sided, misleading claims that likely will prohibit a "free and unfettered" decision to opt out of the class. See Erhardt, 629 F.2d at 846 ("Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice."). (emphasis added)

Georgine v. AmChem Products, Inc., 160 F.R.D. 478, 490, 497 (E.D. Pa. 1995)

Notice to class members is crucial to the entire scheme of Rule 23(b)(3). It sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected. See In re Gypsum Antitrust Cases, 565 F.2d 1123, 1125(9 Cir. 1977); In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5 Cir. 1977). It also preserves the right of class members to "opt out" if they believe their interests are antagonistic to the other class members, or if they wish to proceed by separate suit. In re Nissan Motor Corp. Antitrust Litigation, supra at 1104-05.

It is the responsibility of the court to direct the "best notice practicable" to class members, Rule 23(c)(2), and to safeguard them from unauthorized, misleading communications from the parties or their counsel. Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice. (emphasis added)

Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2nd Cir. 1980)

Unapproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice. Particularly should such communications seem vested with official authority, there arises not only the risk of subsequent disenchantment with the judicial process, but also the danger that individuals will be induced to act to their detriment in reliance upon misinformation and/or falsehoods. Thus entailed in this abuse is something more than a general interest in orderly process which is shared by the court and the public; there is the added interest of the individual in achieving a full and fair judicial remedy.

Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790-91 (E.D. La. 1977)

> Commentators have suggested that FR Civ P 23(c)(2) notice should emanate from the court and on the court's stationery in order to prevent FR Civ P 23 from being used as a device to enable client solicitation.
>
> 32B Am Jur 2d FEDERAL COURTS, s. 2062

23 One of the greatest risks of unsupervised notice is that the party providing the notice will fail to disclose its interest in the case. The drafters of the Act worried specifically about this problem, requiring that class counsel's fee arrangements be disclosed and establishing judicial supervision of notice to insure adequate disclosure. Accordingly, s. 17(6)(c) and (d) of the Act provide (emphasis added):

> Notice under this section shall, unless the court orders otherwise, ...
>
> (c) describe the possible financial consequences of the proceeding to class members;
>
> (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements ...

24 Here, Class counsel's fees depended upon the number of claims submitted into the settlement: 20% of the amounts awarded were to be diverted to Class counsel (and a further 10% was to go to the Class Proceedings Fund). This, however, was not revealed in Class counsel's unauthorized solicitation campaign although the "claim form kits" were cloaked with the appearance of a dispassionate summary of the claims process and its consequences.

25 In a spirit similar to section 17 of the Act, American courts have recognized that the failure to disclose one's financial interest in a case renders a notice materially misleading:

> Various communications disseminated to class members by attorneys opposed to this settlement were, on their face, clearly materially false and misleading in several respects. Many of the letters and advertisements were misleading because they ... did not reveal the personal interests of the drafters of the letters and advertisements.
>
> ...
>
> Another misleading characteristic of the letters and advertisements disseminated by counsel is that each of them failed to disclose that the authors had a strong pecuniary interest in disseminating/publishing the communications ... In addition, asbestos plaintiffs' counsel would benefit financially from additional opt-outs ...
>
> ...
>
> In the instant case, because none of the communications at issue revealed to the recipient that the drafter had a financial motive to obtain additional opt-outs, the recipient was not on notice to closely scrutinize the substance of the communications. Moreover, as apparent disinterested officers of the court, class members likely believed the communications. (emphasis added)

Georgine, 160 F.R.D. at 490, 494-95, 496

26 Unsupervised notice promulgated by an interested party interferes with the efficacy and fairness of a class action. Unsupervised notice can also work great unfairness to other parties as well as associate the court involuntarily with the unseemliness that goes along with private solicitation by an interested party. Through experience, United States courts have become aware of the "heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding".

Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790 (E.D. La. 1977)).

27 In one American case in which class counsel had engaged in mass mailings to class members which included brochures about their practices, the court issued a protective order because of such demonstrated "potential for abusive communications with class members."

Reed v. American Steamship Co., 682 F. Supp. 333, 339 (E.D. Mich. 1988)

28 In another American case involving an unauthorized mass mailing by class counsel soliciting participation in a class action, the court aptly summarized the objections to the practice:

> The impropriety of this letter is clear even if addressed solely to Rule 23(c)(1) class members whose continued involvement in the suit is uncertain. It was even more improper because it was sent to non-class members whose inclusion in the class is now sought. It has the odour of barratry.
>
> There is no provision in the Federal Rules for counsel for a party, sua sponte, to notify class members or non-class members, formally or informally, of the pendency of a lawsuit. In an action such as this one, arising under Subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, notice to class members is governed by the provisions of Rule 23(d)(2). Rule 23(d)(2) vests the court with the sole discretionary authority to issue notice. As Rule 23(d)(2) states, the discretionary notice is for the purpose of assuring fair conduct of an action or protecting class members -- it is not for undesirable solicitation of claims. See, EEOC v. Red Arrow Corp., 392 F.Supp. 64, 8 FEP Cases 621 (E.D. Mo. 1974); Cherner v. Transitron Electronic Corp., 201 F.Supp. 934 (D.Mass. 1962); Hormel v. United States, 17 F.R.D. 303 (S.D.N.Y. 1955). In fact, class member communications initiated by counsel without court supervision which have improper connotations are considered a breach of professional ethics. Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972). n7 Further, solicitous communication with persons who are not even class members for the purpose of representation is a sufficient basis for denial of class action status with respect to those persons improperly solicited. Carlisle v. LTV Electrosystems, Inc., 54 F.R.O. 237(N.O. Tex. 1972).
>
> n7 See also Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc. 481 F.2d 1045, 1050 (2d Cir. 1973) cert. den. 94 S.Ct. 722.

In EEOC v. Red Arrow Corp., supra, the EEOC (without prior authorization by court) placed an advertisement in the newspaper soliciting unsuccessful applicants at the defendant company to participate in a lawsuit. Chastising the EEOC, the court said:

Said advertisement was neither authorized nor was any mention of it made to this Court prior to publication. Such conduct is wholly and totally reprehensible and is inconsistent with the high standard of conduct required from an officer of the Court. This Court has never and shall never countenance such demeanor [sic] on the part of an attorney for to do so would undermine the very bulwarks of our jurisprudential heritage. Id.

While refusing to dismiss the action entirely, the court ruled that no fruits of the impermissible publication would be admissible in evidence and that any similar publication would result in dismissal.

Clearly, it is the responsibility of the court to either promulgate a discretionary 23(d)(2) notice where one is deemed appropriate or to designate that a party send such a notice under the court's supervision. 38 Moore's Federal Practice P23.72 (1974) citing Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 398, n.157 (1967). Professor Moore cautions:

[If] a notice is sent out by the parties the court should carefully supervise its contents in order to avoid the undesirable solicitation of claims or other improprieties. Id. (Emphasis supplied).

The authority and responsibility is also vested in the court to supervise the conduct of the parties even after the notice is sent. Professor Moore continues:

Should the notice elicit any inquiries from class members, the court should likewise supervise the contents of any responses. Id.

Lewis v. Vloomsburg Mills, Inc., 1976 U.S. Dist. LEXIS 17261, at *5-8 (D. S.Car. 1976)

29 The unsupervised "drumming up" of business presents a special danger of unfairness in a case like this one, where compensation has been authorized for people who claim completely subjective ailments without any medical backup (Category 1) and consequently where the opportunity for fraud lurks. The Act induces defendants to agree to such settlements with the assurance that the court will review and approve any attempt to give notice. This scheme enables the court to screen for and prevent the issuance of notices that tend to invite fraudulent or abusive claims. When the court is circumvented, the result is notices such as the December 12, 1997 cover letter (Appendix "A") sent to thousands by Class counsel highlighting: People who did not get medical treatment can still get up to $1,250 each in compensation.

30 In the United States, the authority of a court to check abuses in the dissemination of notices in a class action has been a matter of judicial interpretation, and, as the cases cited above show, many courts have found that the prevention of abuse requires that courts play an active role in scrutinizing the attempts of interested parties to promulgate notices. It is true that some commentators in the United States dispute whether the court should play such a role. In Ontario, however, there is no room for argument. Section 20 of the Act makes this supervising role of the court mandatory. The Act expresses a preference for the judicial ability to review class notices and prevent the abuses that have sprung up in the United States as a result of unsupervised solicitations. Class counsel's systematic campaign of notice without the approval of the court violated the plain language of the Act.

31 At the end of the section titled "Notice Under The Proposed Class Actions Act", the Law Reform Commission Report makes 11 recommendations. The last of these recommendations states:

> (11) Notice should not be given unless the court approves its content.

32 Subsections 17(4) and (5) of the Act explicitly contemplate the modes of notice that may be given in a class proceeding, including the very ones employed by Class counsel:

> (4) The court may order that notice be given,
>
> (a) personally or by mail;
> (b) by posting, advertising, publishing or leafleting;
> (c) by individual notice to a sample group within the class;
> (d) by any means or combination of means that the court considers appropriate.
>
> (5) The court may order that notice be given to different class members by different means.

33 In all circumstances, it is "the court" which will order notice; and s. 20 leaves no doubt: "[a] notice under section 17, 18 or 19 shall be approved by the court before it is given".

34 I am satisfied the notice provisions of the Act require all notices be approved by the Court including before certification, after certification before the opting out period expires as well as after.

Issue #2 - Solicitor Client Communication

35 Prior court approval for all notices given under the Act does not mean that Class counsel may not communicate with members of a class it represents for legitimate purposes in a nonabusive way. The Act does however clearly forbid unilateral efforts to give "notice" and Class counsel's mass solicitation campaign cannot be regarded as anything other than a concerted effort to give notice.

36 The composition of a class is not fixed or determinable until the opt-out period required by the Act has expired. In the opt-out period, potential class members are free to decide whether or not to participate in the class action. The Act requires this option because individuals pursuing their self-interest may have very good reasons not to be bound by a resolution of the class case. They may want to preserve their rights to pursue individual actions; they may not feel that they have been wronged; or they may have other available avenues of redress which they perceive to be superior than the class proceeding. Thus, no matter how the relationship of class counsel and class members

is classified after the opt-out period has expired, during the opt-out period potential class members can be regarded as no more than potential clients of class counsel.

37 As stated by Newberg (the well known American treatise on class actions):

> Courts are concerned during the period after certification but before the expiration of the exclusion period with the possibility of solicitation or champerty by the attorneys for the class representative or the negotiation of piecemeal settlements by the defendants. During this exclusion period, the status of class members is particularly amorphous because the putative class may contain members who will reject the class action remedy.
>
> Newberg on Class Actions, s. 15.15, at 15A3 (3rd ed. 1992)

38 Privilege will be extended to communications which meet the test propounded by Wigmore and accepted by the Supreme Court of Canada:

> 1. The communication must originate in confidence that they will not be disclosed;
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
> 4. The injury that would inure to the relation by the disclosure of the communication must be greater that the benefit thereby gained for the correct disposal of litigation.
>
> 8 Wigmore, Evidence (McNaughton rev. 1961), par. 2285, at 527, as quoted by Spence, J. in Slavutych v. Baker (1975), [1976] 1 S.C.R. 254 at 260.

39 Privilege will attach to communication between solicitor and client if it is made in the course of seeking legal advice with the intention that it be kept confidential.

Solosky v. Canada, [1980] 1 S.C.R. 821 at 835

Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 870-72

40 Thus when communication between solicitor and client is made in the presence of third parties and no reasonable steps are taken to ensure that the conversation would be kept confidential no privilege attaches to the communication. Accordingly, where a document was widely circulated within a bank with no notation on its face that it was to be kept confidential, and no intention that it be kept confidential, it was not privileged.

> Toronto Dominion Bank v. Leigh Instruments Ltd. (1997), 32 O.R. (3d) 575 (Gen. Div.)
>
> R.D. Manes & M.P. Silver, Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993) at 79-82

Wellmans v. General Crane Industries Ltd. (1986), 20 O.A.C. 384

41 Class counsel's solicitation campaign cannot be considered privileged solicitor client communications consistent with these authorities. The campaign was undertaken with no intention of confidentiality or confidentiality in fact. By Class counsel's admission, most of the recipients of the solicitations were not class members, and Class counsel knew this would be the case before sending the solicitations. Similarly, no steps were taken to insure that the solicitations be treated as confidential communications. No warning or indication of secrecy was included with the solicitations and recipients were at all times free to circulate and share the materials as they saw fit.

42 Class counsel have also not raised any valid claim of solicitors' work product or litigation privilege relating to their unauthorized solicitations. The conduct concerned involves no work product and no invasion of privacy. There is no element of fact, evidence presentation, or litigation strategy involved. The conduct in issue relates to attempts to publicize the Settlement and locate claimants. Furthermore, Class counsel have taken no steps to maintain privacy. They have sought publicity and they have placed their conduct in the public domain.

Issue #3 - The effect of the settlement

43 There is no doubt Inco considered it had a complete settlement, including what notices would be given to possible Class members. The Minutes of Settlement set out the notice of certification in detail and the method of its delivery by print and radio media. The Minutes of Settlement did not prohibit any other forms of notice which might be undertaken by Class Council.

44 Inco's counsel states Class counsel violated the spirit of the settlement. That may be so from Inco's perspective. However, if one thing is to be learned, it is that defence counsel in dealing in Class Proceedings ought to be extremely careful and diligent while crafting settlement documentation. Often times, Class counsel have a direct interest in the number of claimants coming forward to join the Class.

45 The settlement documentation did not restrict the complained of course of action of Class counsel and the Court is not going to attempt to rule upon what Inco states was the spirit of the settlement.

Remedy and Order

46 It was submitted that an appropriate remedy for Class counsel's unapproved solicitation campaign must take into account the effect of the campaign on the Court's process, on putative Class members and on Inco.

47 As to the Court's process, unauthorized mass notice campaigns engaged in by Class counsel render the Act's careful regulation of notice and the Court's role in supervising notice ineffectual and irrelevant. This is complicated further by Class counsel using material imprinted with the court style of cause to tout their firm and firm members. An appropriate remedy must promote future compliance with the Act and respect for the court's process.

48 As to Inco, the campaign may have invited abusive and fraudulent claims by highlighting the opportunity to claim up to $1,250, without any support whatsoever, in a mass distribution that by admission reached thousands who are not class members. Inco submits that it would be inappropriate to deprive class members with bona fide claims of the compensation they are entitled to under the settlement because Class counsel undertook an unauthorized notice campaign. Rather, Inco submits it should be afforded adequate opportunity to investigate any fraud and abuse that may have

been engendered by Class counsel's solicitation and be compensated for any such fraud or abuse discovered. To this end, Inco requests the Court to order that: (a) Class counsel provide it with copies of all notice of claim coupons it received in this action together with the date of receipt; (b) Class counsel supply a list of all claimants who have responded to any of its unauthorized solicitations; (c) Inco be entitled to additional peremptory challenges pursuant to the terms of this settlement in respect of any claimants who have responded to unauthorized solicitations, so that such claimants shall be subject to individual assessment at Inco's discretion; (d) Class counsel be denied their fees from any claimant who responded to an unauthorized solicitation; (e) Class counsel pay Inco's costs and the costs of the Arbitrator on a solicitor and client basis in respect of any claims discovered to be fraudulent or exaggerated; (f) Class counsel indemnify Inco for any claims submitted by anyone who received unapproved solicitations after Inco protested this matter to the Court; and (g) for the costs of this motion.

49 As to putative Class members who may have been induced to forgo opting out of this case or claiming compensation through Inco's pre-existing program, it is submitted that an appropriate remedy would require Class counsel to be denied their fees and costs under the settlement in respect of any claimant who has made a claim after being the recipient of an unauthorized solicitation, such that successful claimants be entitled to retain the monies which would otherwise have been remitted to Class counsel by way of fees. This would require the Court to order Class counsel to ascertain the necessary information from claimants.

50 The Court was requested by the defendant to declare that the conduct of Class counsel violated the Rules of Professional Conduct and an Act Respecting Champerty, R.S.O. 1897 as referred to in ss. 33(1) of the Act. Firstly, these proceedings are not the proper forum to deal with the Law Society's Rules of Professional Conduct. Secondly, I am not sure the Court has jurisdiction to make the declaration requested with respect to champerty by virtue of an Act Respecting Champerty, R.S.O. 1897 merely being referred to in ss. 33(1) of the Act. In any event, it is not necessary for me to do so in order to properly dispose of this motion.

51 In all the circumstances and given the actions of Class counsel, left unchecked, would have resulted in substantially increasing their own gain, this Court is satisfied the following Order is required:

1. Class counsel shall forthwith cease and be restrained from all further attempts at giving unapproved notice in these proceedings;
2. Class counsel shall provide forthwith the solicitors for Inco with copies of all notice of claim coupons they received in this action after December 18, 1997, together with the date of receipt;
3. Inco shall have as many additional peremptory challenges, pursuant to the terms of the Minutes of Settlement, as it is determined that there were notice of claim coupons filed by Category I claimants, as a result of the unauthorized notice, to be exercised at Inco's discretion;
4. Class counsel shall be responsible for Inco's solicitor and client costs in exercising the additional preemptory challenges referred to in No. 3 above;
5. Class counsel shall not recover either from the defendant or the Class any of their costs and disbursements incurred in giving any of the unauthorized notices referred to in these reasons;

6. Class counsel shall pay Inco's costs and the costs of the Arbitrator on a solicitor and client scale in respect of any claims submitted by Category I claimants as a result of the unauthorized notice and found to be fraudulent.

52 Submissions regarding costs have yet to be made so I will reserve on same until after argument. Counsel are invited to approach me through the trial coordinator to arrange a suitable date. If it is the intention of the defendant to request costs against Class counsel personally, then it is directed to give Class counsel notice of its intention in writing, sufficiently prior to the date set, for preparation.

POUPORE J.

* * * * *

APPENDIX "A"

DESMARAIS, KEENAN
Barristers and Solicitors
Suite 100, 30 Durham St.
Sudbury, Ontario
P3C 5E5

MANGAN v. INCO

Class Action Claim Forms Inside

Communiquons-nous avec vous dans la langue officielle de votre choix? Telephone (705) 675-7269

Are we communicating with you in the official language of your choice? Telephone (705) 675-7269

This package contains

Class Action Claim Forms

for the MANGAN v. INCO class action settlement
for the November 16, 1995 accidental release
of Sulpher Dioxide Gas.

DEADLINES: CLAIMANTS MUST

1. file a Notice of Claim by March 6, 1998, and
2. file a Detailed Claim Form by June 8, 1998.

(REDUCED FROM IS ORIGINAL SIZE OF 9 3/16" X 5 3/4")

DESMARAIS, KEENAN
Barristers and Solicitors
Suite 100, 30 Durham St.
Sudbury, Ontario
P3C 5E5

MCGOWAN & ASSOCIATES
Barristers and Solicitors
Suite 405,
133 Richmond St. West
Toronto, Ontario

M5H 2L3

December 12, 1997

Dear

Mangon v. Inco Ltd. Class Action

We are the lawyers for the class in the class action lawsuit about the sulphur dioxide gas release from Inco's Copper Cliff acid plant on November 16, 1995 at about 5:00 p.m.

If you or a member of your family were adversely affected by the gas, and wish to make a claim under the settlement of this case, you may use the enclosed papers.

As explained in the enclosed Guide (cream coloured paper):

1. you must file the Notice of Claim Coupon (blue paper) not later than March 6, 1998;

   and

2. you must file the Detailed Claim Form (green paper) not later than June 8, 1998.

You may obtain further information by calling 705-675-7269.

Yours very truly,

James M. Young
(Desmaris, Keenan)

Yours very truly,

Michael McGowan
(McGowan & Associates)

P.S. People who did not get medical treatment can still get up to $1,250 each in compensation. See the Guide for details.

qp/s/bbd/mjb/DRS

Tab 15

Indexed as:
Menegon v. Philip Services 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 Courts of Justice Act, R.S.O. 1990 c. C-43, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of Philip Services Corp. and the applicants listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Between
Joseph Menegon, plaintiff, and
Philip Services Corp., Salomon Brothers Canada Inc., Merill Lynch Canada Inc., CIBC Wood Gundy Securities Inc., Midland Walwyn Capital Inc., First Marathon Securities Limited, Gordon Capital Corporation, RBC Dominion Securities Inc., TD Securities Inc., and Deloitte & Touche, defendants

[1999] O.J. No. 4080

11 C.B.R. (4th) 262

39 C.P.C. (4th) 287

Court File Nos. 99-CL-3442 and 4166CP/98

Ontario Superior Court of Justice
Commercial List

Blair J.

August 27, 1999.

(60 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval -- Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class or representative actions -- Conflict of laws -- Bankruptcy.

Motion by the defendant Philip Services for authorization to enter into a proposed settlement under the Class Proceeding Act. Joint motion by the representative plaintiff Menegon and by Philip for certification of class proceedings as against Philip only. Motion by the defendant Deloitte and Touche and by former officers and directors of Philip to declare an insolvency plan unreasonable. Motion by the creditor Royal Bank for a declaration that its claim against Philip under certain leases be determined under Canadian law. Philip was the parent company of a large network of subsidiaries in Canada and the United States. Publicity regarding inventory discrepancies led to a drop in prices of Philip shares, resulting in various class actions which alleged that Philip's financial disclosure contained material misstatements in violation of United States securities laws. The actions were consolidated and ultimately dismissed, though an appeal was pending. Menegon commenced a class proceeding in Ontario for misrepresentation and rescission relating to purchase of Philip shares. The Royal Bank had a claim against Philip under 57 equipment leases governed by Ontario law with respect to equipment located in Ontario. A memorandum of understanding outlined a proposed settlement between Philip and the class action plaintiffs in both the United States and Canadian proceedings. Philip filed for bankruptcy protection in the United States and for protection in Canada under the Companies' Creditors Arrangement Act. The Canadian plan provided that Canadian claimants were to be governed by and treated in the United States proceedings.

HELD: Class proceedings certified as against Philip for settlement purposes only. Deloitte & Touche, the officers and directors, and the Royal Bank were all entitled to assert claims in the Canadian proceedings. Royal Bank was also entitled to a declaration that its claims under the leases were to be determined in Canadian proceedings. Approval of the settlement was premature. Reasonableness of the plan was an issue to be determined at a sanctioning hearing.

Statutes, Regulations and Rules Cited:

Bankruptcy Code.

Class Proceedings Act, 1992, ss. 5(1), 17.

Companies' Creditors Arrangement Act, ss. 5.1(3), 18.6(2), 18.6(5).

Courts of Justice Act, s. 97.

Counsel:

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John McDonald, for the Class Proceedings plaintiffs.
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B. Zarnell, for the defendants Merill Lynch Canada Inc., Midland Walwyn Capital Inc., First Marathon Securities Limited, Gordon Capital Corporation and Salomon Brothers Canada Inc. ("The Underwriters")
Hilary Clarke, for the Royal Bank of Canada.
Pamela Huff and Susan Grundy, for the Lenders under the Credit Agreement.
Joseph Groia and Subrata Bhattacharjee, for the certain Directors.
E.A. Sellars, for the defendant CIBC as Account Intermediary.
Steven Graff, for the PHH Vehicle Leasing.

BLAIR J.:--

I - FACTS

Background

1 The issues raised on these Motions touch upon difficult areas in the burgeoning field of cross-border insolvencies.

2 Philip Services Corp. is the ultimate parent company of a network of approximately 200 directly and indirectly owned subsidiaries in Canada, the United States and elsewhere. The operations of this international conglomerate of companies are service oriented, with a primary focus on what are referred to as "Metals Services" and "Industrial Services". The former involves the collection, processing and recycling of scrap metal for steel mills and for the foundry and automotive industries. The latter entails providing such things as cleaning and maintenance services, waste collection and transportation, emergency response services and tank cleaning for major industries ("outsourcing services"), and providing "by-products recovery services", with heavy emphasis on chemical and fuel and polyurethane recycling, for the same industries.

3 The Philips conglomerate - with consolidated revenues in 1988 of U.S. $2 billion, but a consolidated net loss of U.S. $1.587 billion for the period ending December 31, 1998 - has fallen into insolvent circumstances. On June 25, 1999, Philip Services Corp. and its Canadian subsidiaries sought and obtained the protection of this Court under the provisions of the CCAA to enable them to attempt to restructure their affairs. On the same date, Philip Service Corp. and its primary subsidiary for its U.S. operations, Philip Services (Delaware) Inc., together with other U.S. subsidiaries, filed for Chapter 11 protection under the U.S. Bankruptcy Code in United States Bankruptcy Court (District of Delaware). On July 12, 1999, a "Disclosure Statement and a Plan of Reorganization" was filed in the U.S. Bankruptcy Proceedings ("the U.S. Plan"). On July 15th, a Plan of Compromise and Arrangement was filed in the CCAA Proceedings ("the Canadian Plan").

4 As the parties and counsel have done, I shall refer to Philip Services Corp. as "Philip" and to Philip Services (Delaware) Inc. as "PSI". I shall refer to the conglomerate as a whole as "Consolidated Philip."

5 Philip is an Ontario corporation with head offices in Hamilton, Ontario. It is a public company with stock trading on the Toronto Stock Exchange, the Montreal Exchange, and the New York Stock Exchange. Although trading is suspended at the present time, the bulk of trading occurred on the New York Stock Exchange. Eighty-two percent of Philip's issued and outstanding shares are owned by U.S. residents. Moreover, it appears, the majority of Philip's operating assets, and of its operations, are located in the United States. Consolidated Philip carries on business at more than 260 locations, and employs more than 40,000 industrial and commercial customers world-wide. In Canada, there are 94 locations, about 2,000 employees, and annual revenues in the neighbourhood of U.S. $333 million.

6 Philip expanded very rapidly in the past few years - perhaps too rapidly, as it turns out. Consolidated Philip grew by more than 40 new business acquisitions in 1996 and 1997. Associated with this expansion was the negotiation of a U.S. $1.5 billion Credit Agreement with Philip and PSI as

borrowers and a syndicate of more than 40 lenders (the "Lenders"). Under the Credit Agreement Philip guaranteed the borrowings of PSI, and PSI guaranteed the borrowings of Philip. In addition, certain subsidiaries of Philip and PSI guaranteed all of the liabilities of Philip and PSI to the lenders, and the guarantees from the subsidiaries were secured by general agreements and specific assignments of assets. In short, the Lenders have security over virtually all of the assets of Consolidated Philip. Moreover, subject to certain specific exceptions, it is first security.

7 During this same period of expansion, Philip raised about U.S. $362 million through a public offering in the U.S. and Canada. Seventy-five percent of these shares were sold in the U.S. As events transpired, these public offerings have led to a series of class actions against Philip both in the U.S. and in Canada. They arose out of certain discrepancies between copper inventory as shown on the books and records of Philip and actual inventory on hand, which were revealed in audits in early 1998. Publicity surrounding the discrepancies led to a drop in the price of Philip shares, which led to various class actions. Eventually, it was determined that Philip's liabilities had been understated by approximately U.S. 35 million. As a result, it was required to file an Amended Form 10-K with the U.S. Securities and Exchange Commission restating its financial results for 1997 to show an additional loss of $35 million. It was also required to revise the amount of pre-tax special and non-recurring charges for that same year.

8 It is said that the unsettling effects of the financial irregularities and the class action proceedings, in conjunction with a general uncertainty in the markets serviced by Consolidated Philip, caused Philip's earnings to drop dramatically. It could not refinance its long-term debt under the Credit Agreement. Its trade credit was curtailed. It lost contracts and, because its bonding capacity was impaired, it was further hampered in its ability to win new contracts. In spite of concerted efforts over a period of nearly a year, Philip was not able to re-finance its debt or to restructure its affairs outside of the court restructuring context. Cash conservation measures in late 1998 led to defaults under the Credit Agreement. Debt restructuring negotiations with the Lenders since that time led ultimately to the parallel insolvency proceedings in Canada and the U.S. to which I have referred above.

The Class Proceedings

9 Developments in the class action proceedings are what have led specifically to the Motions which are presently before this Court.

10 In February and March of 1998 various class actions were filed in the United States against Philip, certain of its past and present directors and officers, the underwriters of the Company's November 1997 public offering, and the Company's auditors (Deloitte & Touche).[1] The actions, now consolidated, alleged that Philip's financial disclosure for various time periods between 1995 and 1997 contained material misstatements or omissions in violation of U.S. federal securities laws.

11 In May, 1998, a class proceeding was also commenced in Ontario, under the Class Proceedings Act, 1992 ("the CPA Proceeding"). The plaintiff is Joseph Menegon, a retired school teacher living in Hamilton, who had purchased 300 common shares of Philip on the TSE in November, 1998. The CPA Proceedings is an action for misrepresentation, negligent misrepresentation and rescission relating to the purchase of shares of Philip by people in Canada between February 28 and May 7, 1998. The defendants are Philip, the various Underwriters, and Deloitte & Touche.

12 At the instance of Philip and Deloitte & Touche, however, a motion was brought for an order dismissing the U.S. Class Action on the grounds that the United States Court was not the proper

Court for the disposition of the claims, but that the Ontario Court was. This motion was successful and on May 4, 1999 the U.S. Class Action was dismissed. A motion to reconsider was also dismissed. Although the U.S. Class Action plaintiffs have appealed, the present status of those proceedings is that they have been dismissed.

13 Nonetheless, the U.S. claims persist, and there have been negotiations between counsel for the U.S. and Canadian Class Action plaintiffs and Philip since early 1999 with a view to arriving at a settlement of the class action claims against Philip. Because of the nature of these claims, and the potential quantum of any judgments that might be obtained, a resolution of the Class Action proceedings, according to Philip, is an essential element of any successful restructuring. On June 23, 1999, the parties to the negotiations entered into a Memorandum of Understanding which outlined a proposed settlement between Philip and the U.S. Class Action and CPA Proceedings plaintiffs.

14 Philip and the CPA Proceeding plaintiff now seek certification of the CPA Proceeding and approval of the Settlement by the Court. Philip, separately, seeks approval of this Court under the CCAA to enter into the proposed Settlement. These motions have triggered the series of matters that are now to be disposed of. Deloitte & Touche not only opposes the Motions, but seeks separate declaratory relief on its own part touching upon the Settlement itself and as well the overall "fairness" and "reasonableness" of the proposed Canadian Plan. I shall return to the specifics of the competing Motions and the relief sought shortly. First, however, some brief reference to the controversial aspects of the Canadian and U.S. Plans, and to the terms of the Settlement, is required.

The Controversial Aspects of the Plans, and the Settlement

15 The principle terms and conditions of the U.S. and Canadian Plans, as they presently stand, were hammered out in a "Lock-Up Agreement" entered into in April, 1999 and later amended on June 21st, between Philip (as Canadian Borrower), PSI, (as U.S. borrower), and a Steering Committee representing the Lenders. There were also negotiations with certain of Philip's major unsecured creditors and with counsel for the U.S. and Canadian class action plaintiffs. The Lock-Up Agreement is variously described as the result of "heavy" negotiations and "very hard bargaining". No doubt that is indeed the case.

16 The amended Lock-Up Agreement provides in substance that the Lenders will become the holders of 91% of the equity in the newly restructured Philip, and that they will as well receive U.S. $ 300 million of senior secured debt (now reduced to $250 million through asset sales) and $100 million of secured "payment in kind" notes. Under the U.S. Plan the remaining 9% of the equity in the restructured Philip is to be made available to other stakeholders, on the following basis: 5% (plus U.S. $60 million in junior notes) is to be for the compromised unsecured creditors; 2% for the existing shareholders; 1.5% for the Canadian and U.S. class action plaintiffs; and, 0.5% for the holders of other securities claims. The formula is conditional upon cross-approvals of the U.S. and Canadian Plans.

17 From Philip's perspective the Plans filed in both the U.S. and in Canada are interdependent and form a single Plan from a "business point of view". The general concept of the overall plan is that each class of stakeholders in the Consolidated Philip with similar characteristics are to be treated similarly whether they are located in the U.S. or in Canada. With this in mind, and having regard to the need for a coordinated restructuring of claims and interests against Philip, PSI, and the Canadian and U.S. subsidiaries, the Plans provide that,

a) creditors with claims against Philip's Canadian subsidiaries but not against Philip itself are to file their claims in the CCAA proceedings in Canada, and are to be dealt with in the Canadian Plan; and

b) creditors with claims against Philip or its U.S. subsidiaries are to have their claims processed in the U.S. proceedings and are to be dealt with in the U.S. Plan.

18 The result of this is that the claims of Philip's creditors, whether Canadian or U.S. are to be dealt with under the U.S. Plan and governed by Chapter 11 of the U.S. Bankruptcy Code. This includes the claims of Deloitte & Touche and of the Underwriters, and of certain former officers and directors, for contribution and indemnity in relation to the U.S. and Canadian class proceedings. It also includes the claims of certain creditors, such as Royal Bank of Canada, in relation to personal leases.

19 Not surprisingly, those so affected take umbrage at this treatment. They submit that it contravenes the provisions of the CCAA and their substantive rights under Canadian law, and should not be countenanced. It renders the Canadian Plan unfair and unreasonable, in their submission, and should not be sanctioned. Philip argues, on the other hand, that matters relating to whether or not the Plan is fair and reasonable are matters tó be dealt with at the sanctioning hearing, when the Plan is brought before the Court for approval after is has received the earlier approval of the Company's creditors.

The Proposed Settlement

20 Under the proposed Settlement the Canadian and U.S. class action plaintiffs are to receive 1.5% of the common shares of a restructured Philip, as noted above. The shares are to be distributed pro rata amongst the Canadian and U.S. plaintiffs. There is to be, in addition, an amount of up to U.S. $575,000 for costs of counsel for the U.S. and Canadian class action plaintiffs. The Settlement is embodied in the U.S. Plan as "Allowed Class 8B Claims". It includes the right of persons caught by the class proceedings to opt out; however, any member of the class who elects to opt out of the proposed settlement is also to be dealt with in the U.S. Plan as a Class 8B claimant.

21 The proposed Settlement is conditional upon its being approved by the Courts in Canada and in the U.S. and according to Philip, upon the successful implementation of both the Canadian and the U.S. Plan. Philip has made it clear that it and its professional advisors do not believe that a restructuring of Philip can be accomplished without resolution of the class action claims in Canada and the U.S. Philip, counsel in the Canadian class action, and the Lenders all argue that in the event of liquidation, the plaintiffs will get nothing because -- even if they are successful on liability -- they will have no chance of recovering a damage award against the insolvent Philip. The Settlement is also recommended by Ernst & Young, the court appointed Monitor for Philip in the CCAA proceedings.

22 What, then, are the specific issues that the Court is asked to determine on the pending Motions?

II - THE ISSUES RAISED

23 The following Motions, as summarized, are before the Court:

1) A Motion by Philip pursuant to the CCAA for authorization and direction to enter into the proposed Settlement of the proceeding pending against it under the Class Proceeding Act;
2) A joint Motion by Philip and Mr. Menegon, the representative plaintiff in the CPA Proceedings, for certification of the class proceeding as against the defendant Philip only, and for approval of the Settlement Agreement together with directions regarding notification of members of the proposed class;
3) A cross-Motion by Deloitte & Touche - one of Philip's co-defendants in the CPA Proceedings, supported by the other co-defendant Underwriters -- for declaratory relief in the nature of an order:

    a) declaring, pursuant to s. 5.1(3) of the CCAA and s. 97 of the Court of Justice Act that the Canadian Plan is not fair and reasonable in the circumstances, having regard to those provisions in the Canadian Plan which compromise the ability of Deloitte & Touche to claim contribution and indemnity against Philip and certain of its directors, officers and employees;
    b) precluding the compromise of the Deloitte & Touche claims and amending both the Canadian Plan and the U.S. Plan so the Deloitte & Touche's rights are to be determined under the Canadian Plan alone, and in accordance with Canadian law and without unfairly prejudicing its rights.

4) A Motion by Royal Bank of Canada for an order,

    a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;
    b) declaring that the Canadian Plan is not fair and reasonable because it seeks to compromise the Bank's claims in the U.S. Plan, thus adversely affecting the Bank's rights and circumventing Philip's obligations under Canadian law;
    c) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and
    d) amending sub-paragraph 14(d) of the Initial Order granted in the CCAA proceeding on June 25, 1999 -- which presently permits Philip to terminate any and all arrangements entered into by them by providing that the sub-paragraph does not apply to leases of personal property; and, finally,

5) A Motion on behalf of certain former officers and directors of Philip seeking to have the Canadian Plan and the U.S. Plan declared not fair and reasonable in the circumstances, having regard to those provisions,

a) which attempt to compromise or otherwise limit the ability of the Moving Parties to claim contribution and indemnity from Philip without compensation whatsoever;
b) which call for releases to be provided to current directors and officers of Philip, but not to former directors and officers;
c) which deprive the Moving Parties of their rights as creditors to vote on the Canadian Plan.

III - LAW AND ANALYSIS

The Class Proceedings

24 There is little difference is substance between the joint Motion of Philip and the Canadian class action plaintiff under the Class Proceedings Act, and that of Philip alone, under the CCAA. Both ultimately seek approval and implementation of the proposed Settlement. However, the CCAA proceeding provides the context in which this approval is sought and, indeed - as I have already mentioned - Philip and others are of the view that a successful restructuring of Consolidated Philip is not possible without the implementation of the proposed Settlement, and that the converse is also true. Thus, there is a close link between the two, and in my opinion the issue of settlement approval cannot be viewed in isolation from the CCAA/restructuring environment in the context of which it was developed.

Certification

25 I have little hesitation in certifying - and do certify - the CPA Proceeding as a class proceeding pursuant to subsection 5(1) of the Class Proceedings Act, as requested. That is, the proceeding is certified as a class proceeding as against the defendant Philip only and for settlement purposes only. It is without prejudice to any arguments the other defendants to the CPA Proceedings may wish to make in opposition to any element of the plaintiff's claim, including, but not limited to, certification of a class as against them.

26 For those purposes, however, I am satisfied that the tests set out in subsection 5(1) have been met. The statement of claim discloses a cause of action based upon faulty disclosure. There is an identifiable class, as articulated in the materials, and a common issue, as therein very broadly defined.[2] A class proceeding makes sense, and is the preferable procedure for the resolution of the common issue in the circumstance, and Mr. Menegon constitutes a representative plaintiff as called for in the subsection. An Ontario Court has jurisdiction pursuant to the Class Proceedings Act to certify a Canada-wide opt out class where the action has a "real and substantial" connection to Ontario, as is the case here; see, Carom v. Bre-X Minerals Ltd., 43 O.R. (3d) 441, February 11, 1999, (Ont. Gen. Div.); Nantais et al v. Telectronics Proprietary (Canada) Ltd. et al, (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal refused [1995] O.J. No. 3069, at p. 347 (Div. Ct.).

Approval and Notice

27 I have concluded, however, that Notice should be given at this time to the members of the class as certified, in accordance with the provisions of section 17 of the Class Proceedings Act, but that the proposed Settlement ought not to be approved at this time and at this stage of the restructuring proceedings.

28 This conclusion is based not so much on the issue of whether notification under the Act may be given jointly for certification and approval, and not so much of the question of the merits of the

proposed Settlement as between the class action plaintiffs and Philip. The former issue has not yet been settled, but need not be determined in this case. The latter is supported by the recommendations of the Monitor and seasoned U.S. representative counsel, and by the "reality check" that is there is no settlement it is unlikely that the class action plaintiffs will ever recover anything from Philip.

29 Rather, my conclusion is based upon my sense that it is premature to approve a settlement of the U.S. and Canadian class action proceedings at this stage of the restructuring process. Philip and the Lenders have made it clear that the settlement of those claims forms a central underpinning to the ability of Consolidated Philip to reorganize successfully. But the reverberations of the class actions extend to more than merely the relations between Philip and the class action plaintiffs. They affect the relations between Philip and the co-defendants in the proceedings, and between the class action plaintiffs and the co-defendants as well. The class action plaintiffs and the co-defendants are all unsecured claimants of Philip in the restructuring process - the claim of the co-defendants for contribution and indemnity against Philip and its former officers and directors arise out of the same "nucleus of operative facts"[3] as the claims of the class action plaintiffs against Philip; and one follows from the other. It has frequently been noted that the full name of the CCAA is "An Act to facilitate compromises and arrangements between companies and their creditors". In the bare-knuckled ring of commercial restructuring negotiations, this cannot be accomplished if one group of unsecured claimant is given an unwarranted advantage over another.

30 To grant approval to the proposed Settlement of the class action plaintiffs with Philip at this stage would in effect immunize both those plaintiffs and Philip from the need to have regard to the co-defendants in resolving their dispute. It may well be that a plaintiff in an action with multi-party defendants can settle unilaterally with one of those defendants without creating other repercussions in the lawsuit. It may also be, however, that such a settlement cannot be effected without taking into account some aspects of the "other party" issues - things such as the impact of the settlement on the co-defendants' claims for contribution and indemnity, including the quantum of or a cap on recovery and questions of releases, to take only some examples.

31 For instance, Philip is contractually bound under the terms of its Underwriting Agreement with the Underwriters to indemnify and hold the Underwriters harmless against all claims based on allegations of untrue statements or alleged untrue statements in a prospectus. More to the point, Philip is not entitled without the consent of the Underwriters, under the terms of the same Agreement, to settle any action in which such claims are made against it and unless the settlement includes an unconditional release in favour of the Underwriters. Approval of the proposed Settlement at this state of the restructuring proceedings would deprive the Underwriters of the contractual right. What is significant at this point is not the attempt to compromise the claim, including the contractual right to the release, but rather the loss of the bargaining chip on the part of the Underwriters in the process as a result of the unilateral settlement as between Philip and the plaintiffs.

32 Philip, the Lenders, and counsel for the class action plaintiffs have mounted an adamant chorus that if the proposed Settlement is not approved the U.S. and Canadian class action plaintiffs will get nothing because Philip will be liquidated and, in addition, that there is simply no room for the class action plaintiffs to receive anything more than the 1.5% share distribution in the restructured Philip which is currently on the table. The Lenders point out that they are fully secured and that they need not leave available even that 1.5% interest (not to mention the 9% equity interest which they have agreed to leave available to other stakeholders generally). These pronouncements may well

reflect the final reality of the situation. However, I am somewhat less inclined to accept them at face value than the parties are to make them, particularly at this stage of the proceedings. It would not be the first time in restructuring negotiations where an adamant chorus turned into a more harmonious melody before the end of the day. Only the final moments of the process will tell the tale. In the meantime, as many negotiating options as possible should be kept open as amongst claimants of equal status in the restructuring, in my view.

33 I do not say that this proposed Settlement, in its present or some other form, will not ultimately be approved. It is simply premature at this stage in the restructuring process to give it that imprimatur, in my opinion - if the imprimatur is to be given - for the reasons I have articulated. Accordingly, the question of approval of the proposed Settlement is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing. In the meantime, Notice of certification and of the pending motion for approval is to be sent to all members of the class.

The Fairness Issues Regarding the Canadian Plan.

34 Much of the foregoing reasoning applies to the conclusions I have reached with respect to the issues raised by Deloitte & Touche and others respecting the Canadian Plan and its nexus with the proposed Settlement.

35 The claim of the plaintiffs in the CPA Proceedings as against Deloitte & Touche and the Underwriters includes a claim for the difference between the value received by the plaintiffs as a result of the settlement and their actual loss. If the Settlement and the Canadian and U.S. Plans are approved, however, these co-defendants will lose their rights to claim contribution and indemnity form Philip in the class action. This, in itself, is not a reason for impugning the fairness and reasonable of the Plans, because the ability to compromise claims against it is essential to the ability of a debtor corporation to restructure its affairs. Nonetheless, where the proposed structure of the reorganization affects the substantive rights of claimants in a fashion which treats them differently than they would otherwise be treated under Canadian law, and where the effect of that treatment is to place the claimants in a position where their ability to engage in full and complete negotiations with the debtor company are impaired, there is cause for concern on the part of the Court. That, in my view, is the case here.

36 The effect of the Canadian Plan, as presently structured, is to deprive Deloitte & Touche, the Underwriters and others such as the former directors and officers of Philip who may have claims of contribution and indemnity as against Philip arising out of the same "nucleus of operative facts" pertaining to the class action claims, for pursuing those contribution claim in the Canadian CCAA proceeding. The same is true, but for different reasons, of the claim of Royal Bank with respect to its equipment leases. This is accomplished by carving out the claims in question from the CCAA proceedings and providing that they are to be dealt with under the U.S. Plan in U.S. Bankruptcy Court in accordance with the provisions of the U.S. Bankruptcy Code. All claims against Philip are to be dealt with in that fashion, notwithstanding that it was Philip which set in motion the CCAA proceeding in the first place and which sought and obtained the stay of proceedings preventing these very same claimants form pursuing their claims in Canada against it. At the same time, the Canadian Plan, but its very terms, is to be binding upon all holders of claims against Philip - including those which are subject to the Canadian Plan; see section 9.15 of the Canadian Plan. This is to be accomplished without even according the right to those claimants to vote on the Plan.

37 The binding nature of the Canadian Plan has the effect of requiring the responding claimants to provide releases in favour of Philip while they are at the same time not released by Philip from claims that might be subsequently asserted against them. Furthermore, as the Plan presently stands, Deloitte & Touche and the Underwriters will be against them. Furthermore, as the Plan presently stands, Deloitte & Touche and the Underwriters will be deemed to have released former directors and officers from claims for contribution and indemnity. The Class Action plaintiffs have chosen not to pursue the directors and officers, at the present time, and there is apparently upwards of $100 million in insurance that might be available to satisfy such claims. This is a matter of considerable concern for Deloitte & Touche and for the Underwriters. Philip has advised, during the course of these motions and before, that it does not intend the proposed Settlement or the Plan to preclude the ability of Deloitte & Touche and of the Underwriters to pursue the former officers and directors. For the present, however, the Plan is worded in such a way that they will be so precluded. The real point is that all of this is being visited upon the responding claimants without there being entitled to any say in the Canadian proceedings as to their willingness or lack of willingness to be so treated.

38 In my opinion it is the loss of the right to vote in the Canadian Plan which lies at the heart of the present dilemma. The mere fact that a Canadian creditor's rights are to be dealt with and affected by single or parallel insolvency proceedings in the U.S. Bankruptcy Court - or that the reverse may be the case (U.S. creditor/Canadian Court) - is not necessarily sufficient, in itself, to undermine the fairness and reasonable of a proposed Plan; see, for example Roberts v. Picture Butte Municipal Hospital (1998), 64 Alta. L.R. (3d) 218 (Alta. Q.B.); Re Starcom Services Corp., Bank. W.D. Wash., case no M-98-60005, Nov. 20, 1998. In Canadian insolvency proceedings under the CCAA, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the CCAA proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky - and potentially large - contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal.

39 While the fact that their treatment under U.S. Bankruptcy law will apparently be considerably less favourable then their treatment under Canadian law is not determinative, it is certainly a factor for consideration when taken in conjunction with the loss of voting rights in the Canadian Plan. As counsel have presented it, contribution claimants such as Deloitte & Touche, the Underwriters and the directors and officers will have the status equivalent to equity holders under the U.S. Plan. Their claims will not be considered as unsecured debt claims in terms of priority ranking. Pursuant to the "cram down" provisions of the U.S. Bankruptcy Code, the Bankruptcy Court can approve a plan of reorganization even if a class of creditors votes not to accept the plan provided no junior-ranking class receives a distribution and the plan is otherwise fair and reasonable. Moreover, the U.S. Bankruptcy Court may on motion deem such a class of stakeholders to have voted to reject the plan in order to dispense with the necessity of having such a vote amongst its members. While Philip's deponents and its counsel have not said so expressly, it is the clear inference from the materials filed that that is precisely the route which Philip proposes to follow vis à vis the contribution claimant whose claims have been left to be dealt with under the U.S. Bankruptcy Code.

40 For purposes of the CCAA the claim of an unsecured creditor includes a claim in respect of any indebtedness, obligation of liability which would be a claim provable in bankruptcy, and there-

fore includes a contingent claim for unliquidated damages. Thus, Deloitte & Touche, the Underwriters, the officers and directors, and Royal Bank are all entitled to assert claims in the CCAA proceedings. They are Canadian claimants, asserting claims against a Canadian company in a Canadian proceeding. In respect of the claims for contribution and indemnity those claims arise out of a "nucleus of operating facts" which the U.S. Courts - at the urging of Philip, amongst others - have already determined are more conveniently litigated in Canadian class action proceedings.

41 In respect of the Royal Bank, the claim relates to some 57 equipment leases entered into between the Bank and Philip under lease agreements governed by the laws of Ontario and with respect to equipment located (with one exception) in Ontario. However, under U.S. Bankruptcy laws, Philip would be entitled to "reject" leases, which it is not entitled to do under Ontario law, although it may of course "break" the leases if it is prepared to suffer the legal consequences. Again the attempt by Philip is to treat the claims under a regime which is more favourable to it and less so to the claimant. That attempt may not in itself be objectionable, but to the extent that it is accomplished by depriving the creditor of its right to vote and to participate in the Canadian proceedings which were initiated for the purposes of shielding Philip against the claim, it is troubling.

42 The rights of creditors under the CCAA cannot be compromised unless,

a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;
b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;
c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,
d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).

43 See CCAA, section 4, 6 and 12; Re Olympia & York Developments Ltd. (1993), 12 O.R. (3d) 500, at p. 510 (Ont. Gen. Div.).

44 Here, for the reasons I have outlines, what Philip proposes is inconsistent with the foregoing.

45 Philip and the Lenders argue that the issues raised in this regard by the Respondents go entirely to the fairness and reasonableness of the U.S. and Canadian Plans, and that such considerations should be reserved for determination at the sanctioning hearings. I agree that generally speaking matters relating to fairness and reasonableness are better considered in the overall context of the final sanctioning hearing. Where, as here, however, the debtor company has acted earlier to obtain approval of a step in the restructuring process - in this case, the Class Action Settlement - which gives rise to issues that are inextricably linked to the overall fairness of the proposed Plan, and its compliance with statutory requirements, the consideration of those issues may be called for. This is one of those cases, Settlement - in conjunction with the manner in which the debtor intends to treat other claimants directly affected by the settlement, have the effect of requiring those claimants to participate in the subsequent restructuring negotiations without a full deck of cards.

46 Philip and the Lenders also argue that "comity" demands that this Court defer to the U.S. Bankruptcy Court in allowing the claims of Deloitte & Touche, the Underwriters, the former direc-

tors and officers, and the Royal Bank to be dealt with in the U.S. Plan. They point out that in its Initial Order in the CCAA proceedings this Court approved an international Protocol which provides for co-operation between the U.S. and Canadian Court, to the extent possible. I do not think that either comity or the question of whether the claims will be dealt with ultimately under the U.S. Plan, are the issues here. In addition, the effect of the Protocol as I read it - given the circumstances outlined above - is to provide some protection to claimants on either side of the border from being swept into the rigours of the other countries regimes where to do so might prevent them from asserting their substantive rights under the applicable laws of their own jurisdiction.

47 In this regard, the following provisions of the Protocol are worthy of note:

> (C) Comity and Independence of the Courts
>
> (7) The approval and implementation of this Protocol shall not divest or diminish U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing the Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.
>
> 8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.
>
> 9. In accordance with the principles of comity and independence established in paragraphs 7 and 8 above, nothing contained herein shall be construed to:
>
> * increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada ...;
> * preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.
>
> (emphasis added)
>
> (J) Preservation of Rights
>
> 27. Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affects the powers, rights, claims and defenses of the Debtors and their estates, the Committee, the Estate Representatives, the U.S. Trustee or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA.

(emphasis added)

48 The extension of comity as between Courts in cross-border insolvency situations, and co-operation generally in such matters, are matters of great importance, to be sure, in order to facilitate the successful and orderly implementation of insolvency arrangements in such circumstances. Nothing I have said in these Reasons is intended to counter that ethic. However, comity and international co-operation do not mean that one Court must code its authority and Jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction, whenever any kind of differences between the two jurisdiction may arise. Both the Protocol and the provisions of subsection 18.6(2) of the CCAA - which gives this Court authority "to make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in c co-ordination of proceedings under [the CCAA] with any foreign proceeding" - confirm this, Subsection 18.6(5) of the CCAA provides that "nothing in this section requires the Court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court" (emphasis added)

49 Here, there is yet no order of the U.S. Court, or treatment of the Claimants or Debtor to which comity may be extended, but there is - as I have outlined above - a failure to comply with the requirements of insolvency laws and procedure of Canada, as stipulated in the CCAA. I conclude, therefore, that the Canadian Plan as it presently stands is flawed because it seeks to exclude Canadian claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote.

50 There was much debate in argument over whether the issue of treatment of the claims in the Canadian or U.S. proceedings was a function of the "real and substantial connection" of Philip with the U.S. jurisdiction, or a function of the "real and substantial connection" of the responding claimants and their claims to the Canadian proceedings. There is no doubt that Philip has a substantial connection with the United States in terms of the residence of the majority of shareholders and the location of the majority of operating assets. This connection certainly justifies the U.S. Chapter 11 proceedings. However, Philip also has a substantial connection to Canada, with its headquarters in Ontario, its Canadian subsidiaries, and its 94 locations and 2,000 employees throughout the country. This connection, together with its array Canadian creditors, sustains the resort to the CCAA proceedings.

51 I do not think that the analysis fall to be made, in these particular circumstances, on purely foreign conveniens grounds. There is more to the situation than that.

Philip initiated the CCAA proceedings and sought and accepted the benefits flowing from that step. The responding claimants seek to assert claims in the Canadian proceeding against the Canadian company which instituted those proceedings, in relation to matters arising out of a Canadian class proceeding or (in the case of Royal Bank) out of Canadian contracts and equipment largely located in Canada. The substantive law of Canada under the CCAA, and the procedures therein laid down, entitle them to assert those claims in the Canadian proceedings and to have a vote on the "Plan" which is set forth by the debtor company to compromise them. They should not be deprived of those substantive and procedural rights without having any say in the matter. Putting it another way, I am satisfied that the unquestioned "juridical advantage" which Philip seeks to achieve through its proposed treatment of the responding claimants is outweighed by the unquestioned "juridical disad-

vantage" on the part of the latter, given that the juridical scales would otherwise be tipped towards Philip through the resort to a stratagem which in my view is not sanctioned under the CCAA.

52 Philip and the Lenders argue that there is great urgency to effect the restructuring process, and that requiring Philip to adhere to the procedures relating to classification, the valuation of claims, and voting - with the numerous issues that may have to be determined in that context - may well doom the process from the beginning. The Lenders are truculent, as their secured position lead them to be; they say that if the reorganization is not completed quickly they may simply abandon the process and exercise their rights to realize on their security, and the entire restructuring process will fail, with dire consequences for all concerned. Mr. McDougall, on behalf of Deloitte & Touche, characterized this as "the cry of doom".

53 I am very aware of the need for timeliness in situations as these - particularly given the sensitive nature of Consolidated Philip's service oriented business. However, I do not think that the need for a timely resolution alone is justification for depriving claimants of their substantive rights under Canadian law, and for abrogating their right to vote which lies at the very heart of the Canadian restructuring process from the creditor's perspective. It is the tool which gives them ultimate leverage in the bargaining process, and without it their practical rights - as well as their substantive and procedural ones - are greatly diminished.

III - CONCLUSION

54 An order will therefor go in terms of the foregoing.

The Class Proceedings

55 As indicated, an Order is granted certifying the CPA Proceedings as a class proceeding, pursuant to subsection 5(1) of the Class Proceedings Act, as against Philip only and for settlement purposes only. The certification is without prejudice to any arguments the other defendants in the CPA Proceeding may wish to make in opposition to any element of the plaintiff's claim including, but not limited to, certification of a class as against them. In addition, notice of the certification and of the pending motion for approval of the proposed Settlement is to given to members of the class as certified, in accordance with the provisions of section 17 of the Act. The question of approval of the Settlement, in its present form or some other form as may be advised, is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing.

The Fairness/Substantive Law Issues

56 Notwithstanding the observations in these Reasons about the Canadian Plan and the treatment of claims in the U.S. proceedings, I am reluctant to grant the sweeping declaratory relief sought by the Respondents. Whether the Plan is ultimately found to be fair and reasonable and in accordance with all necessary requirements remains still a matter for determination in the sanctioning hearing, after all the negotiations have been concluded and the votes counted. As much as is reasonably possible should be left to that process.

57 I am prepared to make an Order, however - and do - declaring that the Canadian Plan as it is presently constituted fails to comply with the procedural and statutory requirements of the CCAA regime in that it seeks to exclude the responding claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without

affording those claimants any right to vote. Anything further in this respect, it seems to me, should be left to the negotiation arena.

58 The position of the Royal Bank is slightly different. It is entitled, in addition, to an order,

a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;
b) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,
c) amending sub-paragraph 14(d) of the Initial Order granted in the CCAA proceeding on June 25, 1999 - which presently permits Philip to terminate any and all arrangements entered into by them - by providing that the sub-paragraph does not apply to the Royal Bank leases of personal property.

59 There will be not order as to costs.

60 Order accordingly.

BLAIR J.

qp/t/qlala/qlalm/qlcvs

1 These various actions were eventually consolidated and transferred to the United States District Court, Southern District of New York, by order dated June 2, 1998.

2 The common issue is very broadly and vaguely defined, and while such a definition has received approval in other cases, I do not mean to be taken as having approved such a definition for any purposes other than those of this particular case.

3 To use the phrase adopted by the parties.

Tab 16

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,

Laskin, Cronk and Blair JJ.A.

August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to inter-

pretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

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

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

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

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

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

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

B. Facts

The parties

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

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

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

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

Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

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

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

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

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

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

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP [page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

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

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

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

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

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

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

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

The Plan

(a) Plan overview

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

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

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

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

(b) The releases

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

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

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

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
(c) the Canadian banks provide below-cost financing for the margin funding facility; and
(d) other parties make other contributions under the Plan.

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

The CCAA proceedings to date

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

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

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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

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

third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

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

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

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

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[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 [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the 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] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

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

[46] These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters",[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 [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

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

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive

approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in 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. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

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

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[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 [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

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

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

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later refer-

ences. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

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

The statutory wording

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

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

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

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

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]

. . . . .

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

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

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

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

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

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T& N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[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 [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[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 ex-

change for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

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

The required nexus

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

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

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

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons.

The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

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

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

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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

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

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

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept

that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg,[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). [page536]

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

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

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

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

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

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes be-

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

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

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

> In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

(Footnote omitted)

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

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

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

(Citations omitted; emphasis added)

See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

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

> not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

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

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

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

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

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

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

to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

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

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

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

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

The 1997 amendments

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

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the com-

pany that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

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

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

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

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

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

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

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

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec

Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

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

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p. 661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

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

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

Conclusion with respect to legal authority

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

(2) The Plan is "fair and reasonable"

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

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

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

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

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be pro-

tected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

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

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

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

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his

usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

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

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

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

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

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

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

D. Disposition

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

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation [page549]

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
(7) Mario J. Forte, for Caisse de Dépôt et Placement du Québec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service

(16) James A. Woods, Sébastien 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.

Notes

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

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

3 Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

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: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

Court of Appeal File No.: M42068
Court File No.: CV-12-9667-00CL

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

BOOK OF AUTHORITIES OF THE APPELLANTS, INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., AND COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

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