

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

AND IN THE MATTER OF 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

**BRIEF OF AUTHORITIES**

August 27, 2012

**LENCZNER SLAGHT ROYCE  
SMITH GRIFFIN LLP**

Barristers  
Suite 2600  
130 Adelaide Street West  
Toronto ON M5H 3P5

**Peter H. Griffin (19527Q)**

Tel: (416) 865-2921  
Fax: (416) 865-3558  
Email: pgriffin@litigate.com

**Peter J. Osborne (33420C)**

Tel: (416) 865-3094  
Fax: (416) 865-3974  
Email: posborne@litigate.com

**Shara N. Roy (49950H)**

Tel: (416) 865-2942  
Fax: (416) 865-3973  
Email: sroy@litigate.com

**Brendan Gray (58586B)**

Tel: (416) 865-2945  
Fax: (416) 865-2878  
Email: bgray@litigate.com

Lawyers for the Moving Party, Ernst & Young  
LLP

TO: THE ATTACHED SERVICE LIST

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

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

**SERVICE LIST  
(as at July 20, 2012)**

**TO: BENNETT JONES LLP**  
3400 One First Canadian Place,  
P.O. Box 130  
Toronto, Ontario M5X 1A4

Robert W. Staley  
Tel: 416.777.4857  
Fax: 416.863.1716  
Email: staleyr@bennettjones.com

Kevin Zych  
Tel: 416.777.5738  
Email: zychk@bennettjones.com

Derek J. Bell  
Tel: 416.777.4638  
Email: belld@bennettjones.com

Raj S. Sahni  
Tel: 416.777.4804  
Email: sahnir@bennettjones.com

Jonathan Bell  
Tel: 416.777.6511  
Email: bellj@bennettjones.com

Sean Zweig  
Tel: 416.777.6254  
Email: zweigs@bennettjones.com

Lawyers for the Applicant, Sino-Forest  
Corporation

**AND GOWLING LAFLEUR HENDERSON LLP**  
**TO:** 1 First Canadian Place  
100 King Street West, Suite 1600  
Toronto, Ontario M5X 1G5

Derrick Tay  
Tel: 416.369.7330  
Fax: 416.862.7661  
Email: derrick.tay@gowlings.com

Clifton Prophet  
Tel: 416.862.3509  
Email: Clifton.prophet@gowlings.com

Jennifer Stam  
Tel: 416.862.5697  
Email: Jennifer.stam@gowlings.com

Jason McMurtrie  
Tel: 416.862.5627  
Email: Jason.mcmurtrie@gowlings.com

Lawyers for the Monitor

**AND FTI CONSULTING CANADA INC.**

**TO:** T-D Waterhouse Tower  
79 Wellington Street West  
Toronto-Dominion Centre, Suite 2010,  
P.O. Box 104  
Toronto, Ontario M5K 1G8

Greg Watson  
Tel: 416.649.8100  
Fax: 416.649.8101  
Email: greg.watson@fticonsulting.com

Jodi Porepa  
Tel: 416.649.8070  
Email: Jodi.porepa@fticonsulting.com

Monitor

**AND BAKER MCKENZIE LLP**

**TO:** Brookfield Place  
2100-181 Bay Street  
Toronto, Ontario M5J 2T3

John Pirie  
Tel: 416.865.2325  
Fax: 416.863.6275  
Email: john.pirie@bakermckenzie.com

David Gadsden  
Tel: 416.865.6983  
Email: david.gadsden@bakermckenzie.com

Lawyers for Poyry (Beijing) Consulting  
Company Limited

**AND AFFLECK GREENE MCMURTY LLP**

**TO:** 365 Bay Street, Suite 200  
Toronto, Ontario M5H 2V1

Peter Greene  
Tel: 416.360.2800  
Fax: 416.360.8767  
Email: pgreene@agmlawyers.com

Kenneth Dekker  
Tel: 416.360.6902  
Fax: 416.360.5960  
Email: kdekker@agmlawyers.com

Michelle E. Booth  
Tel: 416.360.1175  
Fax: 416.360.5960  
Email: mbooth@agmlawyers.com

Lawyers for BDO

**AND TORYS LLP**

**TO:** 79 Wellington Street West  
Suite 3000, Box 270  
Toronto-Dominion Centre  
Toronto, Ontario M5K 1N2

John Fabello  
Tel: 416.865.8228  
Fax: 416.865.7380  
Email: jfabello@torys.com

David Bish  
Tel: 416.865.7353  
Email: dbish@torys.com

Andrew Gray  
Tel: 416.865.7630  
Email: agray@torys.com

Lawyers for the Underwriters named in Class  
Actions

**AND LENCZNER SLAGHT ROYCE SMITH**  
**TO: GRIFFIN LLP**  
Suite 2600, 130 Adelaide Street West  
Toronto, Ontario M5H 3P5

Peter H. Griffin  
Tel: 416.865.9500  
Fax: 416.865.3558  
Email: pgriffin@litigate.com

Peter J. Osborne  
Tel: 416.865.3094  
Fax: 416.865.3974  
Email: posborne@litigate.com

Linda L. Fuerst  
Tel: 416.865.3091  
Fax: 416.865.2869  
Email: lfuerst@litigate.com

Shara Roy  
Tel: 416.865.2942  
Fax: 416.865.3973  
Email: sroy@litigate.com

Lawyers for Ernst & Young

**AND MERCHANT LAW GROUP LLP**  
**TO:** Saskatchewan Drive Plaza  
100-2401 Saskatchewan Drive  
Regina, Saskatchewan S4P 4H8

E.F. Anthony Merchant, Q.C.  
Tel: 306.359.7777  
Fax: 306.522.3299  
tmerchant@merchantlaw.com

Lawyers for the Plaintiffs re Saskatchewan  
action

**AND GOODMANS LLP**  
**TO:** 333 Bay Street, Suite 3400  
Toronto, Ontario M5H 2S7

Benjamin Zarnett  
Tel: 416.597.4204  
Fax: 416.979.1234  
Email: bzarnett@goodmans.ca

Robert Chadwick  
Tel: 416.597.4285  
Email: rchadwick@goodmans.ca

Brendan O'Neill  
Tel: 416.979.2211  
Email: boneill@goodmans.ca

Caroline Descours  
Tel: 416.597.6275  
Email: cdescours@goodmans.ca

Lawyers for Ad Hoc Committee of Bondholders

**AND ONTARIO SECURITIES COMMISSION**  
**TO:** Suite 1900, 20 Queen Street West  
Toronto, Ontario M5H 3S8

Hugh Craig  
Senior Litigation Counsel  
Tel: 416.593.8259  
Email: hcraig@osc.gov.on.ca

**AND OSLER, HOSKIN & HARCOURT LLP**

TO: 1 First Canadian Place  
100 King Street West  
Suite 6100, P.O. Box 50  
Toronto, Ontario M5X 1B8

Larry Lowenstein  
Tel: 416.862.6454  
Fax: 416.862.6666  
Email: llowenstein@osler.com

Edward Sellers  
Tel: 416.862.5959  
Email: esellers@osler.com

Geoffrey Grove  
Tel: (416) 862-4264  
Email: ggrove@osler.com

Lawyers for the Board of Directors of Sino-Forest Corporation

**AND SISKINDS LLP**

TO: 680 Waterloo Street  
P.O. Box 2520  
London, Ontario N6A 3V8

A. Dimitri Lascaris  
Tel: 519.660.7844  
Fax: 519.672.6065  
Email: dimitri.lascaris@siskinds.com

Charles M. Wright  
Tel: 519.660.7753  
Email: Charles.wright@siskinds.com

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

**AND COHEN MILSTEIN SELLERS & TOLL PLC**

TO: 1100 New York, Ave., N.W.  
West Tower, Suite 500  
Washington, D.C. 20005

Steven J. Toll  
Tel: 202.408.4600  
Fax: 202.408.4699  
Email: stoll@cohenmilstein.com

Matthew B. Kaplan  
Tel: 202.408.4600  
Email: mkaplan@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed Class re New York action

**AND KOSKIE MINSKY LLP**

TO: 20 Queen Street West, Suite 900  
Toronto, Ontario M5H 3R3

Kirk M. Baert  
Tel: 416.595.2117  
Fax: 416.204.2899  
Email: kbaert@kmlaw.ca

Jonathan Ptak  
Tel: 416.595.2149  
Fax: 416.204.2903  
Email: jptak@kmlaw.ca

Jonathan Bida  
Tel: 416.595.2072  
Fax: 416.204.2907  
Email: jbida@kmlaw.ca

Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action against the Applicant

AND **COHEN MILSTEIN SELLERS & TOLL**  
TO: **PLC**  
88 Pine Street, 14<sup>th</sup> Floor  
New York, NY 10005

Richard S. Speirs  
Tel: 212.838.7797  
Fax: 212.838.7745  
Email: rspeirs@cohenmilstein.com

Stefanie Ramirez  
Tel: 202.408.4600  
Email: sramirez@cohenmilstein.com

Attorneys for the Plaintiff and the Proposed  
Class re New York action

AND **THOMPSON HINE LLP**  
TO: 335 Madison Avenue – 12<sup>th</sup> Floor  
New York, New York 10017-4611

Yesenia D. Batista  
Tel: 212.908.3912  
Fax: 212.344.6101  
Email: yesenia.batista@thompsonhine.com

Irving Apar  
Tel: 212.908.3964  
Email: irving.apar@thompsonhine.com

Curtis L. Tuggle  
3900 Key Center, 127 Public Square  
Cleveland, Ohio 44114  
Tel: 216.566.5904  
Fax: 216.566.5800  
Email: Curtis.tuggle@thompsonhine.com

Lawyers for Senior Note Indenture Trustee

AND **LAW DEBENTURE TRUST COMPANY OF**  
TO: **NEW YORK**  
400 Madison Avenue – 4<sup>th</sup> Floor  
New York, New York 10017

Anthony A. Bocchino, Jr.  
Tel: 646-747-1255  
Fax: 212.750.1361  
Email: anthony.bocchino@lawdeb.com

Senior Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: Global Corporate Trust  
101 Barclay Street – 4<sup>th</sup> Floor East  
New York, New York 10286

David M. Kerr, Vice President  
Tel: 212.815.5650  
Fax: 732.667.9322  
Email: david.m.kerr@bnymellon.com

Convertible Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: 320 Bay Street, 11<sup>th</sup> Floor  
Toronto, Ontario M5H 4A6

George Bragg  
Tel: 416.933.8505  
Fax: 416.360.1711 / 416.360.1737  
Email: George.bragg@bnymellon.com

Convertible Note Indenture Trustee

AND **THE BANK OF NEW YORK MELLON**  
TO: 12/F Three Pacific Place  
1 Queen's Road East, Hong Kong

Marelize Coetzee, Vice President  
Relationship Manager, Default- Administration  
Group – APAC  
Tel: 852.2840.6626  
Mobile: 852.9538.5010  
Email: marelize.coetzee@bnymellon.com

Tin Wan Chung  
Tel: 852.2840.6617  
Fax: 852.2295-3283  
Email: tin.chung@bnymellon.com

Grace Lau  
Email: grace.lau@bnymellon.com

Convertible Note Indenture Trustee

AND **WARDLE DALEY BERNSTEIN LLP**  
TO: 2104 - 401 Bay Street, P.O. Box 21  
Toronto Ontario M5H 2Y4

Peter Wardle  
Tel: 416.351.2771  
Fax: 416.351.9196  
Email: pwardle@wdblaw.ca

Simon Bieber  
Tel: : 416.351.2781  
Email: sbieber@wdblaw.ca

Lawyers for David Horsley

AND **LINKLATERS LLP**  
TO: 10<sup>th</sup> Floor, Alexandra House  
18 Chater Road  
Hong Kong China

Melvin Sng  
Tel: 852 2901 5234  
Fax: 852 2810 8133  
Email: Melvin.Sng@linklaters.com

Lawyers for Sino-Forest Corporation (Hong  
Kong)



AND **LINKLATERS LLP**  
TO: 10<sup>th</sup> Floor, Alexandra House  
18 Chater Road  
Hong Kong China

Hyung Ahn  
Tel: 852 2842 4199  
Fax: 852 2810 8133  
Email: hyung.ahn@linklaters.com

Samantha Kim  
Tel: 852.2842 4197  
Email: Samantha.Kim@Linklaters.com

Jon Gray  
Tel: 852.2842.4188  
Email: Jon.Gray@linklaters.com

Lawyers for Sino-Forest Corporation (U.S.)

AND **KING AND WOOD MALLESONS**  
TO: 9th Floor, Hutchison House  
Central, Hong Kong Island  
Hong Kong (SAR)

Edward Xu  
Tel: 852.2848.4848  
Fax: 852.2845.2995  
Email: Edward.Xu@hk.kwm.com

Helena Huang  
Tel: 852.2848.4848  
Email: Helena.huang@kingandwood.com

Tata Sun  
Tel: 852.2848.4848  
Email: tata.sun@kingandwood.com

Lawyers for Sino-Forest Corporation (PRC)

AND **APPLEBY GLOBAL**  
TO: Jayla Place, Wickham's Cay 1  
P.O. Box 3190, Road Town  
Tortola VG1110 BVI

Eliot Simpson  
Tel: 284.852.5321  
Fax: 284.494.7279  
Email: esimpson@applebyglobal.com

Andrew Willins  
Tel: 284 852 5323  
Email: awillins@applebyglobal.com

Andrew Jowett  
Tel: 284 852 5316  
Email: ajowett@applebyglobal.com

Lawyers for Sino-Forest Corporation (BVI)

AND **THORNTON GROUT FINNEGAN LLP**  
TO: Suite 3200, 100 Wellington Street West  
P. O. Box 329, Toronto-Dominion Centre  
Toronto, Ontario M5K 1K7

James H. Grout  
Tel: 416.304.0557  
Fax: 416.304.1313  
Email: jgrout@tgf.ca

Kyle Plunkett  
Tel: 416-304-7981  
Fax: 416.304.1313  
Email: kplunkett@tgf.ca

Lawyers for the Ontario Securities Commission

AND **McCARTHY TETRAULT LLP**  
TO: Suite 2500, 1000 De La Gauchetiere St.  
West  
Montreal, Québec, H3B 0A2

Alain N. Tardif  
Tel: 514.397.4274  
Fax : 514.875.6246  
Email: atardif@mccarthy.ca

Mason Poplaw  
Tel: 514.397.4155  
Email: mpoplaw@mccarthy.ca

Céline Legendre  
Tel: 514.397.7848  
Email: clegendre@mccarthy.ca

Lawyers for Ernst & Young

AND **CHAITONS LLP**  
TO: 5000 Yonge Street, 10<sup>th</sup> Floor  
Toronto, Ontario M2N 7E9

Harvey G. Chaiton  
Tel: 416.218.1129  
Fax: 416.218.1849  
Email: Harvey@chaitons.com

Lawyers for the Law Debenture Trust  
Company of New York

AND **MILLER THOMSON LLP**  
TO: Scotia Plaza, 40 King Street West  
Suite 5800  
Toronto, Ontario M5H 3S1

Emily Cole  
Tel: 416.595.8640  
Email: ecole@millerthomson.com

Joseph Marin  
Tel: 416.595.8579  
Email: jmarin@millerthomson.com

Lawyers for Allen Chan

AND **PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**  
TO: 250 University Ave, Suite 501  
Toronto, Ontario M5H 3E5

Ken Rosenberg  
Tel: 416.646.4304  
Fax: 416.646.4301  
Email: ken.rosenberg@paliareroland.com

Massimo (Max) Starnino  
Tel: 416.646.7431  
Email: max.starnino@paliareroland.com

Lawyers for an Ad Hoc Committee of Purchasers  
of the Applicant's Securities, including the  
Representative Plaintiffs in the Ontario Class  
Action against the Applicant

AND **DEPARTMENT OF JUSTICE**  
TO: 130 King Street West  
Toronto, Ontario M5X 1K6

Diane Winters, General Counsel  
Tel: 416.973.3172  
Fax: 416.973.0810  
Email: diane.winters@justice.gc.ca

Lawyers for Canada Revenue Agency

AND **FASKEN MARTINEAU LLP**  
TO: 333 Bay Street, Suite 2400,  
Bay-Adelaide Centre, Box 20  
Toronto, Ontario M5H 2T6

Stuart Brotman  
Tel: 416.865.5419  
Fax: 416.364.7813  
Email: sbrotman@fasken.com

Conor O'Neill  
Tel: 416 865 4517  
Email: coneill@fasken.com

Canadian Lawyers for the Convertible Note  
Indenture Trustee (The Bank of New York  
Mellon)

AND **EMMET, MARVIN & MARTIN, LLP**  
TO: 120 Broadway, 32nd Floor  
New York, NY 10271

Margery A. Colloff  
Tel: 212.238.3068 or 212.653.1746  
Fax: 212.238.3100  
Email: mcolloff@emmetmarvin.com

U.S. Lawyers for the Convertible Note  
Indenture Trustee (The Bank of New York  
Mellon)

AND **FRASER MILNER CASGRAIN LLP**  
TO: 77 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto Ontario M5K 0A1

Neil S. Rabinovitch  
Tel: 416.863.4656  
Fax: 416 863 4592  
Email: neil.rabinovitch@fmc-law.com

Jane Dietrich  
Tel: 416.863.4467  
Email: jane.dietrich@fmc-law.com

Lawyers for Contrarian Capital  
Management, LLC

AND **LAPOINTE ROSENSTEIN MARCHAND  
MELANÇON, S.E.N.C.R.L.**  
TO: 1250, boul. René-Lévesque Ouest, bureau 1400  
Montréal (Québec) Canada H3B 5E9

Bernard Gravel  
Tel: 514.925.6382  
Fax: 514.925.5082  
Email: bernard.gravel@lrmm.com

Bruno Floriani  
Tel: 514.925.6310  
Email: bruno.floriani@lrmm.com

Québec counsel for Pöyry (Beijing) Consulting  
Company Ltd.

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**TAB**

1. *Re. Canwest Global Communications*, [2010] O.J. No. 3233 (S.C.J.)
2. *Quality Dino Entertainment Ltd.*, [1998] O.J. No. 414 (Gen. Div.)
3. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 (SCC)
4. *Re Ursel Investments Ltd.* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.)
5. *Re: Canadian Airlines Corp.*, 2000 ABQB 442

# TAB 1

*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* 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.*<sup>2</sup>

#### (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*<sup>3</sup>.

**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.<sup>4</sup>

**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.*<sup>5</sup> 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."<sup>6</sup>

23 Similarly, in *Re: Uniforêt Inc.*<sup>7</sup> 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.*<sup>8</sup>, 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.<sup>9</sup>

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*<sup>10</sup> and *Re Calpine Canada Energy Ltd.*<sup>11</sup> 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.*<sup>12</sup> and *Re Laidlaw Inc.*<sup>13</sup>. 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*<sup>14</sup> and *Mei Computer Technology Group Inc.*<sup>15</sup>

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 2

*Indexed as:*  
**Quality Dino Entertainment 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 the Courts of Justice Act, R.S.O. 1990,  
c. C-43  
AND IN THE MATTER OF a Plan of Compromise or Arrangement of  
Quality Dino Entertainment Ltd.**

[1998] O.J. No. 414

3 C.B.R. (4th) 314

77 A.C.W.S. (3d) 245

Commercial List No. 97-BK-000419, formerly file No. B243/97

Ontario Court of Justice (General Division)  
Commercial List

**Farley J.**

Heard: January 28, 1998.

Judgment: February 1, 1998.

(5 pp.)

*Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval.*

Motion to sanction a plan. Creditors voted on Quality's CCAA plan on Friday, January 23, 1998. The motion to sanction the plan was served on the morning of the scheduled hearing. A prior court order provided that the applicant had to apply for the final order no later than January 29. The meeting order provided for a comeback clause but several parties did not take advantage of it. The meeting order also provided that a notice be published in various locations including the Wall Street Journal before December 20. The advertisement was not placed.

HELD: The sanction hearing was adjourned. The Journal notice was to be run forthwith. The results of any additional voting were to be added to the vote results taken on January 23.



**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, s. 12(1)(a)(iii). Bankruptcy and Insolvency Act, ss. 108, 109(6).

**Counsel:**

Alex MacFarlane, for Quality Dino Entertainment Ltd. ("Quality").

J. Berkow, for Price Waterhouse Limited ("Monitor").

Patrick Shea, for Profile Records Inc. and Protoons Inc. ("Profile").

Edmund Lamek, for Precise Exercise Equipment Inc./TRC Sports Medical Products Inc. ("Precise").

Eric O. Peterson, for CMRRA.

M. Chambers, for SPG Music Ltd. ("SPG").

A.B. Schwisberg, for Saturn Distributing Inc. and BMG Music Canada Inc. ("Saturn").

J.H. Grout, for Raymond Kives and Sovereign Products Ltd. ("Kives")

Kenneth Kraft, for Lancier Partners et al ("Hunter Group").

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**1 FARLEY J. (endorsement):**-- This was a motion for the sanctioning of Quality's CCAA Plan which had been voted on by their creditors on Friday, January 23, 1998, and for certain ancillary relief. Short service was requested; one raises one's eyebrows when the motion was only served on the morning of the scheduled (afternoon) hearing. The scheduling was only on the basis that the Meeting Order obtained from Ferrier J. on December 16, 1997 provided that the Creditors' Meetings take place on January 23, 1998 and that:

30. This Court Orders that the Monitor shall report to this Court on all results of the Creditors' Meetings. The Applicant shall apply for the Final Order approving the Plan no later than January 29, 1998 provided that the Plan has been approved by the requisite majority of each Class of Creditors, present, in person or by proxy at the Creditors' Meetings.

I am of the view that this deadline relates to the date for serving the material and not the date for the actual hearing of the motion. Given that view and some of the other difficulties, I would think it helpful to set out some rulings and observations which may assist as well as providing directions for the regularization of these proceedings.

**2** The Meeting Order provided in para. 37(a) for a comeback clause. It was utilized by several claimants to assist. I do not find it helpful for others to object that the Meeting Order worked a hardship against them when they did not take advantage of the comeback clause to seek relief, even though they were served with a copy of the Meeting Order in a timely fashion. Thus the Meeting Order which provides that the claims may be valued at the Recorded Amount (subject to some adjustment) which could be zero for the purposes of voting is to be observed. If those claimants now objecting to having a zero value for voting had wished to take objection and seek relief, they should have used the facility of the comeback clause before the meetings on January 23, 1998. It is too late

now. I would also observe that they did not use the facilities of s. 12(2)(a)(iii) of the CCAA. I note that Houlden J.A. provided for a similar voting procedure in his order of June 30, 1997 as to the Norman Wade Company Limited CCAA Plan. It may be that this arrangement may in certain circumstances be suitable for those companies having numerous (small) creditors and extreme cash flow difficulties.

3 The Meeting Order also provided that notice be published in various locations including The Wall Street Journal (Eastern Seaboard Edition) on or before December 20, 1997. The ad was placed by Quality but unfortunately not published by the Journal. A lame non-explanation was advanced by The Globe and Mail acting as the Journal's booking agent. I would think it helpful to get a detailed explanation (and undertaking against future problems) from the Journal directly. Since we do not know if there are "unknown" creditors out there (a number did surface as a result of The Globe and Mail notice), I would think it desirable to have the Journal notice run. This notice is to be run forthwith and the terms of the Meeting Order are to prevail mutatis mutandis with respect to any new claims arising with all dates being adjusted to the business day following -- eg. if the notice is published February 6, 1998, then the proof of claim is to be filed with the Monitor by March 4, 1998. The results of additional voting, if any, shall be added to the vote results taken on January 23, 1998.

4 The sanction hearing of the Court shall be adjourned to a convenient date in March or April, at which at least five business days notice shall be given. There is to be a supplementary report in the meeting material.

5 In the interim, it would be highly desirable for Quality and any claimants who have not had their claims valued for distribution purposes as yet to resolve those valuations either consensually or pursuant to s. 12(2)(a)(iii) of the CCAA. The Court will take a dim view of any foot dragging since the interests of all stake holders should not be put at risk by the technical manoeuvres of individuals (that is not to be taken that those individuals are not entitled to receive their fair valuation -- but only that they not waste time doing so.)

6 The Stay Order is to be extended to April 30, 1998 (subject to any interested person utilizing the comeback clause to vary or adjust that).

7 An objection was made as to two previously related companies voting. I note that while the Meeting Order adopted the same provisions of the Bankruptcy and Insolvency Act as were set out in the Norman Wade Order, there was a specific exception for s. 109(6) applying. In any event I was advised that each of these two companies is in some form of insolvency proceedings whereby the vote that they made was pursuant to court appointed administrator who would functionally be at arm's length to Quality.

8 I see no merit in the s. 108 BIA objection as those objecting did not either follow the provisions of the Meeting Order or utilize its comeback clause to obtain relief.

9 In the meantime it would be appropriate to dismiss the motion of Saturn. Whether or not the \$1,000 of costs awarded by Lederman J. was actually overdue is moot as Quality provided payment of same at the hearing. The remainder of the Saturn motion has been dealt with in these reasons with these various rulings.

10 It would seem to me appropriate to adjourn the SPG motion to a convenient date to be obtained by SPG and Quality jointly after they have had the opportunity of discussing the question and

determining or not the words used in their agreement actually reflect the substance of the transaction and secondly, how the substance of the transaction is affected by the Plan.

**11** Lastly, I would note that the evidence is uncontested that if the Plan fails and Quality is not restructured, but rather liquidated in the most appropriate way, the expected proceeds would not satisfy the secured claims. Thus there would be nothing available for the unsecured creditors. This may provide some reason for reflection by all unsecured creditors.

**12** As to those matters which I have not specifically ruled on, I adjourn that to a date to be obtained by Quality to fit the schedule I have set out above.

FARLEY J.

qp/d/mop/DRS/DRS

# TAB 3

*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.**

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

[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.*

[page380]

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

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

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*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.

By Fish J.

**Referred to:** *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

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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*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

*Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem* ], 11.09 [ad. *idem* ], 11.4 [am. *idem* ], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem* ], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

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### **History and Disposition:**

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.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 rehabili-

tating 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.

[page404]

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" (*Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the CCAA's purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282  
, at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [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*.

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 competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

**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<sup>1</sup> 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:

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(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-André 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,<sup>2</sup> s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service*

*Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as [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.

**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

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(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 4

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**Ursel Investments Ltd., Re**

**RE URSEL INVESTMENTS LTD. et al.; CANADIAN IMPERIAL BANK OF COMMERCE v. URSEL INVESTMENTS LTD. et al.**

Saskatchewan Court of Queen's Bench

Osborn J.

Judgment: March 2, 1990  
Docket: Doc. Saskatoon 1917

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Counsel: *C.R. Clark* and *W.R. Rooke*, for petitioners-respondents.

*C.G. Morris*, for applicant secured creditor.

*D.C. Hodson*, for Alta Surety Company.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Interim receiver — Appointment.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Application of Act.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act.

Receivers --- Conduct and liability of receiver — Duties.

Meeting of creditors — Debtor applying for court-ordered meeting to approve reorganization plan — Plan designed for sole benefit of debtor not "compromise or arrangement" within meaning of Companies' Creditors Arrangement Act — No meeting ordered — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Receivers — Order appointing receiver — Court ordering receiver where interested parties would be in better and more secure position as a result.

The U group of companies was a close-knit group of family-held companies involved in the construction business.

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The companies operated profitably until 1988, when they experienced problems on two substantial contracts. Their performance bond company was called in to complete a number of their contracts. On May 5, CIBC, the principal secured creditor, applied the account balance of U Group against their joint and several indebtedness to CIBC. On May 10, an interim receiver was appointed by the Court. On May 31, 1989, U obtained an order that they were corporations to which the *Companies' Creditors Arrangement Act* (CCAA) applied, that they had until September to file a formal plan of compromise or arrangement between U and their creditors, and that all proceedings against U be stayed until further order of the court.

U obtained an extension and filed an information circular and a reorganization plan in which U unilaterally determined the amount of CIBC's secured claim by setting off their claim for damages against the amount owing to CIBC. The combined effect was to prevent CIBC from voting in respect of the reorganization plans.

U applied for an order pursuant to the CCAA directing a meeting of certain classes of creditors for the purpose of voting on the reorganization plans. In response, CIBC opposed the order of a meeting and asked that U be deemed unentitled to relief under the CCAA and that its own receiver be appointed.

**Held:**

U's motion was dismissed; CIBC's motion was allowed.

Before a meeting could be ordered pursuant to the CCAA, a reorganization plan constituting a compromise or an arrangement must be submitted. The plan must comprise a mutual or consensual agreement between the company and its creditors. The reorganization plans filed by U did not suffice as either compromises or arrangements. A comprehensive assessment of the plans could only be achieved through careful scrutiny of the plans and the information circular. The information circular presented only U's version of the facts. The Act does not contemplate that the Court will order a meeting where there exists a definite conflict between the companies and the principal creditor.

The continuation of the companies could not be justified by either the provisions or the intent of the CCAA. The public had no interest in the continuation of the enterprise. The plan was not likely to accomplish its purpose as the principal creditor was excluded from participation. The plan could not succeed as it did not embrace all parties, particularly the principal creditor. The plans were not fair, as they were devised for the sole benefit of shareholders, directors and officers of U.

An order for a court-appointed receiver and manager should be granted where such appointment would place the interested parties in a better and more secure position. In addition, there was already a Court appointed interim receiver in charge of U's assets.

**Cases considered:**

*Bank of Nova Scotia v. Sullivan Investments Ltd.*, 1982, 21 Sask. R. 14 (Q.B.) — *applied*

*Dorman, Long & Co., Re; South Durham Steel & Iron Co.*, [1934] 1 Ch. 635, [1933] All E.R. Rep. 460 — *considered*

*Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *applied*

*N.F.U. Development Trust Ltd., Re*, [1972], 1 W.L.R. 1548, [1973] 1 All E.R. 135 (Ch. D.) — *considered*



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*Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 138 (B.C. S.C.) — *applied*

*United Maritime Fisherman Co-Op., Re* (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.) rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) — *applied*

**Statutes considered:**

Companies Act 1948, (U.K.) 11 & 12 Geo. 6, c. 38 —

s. 206(1)

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

s. 2

s. 3

s. 4

s. 5

s. 11

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 2(1)

s. 3(1)

s. 11

Winding-up Act, R.S.C. 1985, c. W-11.

MOTION to direct meeting of creditors and for order appointing receiver.

**OSBORN J.:**

1 There are two motions before the Court.

A. Firstly there is a motion by the Ursel group of companies, as petitioners, for an order under ss. 4 and 5 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 requesting the Court to 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.

B. Secondly there is a motion by the Canadian Imperial Bank of Commerce, one of the secured creditors, for an order appointing a receiver and manager.

2 I propose to deal with these motions in the order set out above.

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## A. Order for a Meeting of the Creditors to be Summoned

### 1. Issue

3 The issue to be decided is whether, on the basis of the material filed, the petitioners are entitled to an order of this Court directing a meeting of the creditors.

### 2. Facts

4 The petitioners collectively are a close-knit group of family-held corporations involved in the construction business. Adam Ursel is an officer and one of the founding and principal shareholders, either directly or indirectly, of each of the petitioner companies.

5 Over the past 7 years the Ursel Group has grown rapidly through obtaining larger and more complex contracts in its Construction Division and the acquisition of companies with which to expand its Building Products Division. These activities have had a positive impact on the Ursel Group's revenue but have also strained its cash resources.

6 In part, as a result of their recent financial difficulties, the operations of the companies have become inextricably intertwined. Certain assets are utilized by all of the companies. Some of the employees work for all of the companies.

7 The companies operated quite profitably through their first years of existence, until 1988, when problems began to be experienced on two substantial contracts, the "City Hospital" contract and the "St. Paul's Hospital" contract.

8 Finally realizing that the timing of the collection of their outstanding claims would not permit them to continue to operate within the confines of their bank lines and cash-flow, they, in March 1989, contacted Alta Surety Company, their performance bonding company, and requested that it complete a number of their contracts. An agreement to this effect dated March 22, 1989 was entered into and signed by the parties, Vijan General Contractors Ltd., Ursel Constructors Ltd., Lois Ursel and Adam Ursel.

9 By petition dated May 2, 1989, the petitioners applied ex-parte for numerous orders pursuant to, inter alia, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. By a fiat dated May 3, 1989, it was ordered that the petitioners' application be set over to May 17, 1989, and that notice of the petitioners' applications be given to Canadian Imperial Bank of Commerce (hereinafter referred to as "C.I.B.C."), the principal secured creditor of the petitioners. Without deciding the applicability of ss. 2 and 3 of the *Companies' Creditors Arrangement Act*, it was further ordered, pursuant to s. 11, that:

(a) All proceedings taken or that might be taken, in respect of the companies named as petitioners in the petition filed on this application, under the *Bankruptcy Act* and the *Winding-up Act* or either of them, be stayed until this application has been heard in Chambers on May 17, 1989, or to any adjourned date and a decision has been handed down on this application, or until any further order.

(b) All further proceedings in any action, suit or proceeding against the petitioner companies is restrained until May 17, 1989, or until further order.

(c) No suit, action or other proceeding shall be proceeded with or commenced against the petitioner companies prior to May 17, 1989, except with the leave of the court.

10 By debenture dated October 30, 1987, in the principal amount of \$2,000,000, Hawk Holdings Inc., Websen

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Technical Products (Canada) Ltd., Nu-Hawk Distributors Ltd. and Specco Construction Products Ltd. (hereinafter referred to as "Hawk Group") are jointly and severally indebted to C.I.B.C. in an amount in excess of \$866,000 as of September 27, 1989. On May 5, 1989, after demand for payment of and cognizant of the said indebtedness, C.I.B.C. applied the account balances of the Hawk Group, totalling \$102,024.89, against their joint and several indebtedness to C.I.B.C.

11 By debenture dated October 30, 1987, in the principal amount of \$5,000,000 Ursel Investments Ltd., Ursel Constructors Ltd. and Ursel Fabricators Ltd. are jointly and severally indebted to C.I.B.C. in an amount in excess of \$2,745,000 as of September 27, 1989. By virtue of the said debenture and certain guarantees, Ursel Investments Ltd., Ursel Constructors Ltd., Vijan General Contractors Ltd. and Krane Service Inc. (hereinafter, together with Ursel Fabricators Ltd., referred to as "Ursel Group") are jointly and severally indebted to C.I.B.C. for the said amounts of \$866,000 and \$2,745,000. On May 5, 1989, after demand for payment of and cognizant of the said indebtedness, C.I.B.C. applied the account balance of the Ursel Group, totalling \$28,294.16, against their joint and several indebtedness to C.I.B.C.

12 On May 10, 1989, on the application of the petitioners and with the qualified consent of C.I.B.C., the fiat dated May 3, 1989, was varied by ordering, inter alia, that Deloitte, Haskins & Sells Limited be appointed interim receiver of the undertaking, property and assets of the petitioners until further order of the Court of Queen's Bench for Saskatchewan (hereinafter referred to as "Court"); that all persons, firms and corporations be enjoined from discontinuing utility services to the petitioners except upon further order of the Court; and that the right of any person, firm or corporation to realize upon or otherwise deal with any security held on the undertaking, property and assets of the petitioners be postponed until further order of the Court. The consent of C.I.B.C. was given without prejudice to the right of C.I.B.C. to challenge the fiat dated May 3, 1989, and the order dated May 10, 1989.

13 On May 31, 1989, on the application of the petitioners and with the consent of C.I.B.C., it was ordered, inter alia, that the petitioners are corporations to which the *Companies' Creditors Arrangement Act* applies; that the petitioners be authorized to file with the Court on or before September 30, 1989, a formal plan of compromise or arrangement between the petitioners and their creditors; that all proceedings taken or that might be taken by any of the petitioners' creditors be stayed until further order of the Court; that the right of any person, firm or corporation to realize upon or otherwise deal with any security held on the undertaking, property and assets of the petitioners be postponed; that no creditor of any of the petitioners exercise any right of set-off against any of the debts owing to any of the petitioners except with leave of the Court; that all persons, firms and corporations be enjoined from discontinuing utility services to the petitioners except upon further order of the Court; that Deloitte, Haskins & Sells Limited be appointed interim receiver of the undertaking, property and assets of the petitioners until further order of the Court; and that liberty be reserved to any and all persons interested to apply to the Court for further or other order.

14 On September 29, 1989, on the application of the petitioners, it was ordered that the date for filing of the formal plan of compromise or arrangement be extended to November 22, 1989. Also, on September 29, 1989, C.I.B.C. applied for leave to have Clarkson Gordon Inc. appointed as receiver-manager of the undertaking, property and assets of the petitioners, which motion was ordered adjourned until November 22, 1989.

15 The petitioners commenced an action against C.I.B.C. by statement of claim dated November 16, 1989, wherein they allege that C.I.B.C. refused to honour its commitments to provide financial support to the petitioners; that C.I.B.C. failed to give reasonable demand or notice prior to commencing realization proceedings; and that, in applying the account balances totalling \$102,024.89 against the indebtedness of the Hawk Group and in applying the account balances totalling \$28,294.16 against the indebtedness of the Ursel Group, both on May 5, 1989, C.I.B.C. acted in direct and flagrant violation of the fiat dated May 3, 1989. The petitioners contend that the alleged actions of C.I.B.C. were the direct cause of their acute financial distress and seek damages in excess of \$15,000,000; exemplary, aggravated and punitive damages; and declaration that the petitioners be released and discharged from any and all liability to C.I.B.C., and order that C.I.B.C. indemnify the petitioners for any and all liability of the petitioners to their unsecured creditors; and an order that C.I.B.C. be held in contempt of court.

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16 By notice of motion dated November 16, 1989, the petitioners filed with the Court an information circular, a reorganization plan in respect of the Hawk Group and a reorganization plan in respect to the Ursel Group. A perusal of the information circular and the reorganization plans reveals that the petitioners unilaterally determined the amount of C.I.B.C.'s secured claim, for the purposes of the *Companies' Creditors Arrangement Act*, by setting off their claim for unliquidated damages against the amount owing to C.I.B.C. Hence, the combined effect of the information circular and the reorganization plans is to prevent C.I.B.C., without judicial sanction, from voting in respect of the reorganization plans.

17 Invoking ss. 4 and 5 of the *Companies' Creditors Arrangement Act*, the petitioners now ask that the Court order meetings of the classes of creditors, as those classes are defined in the information circular and the reorganization plans, for the purpose of voting in respect of the reorganization plans. In response, C.I.B.C. asks that the Court refuse to order the meetings sought by the petitioners; that it conclusively deem the petitioners to be unentitled to relief pursuant to the *Companies' Creditors Arrangement Act*; and that it entertain C.I.B.C.'s application, adjourned from September 29, 1989, to have Clarkson Gordon Inc. (now Ernst & Young Inc.) appointed as receiver-manager of the undertaking, property and assets of the petitioners.

### 3. Law

18 The *Companies' Creditors Arrangement Act*, which I will refer to as the C.C.A.A., poses many interesting problems and has great potential importance. In spite of this, it has received little attention in either Canadian legal literature or the decisions of the courts. This Act was passed during the depression to provide a means by which an insolvent company could avoid or get out of bankruptcy by composing or rearranging the rights of its shareholders and creditors, and thereby maintain its going-concern value. This process is called "reorganization". (See S.E. Edwards, "Reorganizations Under the *Companies' Creditors Arrangement Act*" (1947) 25 Can. Bar Rev. 587.

19 A close reading of the Act indicates that the court has an opportunity to see and deal with the proposal at only three points. The first of these occurs when an application is made under s. 11 for an order staying all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* R.S.C. 1985, c. B-3, and the *Winding-up Act*, R.S.C. 1985, c. W-11, or either of them and further restraining further proceedings in any action, suit or proceeding against the company. The second occurs when the application is made to direct the meetings and the third occurs when the scheme is brought back to it for final sanction.

20 The first stage is a qualifying stage. The court here concerns itself mainly with the requirements of s. 3 of the Act and whether the companies, on the basis of the material filed, come within the restrictive provisions of s. 3 in order to obtain the benefit of the Act. In this case the companies have met the minimum requirements of s. 3 and were properly entitled to the order made on May 31, 1989, which provided that the petitioners were corporations to which the C.C.A.A. applies; that the petitioners be authorized to file with the court on or before September 30, 1989, a formal plan of compromise or arrangement between the petitioners and their creditors.

21 The second stage occurs when the application is made under ss. 4 and 5 of the Act to direct the meetings and it is at this stage that we must direct our attention to all the material filed to date in order to determine the main issue between the petitioner companies and their principal secured creditor.

22 Counsel for the companies argued that ss. 4 and 5 of the Act does not contemplate the court involving itself in a consideration of the merits of the plan or the fairness of the plans at this stage but should order the meetings to be held and then become involved when the application is made under s. 6, which will occur after the meetings have been held and the votes taken and the compromise or arrangement is submitted to the court to be sanctioned.

23 Counsel for C.I.B.C., the principal secured creditor, argued that the Court should consider all of the material

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filed to date and on the basis of that material decide whether a compromise or arrangement, within the meaning and intent of the Act has been proposed between the debtor company and its secured and unsecured creditors or any class of them which would persuade the Court to exercise the discretion contained in the word "may" as it appears in ss. 4 and 5 of the Act.

24 In the absence of any decided cases directly on point I must examine the wording of the ss. 4 and 5 in light of legislative purpose and intent of the Act along with the ordinary meaning of such words. The expression "may", as it appears in ss. 4 and 5, defines the scope of the court's jurisdiction to summon meetings. By virtue of subss. 2(1) ("enactment") and 3(1) and s. 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the expression "may", wherever it occurs in federal enactments, is to be construed as permissive.

25 Accepting that the Court's jurisdiction to summon meetings is discretionary, the Court should examine carefully all of the material filed before considering the order sought by the petitioners. Recourse to s. 4 of the *Companies' Creditors Arrangement Act* presupposes the proposal of a compromise or an arrangement between a debtor company and its unsecured creditors; similarly, recourse to s. 5 presupposes the proposal of a compromise or an arrangement between a debtor company and its unsecured creditors. When deciding an application to direct meetings of creditors, therefore, a court must ensure that, inter alia, the reorganization plan submitted by a debtor company constitutes a compromise or an arrangement.

26 Neither the *Companies' Creditors Arrangement Act* nor the case law construing that Act defines the phrase "a compromise or an arrangement". In general, statutory language is to be accorded its grammatical and ordinary meaning, that is, it is to be understood in its proper and most known signification. Dictionaries assist in deciding the ordinary meaning of statutory language.

27 *The Shorter Oxford English Dictionary on Historical Principles*, 3d ed. (Oxford: Clarendon Press, 1973), at p. 386, defines the term "compromise" as follows:

Compromise ... 3. Arrangement of a dispute by concessions on both sides; partial surrender of one's position, for the sake of coming to terms; the terms offered by either side ....

28 *Webster's New World Dictionary*, 2d ed. (William Collins & World Publishing, 1978), at p. 292, similarly defines the term "compromise";

Compromise ... 1. a settlement in which each side gives up some demands or makes concessions ....

29 Having regard to dictionary entries, the term "compromise" implies a mutual or consensual agreement between opposing parties; it implies an adjustment of contested claims by mutual accommodation or concession.

30 Of particular significance is *Re N.F.U. Development Trust Ltd.*, [1973] 1 All E.R. 135, [1972] 1 W.L.R. 1548 (Ch. D.), in which Brightman J. was called upon to construe subs. 206(1) of the *Companies Act 1948* (U.K.) c. 38, the English equivalent of ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. At p. 140 [All E.R.], Brightman J. reasoned:

Section 206 is dealing with what is described as a 'compromise or arrangement ... between a company and its creditors ... or between the company and its members'. The word 'compromise' implies some element of accommodation on each side.

31 The expression "arrangement" is defined in *The Shorter Oxford English Dictionary on Historical Principles*, supra, at p. 106:

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Arrangement ... 5. A settlement of mutual relations, claims, or matters in dispute ...

32 *Webster's New World Dictionary*, supra, at pp. 76-77, similarly defines the expression "arrangement":

arrangement ... 5. a settlement or adjustment, as of a dispute, difference, etc ...

33 *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Co., 1979) at p. 100, defines the somewhat comparable phrase "arrangement with creditors":

Arrangement with creditors. A plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his debts. Chapter XI of the Federal Bankruptcy Act [the American equivalent of the *Companies' Creditors Arrangement Act*] provides for a device whereby, under the protection and supervision of the court, a financially troubled business may work out a composition or extension agreement with its creditors permitting it to stay in business, rather than going bankrupt.

34 Having regard to dictionary entries, the expression "arrangement" connotes a mutual or consensual settlement of disputed matters. Again, of particular import is *Re N.F.U. Development Trust Ltd.*, supra, in which Brightman J. considered the English equivalent of ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. Having ruled that the term "compromise" implies some element of accommodation, Brightman J. continued, at p. 140 [All E.R.]:

Similarly, I think that the word 'arrangement' in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A member whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression.

35 The case law and dictionary entries in respect of the expressions "compromise" and "arrangement" instruct that any reorganization plan filed by a debtor company pursuant to ss. 4 or 5 of the *Companies' Creditors Arrangement Act* must comprise a mutual or consensual agreement between the company and those of its creditors which the plan purports to bind. They instruct that any reorganization plan proffered by a debtor company as a compromise or an arrangement must embody an adjustment of claims effected by mutual accommodation or concession. Indeed, while the case law in respect of the *Companies' Creditors Arrangement Act* does not define the phrase "a compromise or an arrangement", it can be said that the case law does imply some element of mutual accommodation in the reorganization process. For example, in *Meridian Developments Inc. v. Toronto-Dominion Bank*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.), Wachowich J. commented [p. 114 C.B.R.; p. 155, Alta. L.R.]:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

36 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 138 (B.C. S.C.), at p. 139, Trainor J. commented in like fashion:

I made the order, being satisfied, on the material which was then presented to me, that they should have the opportunity to attempt a reorganization. I was satisfied that the purpose of the legislation was to permit such an attempt for the benefit not only for the corporations themselves but also of all of the creditors who were affected by the business enterprise.

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37 The reorganization plans filed by the petitioners do not suffice either as compromises or arrangements within the meaning of ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. A comprehensive assessment of the reorganization plans proffered by the petitioners can be achieved only through careful scrutiny of the reorganization plans and the information circular. In deciding the petitioners' application to direct meetings, which application involves matters of considerable complexity, the Court is permitted to scrutinize not only the reorganization plan but also the information circular; indeed, in order to exercise its discretionary jurisdiction properly, the Court ought to be informed fully as to all relevant matters. In *Re Dorman, Long & Co.; Re South Durham Steel & Iron Co.*, [1934] 1 Ch. 635, [1933] All E.R. Rep. 460, debtor companies availing themselves of English reorganization legislation sought judicial sanction of their compromises or arrangements. With reference to explanatory circulars, Maugham J. stated, at p. 665 [Ch.]:

I now pass to an important question — namely, the question in relation to the explanatory circular sent out by the directors. I think I have already observed that there is no obligation under the Act to send out such a circular at all ... The practice being to send out an explanatory circular in such a case, it is, in my opinion, the duty of the Court very carefully to scrutinize the circular when the matters involved are matters of considerable difficulty and doubt.

38 An examination of the information circular leads the reader to the conclusion that the petitioners are more concerned with conveying the impression that C.I.B.C. is responsible for the financial state of the companies which existed immediately prior to the application of May 3, 1989. The information circular, which will, if this application is granted, be sent to all unsecured creditors, contains the following statements:

2.01 These cash demands were to a great degree anticipated by Management and they had made previous arrangements with the Bank to ensure adequate financing. It is alleged by the Companies that their current financial situation is a direct result of the conduct of the Bank described below. The Companies have commenced an action against the Bank seeking damages for refusal by the Bank to honour its commitments to provide additional financing to the Companies, the failure of the Bank to give reasonable demand or notice prior to commencing enforcement and realization proceedings and the disregard by the Bank of an order of the Court staying all proceedings against the Companies (see Article 3.06).

.....

3.02 Commencing in approximately December, 1988, the Bank reneged on its agreement to provide increased lines of credit and additional capital financing to the Companies. Subsequently, and on or about March 17, 1989, the Bank, without any notice or demand and at a time when the Ursel Group were not in default under their loan agreements or otherwise, cancelled all of the bank accounts and operating loans of the Ursel Group.

.....

### 3.06 Legal Proceedings by the Companies against the Bank

The Companies have recently commenced an action in the Court against the Bank. In general terms this action is based on the following allegations:

- a) refusal by the Bank to honour its commitment to provide additional financial support to the Companies;
- b) failure of the Bank to give reasonable demand or notice prior to commencing realization proceedings; and
- c) disregard by the Bank of the order of the Court made May 3, 1989 wherein all proceedings against the Companies were stayed.

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It is alleged by the Companies that the unlawful conduct of the Bank was the direct cause of the Companies' current difficult financial situation and the Companies have claimed relief against the Bank including:

- a) a declaration that the Companies are released and discharged from any and all liability to the Bank;
- b) an order that the Bank indemnify the Companies for the liability of the Companies to their secured creditors;
- c) an order that the Bank be held in contempt of Court;
- d) damages in excess of \$15,000,000.; and
- e) Exemplary, aggravated and punitive damages.

39 Page 17 under heading of "notes":

1. The claims of the Bank are subject to a set-off of any damages awarded to the Companies pursuant to the action commenced against the Bank more fully described at Article 3.06. The Companies' claim for damages against the Bank is in excess of \$15,000,000.

40 The information circular containing such unproven statements, circulated to all unsecured creditors of the companies, would lead them to believe that the claim against the bank would result in all of the claims of the unsecured creditors being paid out of the anticipated damage award.

41 The information circular presents only the petitioners' version of the facts, yet s. 4 and 5 of the Act refer to a compromise or an arrangement between the debtor company and its secured creditors. The Act does not contemplate that the court will order a meeting of the creditors when there exists such a definite conflict between the companies and the principal creditor.

42 The allegations made by Thomas Bauman in his affidavit of December 4, 1989 merit consideration if only to show the facts that existed prior to May 3, 1989. These allegations are not contained in the information circular and will not be made available to the unsecured creditors.

43 The following paragraphs are taken from the Bauman affidavit and, although Adam Ursel and Lou Ursel in their respective affidavits of January 3, 1990 attempted to justify the Bauman allegations they did not deny them. The Bauman allegations remain uncontradicted. Excerpts from the Bauman affidavit:

8. That as a result of concerns that CIBC was having with the operating of the Ursel line of credit, at the regional office level, CIBC advised the Ursels that a full review of their financial affairs would have to be conducted and CIBC requested Clarkson Gordon Inc. in February, 1989 to review and assess the financial position of the companies, assess the security value to CIBC and review the companies' contracts. As a result of the investigations made by Clarkson Gordon Inc., who had access to and examined the records of all the companies, they determined that the financial information given by the companies to CIBC was wrong and misleading.

.....

19. That I am advised by Clarkson Gordon Inc. that at a time when the principals of the companies were saying that the companies were cash deficient and requesting increased operating lines from CIBC the shareholders were bleeding the companies.



20. That the records of the Ursel companies disclose that the shareholders, Lou Ursel, Adam Ursel and Don Hnatuk, and their wives, drew out of the companies from October 1, 1987, to April 30, 1989, the sum of \$1,044,193.43 at a time when they knew or ought to have known that the companies were having or would have cash flow problems and were undercapitalized. Of this amount the sum of approximately \$240,000.00 was used to reduce the personal indebtedness of the shareholders to Lloyds Bank. Of the \$1,044,193.43, the sum of \$204,785.82 was withdrawn from the companies by the said shareholders and their wives between October, 1988 and February, 1989, a time when the companies were short of operating funds and needed all their cash to meet their pressing liabilities, and therefore to the detriment of both its secured and unsecured creditors. Of the said \$204,785.82 the sum of \$21,000.00 was used to reduce the shareholders' personal liability to CIBC.

21. That I am advised by Clarkson Gordon Inc. that at a time when the Ursel companies were requesting additional financing, that the companies, in addition to the amounts referred to in paragraph 20, advanced to Don Hnatuk on February 8, 1989, the sum of \$71,430.00

22. That I am advised by Clarkson Gordon Inc. that Ursel Constructors at a critical time paid the tax liabilities of Ursel Fabricators, in the sum of \$75,000 to Revenue Canada as follows: \$25,000.00 in February, 1989, \$25,000.00 in March 1989, and \$25,000.00 in April, 1989. I am informed by Clarkson Gordon Inc. that Ursel Fabricators is a defunct company, no longer carrying on business and has no assets and no ability to repay \$75,000.00 to Ursel Constructors. This money was paid by Ursel Constructors at a time when Lou and Adam Ursel knew that the Ursel companies had cash flow problems.

23. That I am advised by Clarkson Gordon Inc. that in the course of their review, they determined that two computers valued at \$14,532 which had been shown as assets of Ursel Constructors, having been purchased and paid for by Ursel Constructors, were removed from the Ursel companies' premises and are being claimed as personal assets of Lou Ursel and Kathy Ursel-Hnatuk.

24. That on page 13 of Schedule C of the Information circular filed by the petitioners under Material Contracts it states that:

(1) The mortgage granted by Lou Ursel to Ursel Constructors with a balance of \$85,000 owing is subject to a setoff for employee compensation in the amount of \$75,000 by Lou Ursel; and

(2) that a mortgage granted by Kathy Ursel-Hnatuk with a balance owing of \$70,000 is subject to a setoff for employee compensation in the amount of \$40,000 by Kathy Ursel-Hnatuk.

25. That the audited financial statement of the Ursel companies dated September, 1988 show that the said mortgages referred to in paragraph 24 are outstanding with no set offs, and the Ursel companies' first proposal in regard to its indebtedness to CIBC dated March 14, 1989, states, that 'the mortgage receivable (the said mortgages) would be financed with an outside financial institution and repaid to the company in the amount of \$156,673.00'.

26. That in the Ursel companies' second proposal to CIBC on March 29, 1989, the company stated 'Ursel would dispose of the mortgage receivables within four months for the amount of \$156,673.00 which would be applied to Ursel loans (at CIBC)'.

27. That I am advised by Clarkson Gordon Inc. that as of March 31, 1989, there were no wages or other employee compensation due by Ursel Constructors to Lou Ursel and Kathy Ursel-Hnatuk; accordingly either the written information given to CIBC and Clarkson Gordon Inc. by Lou Ursel regarding the mortgages was false and misleading or this employee compensation must have accrued since March 31, 1989, which in such event it would

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then be contrary to the court order of May 31, 1989, which states in paragraph 16(f) that no remuneration shall be paid to the officers and directors of the petitioners except Don Hnatuk.

28. That in any event Lou Ursel was employed by and receiving compensation from Alta Surety pursuant to an agreement made between the petitioners and Alta Surety Company dated March 22, 1989, whereby Lou Ursel was being paid \$4,000 per month.

31. That as a result of the investigations made by CIBC and Clarkson Gordon Inc. it was determined that the Ursel companies were in hopeless financial shape, and CIBC immediately began discussions with the principals of the companies, Adam and Lou Ursel, to resolve matters. That I am informed that the series of meetings were held with the principals of the companies, their accounting and legal advisors, over a period of five weeks from March 14, 1989, to April 21, 1989. At the final meeting an agreement was reached with CIBC whereby CIBC would appoint a monitor to monitor the affairs of the Hawk Group and Krane Service Inc. and that there would be an orderly liquidation of the Ursel companies' assets by CIBC using the services of a receiver and Lou and Adam Ursel. Documents were prepared by CIBC's solicitors for execution by the companies to reflect the agreement and were delivered to the companies' solicitors for execution by the companies but the companies have subsequently refused to implement or be bound by the said agreement and have neglected and refused to execute documents reflecting the said agreement.

44 Adam Ursel in his affidavit of January 3, 1990 responded to the Bauman affidavit as follows:

13. ... The improved financial performance projected is a result of the fact that the Hawk Group has dramatically reduced its overhead expenses, and assuming that sales recover to the same levels as they were in 1988, it is my opinion and belief that the Hawk Group could easily afford the financing costs and be able to have additional cash available for distribution amongst its trade creditors as is indicated by the projection. Given the Court Proceedings that have been commenced by the Petitioners against the CIBC, it is quite possible that there will be no financing costs to take into consideration and, in fact, there may be funds available for unsecured creditors depending on the damages that the Hawk Group is able to prove at trial.

45 Lou Ursel in his affidavit of January 3, 1990 responded to the Bauman affidavit as follows:

21. That in response to paragraphs 19 and 20 of the Bauman Affidavit, I disagree completely with the statement that the shareholders were 'bleeding the companies'. During the 1988 fiscal year of Ursel Investments Ltd. ended September 30, 1988, Ursel Investments Ltd. made a pre tax operating profit of \$345,439.00 as indicated in the Corporate Statement of Earnings which is attached and marked as Exhibit 'M' to this my Affidavit. In accordance with the normal accrual of management bonuses suggested by our auditor, \$311,000.00 was allocated. The subsurface soil contracts on the City Hospital Project only became apparent to the Ursel Group in late September of 1988 and was only considered to be a problem towards the end of November, 1988. The problems with the St. Paul's Hospital Project only became apparent in late November of 1988. Up to the end of November, 1988, the Ursel Group did not have a cash flow problem and was operating under the impression that it had a \$2,000,000.00 line of credit available. Cash flow problems only became apparent when the CIBC advised us that the increased line of credit of Ursel Investments Ltd. had not received 'formal' approval. As and from the 1st day of December, 1989, [sic] to the 3rd day of May, 1989, the principals of the Ursel Group, being myself, my father, Adam Ursel, my mother, Viola Ursel, my sister, Kathy Ursel-Hnatuk and my brother-in-law, Don Hnatuk, received total remuneration of \$332,787.27. Of this amount \$16,896.06 went to tax shelters with the full knowledge of the CIBC; \$4,787.65 was paid for life insurance premiums with the full knowledge of the CIBC; \$215,256.86 was accrued to the Receiver General for Canada for income taxes for the prior year but has never been paid and forms part of the claim of Revenue Canada; \$82,813.34 was for personal use and \$13,033.35 was withheld by the Ursel Group to cover the purchase of 2 computers by myself and my sister. With respect to the sum of \$240,000.00 paid to Lloyds Bank, the CIBC was aware of the indebtedness to Lloyds Bank in the amount of \$740,000.00 for tax shelters prior to entering into the Commitment Letter. The CIBC was only prepared to allow a maximum debt in the tax shelter

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of \$250,000.00 and knew that funds from the Ursel Group would be used to pay down the debt. The majority of the excess debt to Lloyds Bank above the level of \$250,000.00 was paid out by December of 1987. By letter dated the 10th day of December, 1987, a copy of which is attached as Exhibit 'N' to this my Affidavit, the CIBC paid out the remaining portion of the tax shelter loan to Lloyds Bank (referred to as the 'V.G.B. and Associates') in the amount of \$250,000.00.

46 Counsel for the Bank argued that the Court should decline to order the meetings sought by the petitioners because they filed with the Court two reorganization plans in respect of nine corporations. As a matter of procedure it would have been preferable for the petitioners to have applied to the Court for leave to file two organizational plans instead of the one plan contemplated in the May 31, 1989 order. It is not necessary to decide this point at this time as it has little bearing on deciding whether or not a meeting of the creditors is ordered.

47 Stanley E. Edwards in his article 'Reorganizations Under the *Companies' Creditors Arrangement Act*' which appeared in (1947) 25 the Can. Bar Rev., 587 outlined the main problems which counsel and the courts will face in applying the Act. This article suggests that the Court before it orders a meeting of the creditors under ss. 4 and 5 of the Act must first be satisfied that:

- (a) The companies should be kept going despite insolvency.
- (b) The public has an interest in the continuation of the enterprise, particularly if the companies supply commodities or services that are necessary or desirable to large numbers of consumers, or if they employ large numbers of workers who would be thrown out of employment by its liquidation.
- (c) The plan of reorganization is so framed that it is likely to accomplish its purpose.
- (d) The plan should embrace all parties, if possible, but particularly secured creditors.
- (e) The reorganization plan should be fair and equitable as between the parties.

48 Applying these guidelines to the facts of this proposed reorganization plan I have concluded as follows:

49 (a) The petitioners by proposing two plans of reorganization have divided the debtor companies into two categories. One category, i.e., the Ursel Group will be continued in accordance with Article I of the plan as follows:

**Article I — Purpose and Effect of Plan**

1.01 *Purpose of Plan.* The purpose of this Plan is:

- (a) to permit the Ursel Group to remain in possession of the crane rental and leasing business and the undertaking property and assets associated therewith to continue to carry on that business, as reorganized;
- (b) with respect to the construction business, the purpose is to permit the orderly and cost-effective liquidation of the property and assets used in that business in order to repay the Creditors associated therewith as their interests appear and permit the Ursel Group to realize the maximum benefit from the Construction Claims that remain unsettled; and
- (c) to permit the Ursel Group, by invoking this Plan, to pay each Creditor as much or more on account of its Claim, calculated on a net present value basis, than would be paid on a liquidation of the assets of the Ursel Group under proceedings available to wind-up the affairs or liquidate the assets of insolvent debtors or other proceedings

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which might be initiated by Creditors to recover their Claims or to enforce security granted to them by the Ursel Group.

1.02 *Effect of Plan*. This Plan involved the amalgamation and restructuring of certain of the Ursel Group and the sale and transfer of assets among certain of the Ursel Group. If this Plan is approved by the Creditors as required by the Acts and therefore sanctioned by the Court, this Plan will be binding on the Ursel Group and its Creditors.

50 The other category, i.e., The Hawk Group will be continued in accordance with Article I of the Plan as follows:

**Article I — Purpose and Effect of Plan**

1.01 *Purpose of Plan*. The purpose of this Plan is:

(a) to permit the Hawk Group to remain in possession of their building supply business and the undertaking, property and assets associated therewith to continue to carry on that business, as reorganized; and

(b) to permit the Hawk Group, by involving the Plan, to pay each Creditor as much or more on account of its Claim, calculated on a net present value basis, than would be paid on a liquidation of the assets of the Hawk Group under proceedings available to wind-up the affairs or liquidate the assets of insolvent debtors or other proceedings which might be initiated by Creditors to recover their Claims or to enforce security granted to them by the Hawk Group.

1.02 *Effect of Plan*. This Plan involves the amalgamation and restructuring of the Hawk Group and the amendment of certain terms of the Hawk Group's obligations. If this Plan is approved by the Creditors as required by the Acts and thereafter sanctioned by the Court, this Plan will be binding on the Hawk Group and its Creditors.

51 The two plans put forward by the petitioners will result in one group of companies being wound up after the assets have been liquidated and the other group of companies being continued in the building supply business indefinitely. To accomplish this the companies would have to continue to use the bank's security and attempt to defeat the claim of the bank by way of a set off of anticipated damages from the lawsuit commenced after the court order was obtained to prepare and file a reorganization plan.

52 I have concluded that the continuation of these companies cannot be justified by either the provisions or the intent of the *Companies' Creditors Arrangement Act*.

53 (b) It has not been shown by the material filed that the public has any interest in the continuation of the enterprise. The companies do not provide essential services and do not employ a large number of workers. The continuation of these companies will benefit only the Ursel family members.

54 (c) The plan of reorganization as it is presently framed is not likely to accomplish its purpose as the principal creditor has been excluded from participation in the plan. Throughout the information circular reference is made to the result of the lawsuit to the success of the plan. This Court cannot forecast the result of any lawsuit, much less this one.

55 (d) The plan cannot succeed as it does not embrace all parties, particularly the principal secured creditor. The debtor companies by suing the principal secured creditor for \$15,000,000 and then indicating in the information circular that it intended to set off against the secured claim the amount of the unproven claim in damages showed lack of good faith and will result in the principal secured creditor voting against the plan.

56 Supportive of the conclusion is *Re United Maritimes Fisherman Co-Op* (1988), 68 C.B.R. (N.S.) 170, 87

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N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) at pp. 172-173, where Landry J. reasoned:

All evidence points to the fact that the proposed restructuring cannot succeed and that there is absolutely no hope that the contemplated plan of arrangement or compromise will be accepted in accordance with the *Companies' Creditors Arrangement Act*.

.....

Since the restructuring cannot succeed, the normal course of action would be for the court to rescind the 1st December, 1987 order [which order declared that the debtor companies were corporations to which the *Companies' Creditors Arrangement Act* applied, authorized the debtor companies to file a formal plan of compromise or arrangement, stayed all actions, suits and proceedings by the creditors or the debtor companies and appointed an interim receiver].

57 (e) On careful examination of the reorganization plans, as to their propriety or impropriety, their fairness or unfairness, the inescapable conclusion is that they are devised for the sole benefit of a select few, namely, shareholders, directors and officers of the petitioners. They are grossly unfair to the principal secured creditor, namely, C.I.B.C., and offer no substantial benefit to the other creditors of the petitioners."

58 The reorganization plans submitted by the petitioners do not comply with the purpose and intent of the *Companies' Creditors Arrangement Act*. The petitioners have invoked the Act, not for the legitimate purpose of compromise or arrangement, but for their own purposes as extracted from Adam Ursel's affidavit sworn on January 3, 1990, wherein he states in para. 34:

The survival of the Hawk Group is very important to me personally as is the survival of Krane Service Inc. for my son-in-law, Dan Hnatuk.

59 On the basis of the material filed I have concluded that the reorganization plans are nothing more than a scheme of liquidation to be spread out over a considerable period of time to the benefit of the Ursel family and to the detriment of the creditors and in particular the principal secured creditor, the Canadian Imperial Bank of Commerce. The object and purpose of the Act is to continue the company through its period of difficulty to become a viable company for the benefit of its creditors, shareholders, employees and the public.

60 The reorganization plans as proposed fall far short of these objectives.

61 The application by way of notice of motion dated November 16, 1989 returnable November 22, 1989 and adjourned to February 21, 1990 is hereby dismissed.

62 It is ordered that the following orders made by this Court are hereby rescinded:

Fiat dated May 3, 1989,

Fiat dated May 10, 1989,

Fiat dated May 31, 1989.

63 The Act is silent as to costs and since the matter of costs was not addressed during argument, leave is granted to argue the question of costs by way of a telephone conference call with me on a date to be arranged with the local

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Registrar at Yorkton.

### **B. Order for a Court-Appointed Receiver and Manager**

64 I will now deal with the second motion. This is the application by the Canadian Imperial Bank of Commerce for an order appointing Clarkson Gordon Inc. as receiver-manager of the undertaking, property and assets of the petitioners. This motion has been adjourned from time to time to be argued following the motion for an order to direct meetings of the creditors. Leave was granted to the applicant to amend para. 3 of the notice of motion to include the words "pursuant to the provisions of the *Business Corporations Act* for the Province of Alberta".

65 Counsel for the applicant, the Canadian Imperial Bank of Commerce, submitted in argument the following points in support of the application:

The Bank could, pursuant to its Debenture, appoint a receiver and manager with respect to all of the Respondents except Krane Services Inc. ('Krane') and Vijan General Contractors Ltd. ('Vijan') as neither of those companies has granted the Bank a debenture, it is imperative that all of the Respondents be administered by a court appointed receiver and manager for the following reasons.

1. Assets and funds are being moved among corporate entities within the Respondents.
2. Assets and funds of the Respondents have been transferred and comingled among the Respondents without observance of corporate formalities.
3. While the Bank does not have debenture security from Krane and Vijan, it does have security in the form of assignments of accounts receivable and they are both jointly and severally liable for the entire indebtedness of the other Respondents.
4. The existence of intercorporate loan guarantees.

An instrument appointed receiver and manager would be frustrated in its attempts to carry out efficiently its work and duties as a result of the complexities of the operations of the Respondents including:

- a) The fact that the Respondents operate within British Columbia, Alberta, Saskatchewan and Manitoba;
- b) The fact that there are a number of construction projects being carried out within Saskatchewan, some of which are being performed by a bonding company;
- c) The fact that there is a manufacturing plant in British Columbia;
- d) The fact that a number of the Respondents are involved in distribution of products within British Columbia, Alberta and Saskatchewan;
- e) The fact that some of the Respondents are involved in the leasing of equipment within Saskatchewan and Alberta;
- f) The fact that there has been interim [sic] receiver appointed by the Court since May 10, 1989, with very broad powers and duties.
- g) The fact as stated in the Respondents' petition under the *Companies' Creditors Arrangement Act* at page 28

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that:

The operations of the Ursel Group are inextricably intertwined by way of the ownership of assets, management of the business, employment of employees and the undertaking of various projects. CIBC has loaned approximately \$4,500.00 to the companies and the Companies collectively are indebted to more than 1,000 creditors for more than \$4,500.00. In addition, depending upon the ability of Alta to profitably complete the projects currently proceeding under their direction, the Companies may be indebted to Alta.

h) The fact that there are significant contract claims by some of the Respondents in regard to construction projects which will require the co-operation of the principal officers of the Respondents to prosecute and whose co-operation and assistance will not be forthcoming without the intervention of this Court.

66 Because the respondents also operate within British Columbia and Alberta, and because those jurisdictions do not have personal property security legislation, an instrument appointed receiver in those jurisdictions would have greater difficulty in obtaining the assistance of the court if problems arose. As a result, it is anticipated the court appointment will be sought in British Columbia and Alberta and it would be impractical not to have a court-appointed receiver and manager in this jurisdiction.

67 A court-appointed receiver and manager would be able to preserve any goodwill that may be left and would facilitate the sale of any of the respondents as a going concern.

68 Counsel for the respondent, the debtor companies submitted in argument the following points in opposition to the appointment of a receiver and manager:

The Courts in Saskatchewan should only make an appointment when:

- (a) it is shown to be necessary for the Receiver and Manager to more efficiently carry out its work and duties; and
  - (b) such an appointment would place the parties interested in this matter, other than the Debenture holder, in a better and more secure position.
2. A Court appointment is not necessary to allow a Receiver and Manager to more efficiently carry out its duties.
  3. A Court appointed Receiver and Manager would not place the remaining parties (other than the Bank) in a more secure position.
  4. Neither Krane Service Inc. or Vijan General Contractors Ltd. have given Debenture security to the Bank.
  5. The Court appointment of a Receiver and Manager would necessarily prejudice the rights of the companies that have simply guaranteed the indebtedness of their parent companies.
  6. The Courts have been very consistent that if a borrower defaults in making payment, that it must be given a reasonable opportunity to pay prior to enforcement proceedings being taken.
  7. It is respectfully submitted that the application by the Bank to have this Court appoint a Receiver and Manager is simply a device being utilized by the Bank to attempt to circumvent the legal proceedings that have been commenced by the Petitioners against the Bank. The Receiver and Manager being proposed by the Bank is the same Receiver and Manager that the Bank retained to do a complete analysis of the Bank's security. The reports that were prepared by Clarkson Gordon have been referred to throughout these proceedings. It is suggested that

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there would be a conflict of interest with Clarkson Gordon Inc. (now Ernst & Young Inc.) acting as Receiver and Manager for any or all of the companies as it has previously acted for the Bank in preparing the Clarkson Gordon reports.

8. It is respectfully submitted that none of the reasons given by the Bank in support of a Court appointed Receiver and Manager outweigh the extreme prejudice to the Petitioners if a Receiver and Manager is appointed.

69 Having considered the very able arguments made by counsel and having considered the briefs filed in support of such arguments, I am persuaded to give weight to the words of Estey J. in *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.) at p. 17 when he said:

The difference in law between a receiver and manager appointed in a debenture and a receiver and manager appointed by the court appears to be that in the latter instance he is acting in a fiduciary capacity to all parties who may have an interest in the matter after the claim of the debenture holder has been satisfied. I am of the view that the order as asked should be granted only if such an appointment would place the parties interested in this matter, other than the debenture holder, in a better or more secure position.

70 This statement together with the fact that there is already a court-appointed receiver in charge of the petitioners' assets leads me to the conclusion that the Court should appoint the receiver-manager. From the standpoint of the transfer of powers that it should be from one court-appointed receiver to another court-appointed receiver.

71 The relief sought in the notice of motion is granted and an order shall issue in the form of the draft order filed with the following changes thereto:

(a) The addition of the words 'and s. 95 of the *Business Corporations Act* of Alberta' in the third line of the second paragraph of the draft order.

(b) The addition of the following paragraph into the draft order:

THAT nothing in this Order shall be interpreted as interfering with the completion of those construction contracts being undertaken by Alta Surety company pursuant to that agreement made as of March 22, 1989 (the "Contracts") provided that:

(a) Alta Surety Company will provide an accounting of the Contracts to any creditor requesting the same and to the Interim Receiver on a Contract by Contract basis on or before the 15th day of each month commencing on June 15, 1989; and

(b) Subject to the provisions of *The Builders' Lien Act*, S.S. 1984-85, c. B-7.1, Alta Surety Company shall be entitled to use all revenue received from the Contracts to complete such Contracts and the use of such revenue shall be without prejudice to any claim that Canadian Imperial Bank of Commerce may have to the revenue.

72 Costs may be spoken to by way of telephone conference call.

73 As to both applications I wish to say that I am indebted to all counsel who presented their very able arguments in such a professional way and supported such arguments with well organized briefs of law containing photocopies of the applicable case authority. Counsel also went out of their way to assist me by assembling in binder form the material most referred to during the course of argument.



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74 Counsel filed such complete briefs of facts and law that I have taken the liberty of incorporating much of their wording in the factual portion of this judgment.

*First motion dismissed; second motion allowed.*

END OF DOCUMENT

# TAB 5

*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 Midity.  
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 Coastal 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.

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## 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 repre-

sent 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 oneworld™ 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 acquisition, 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 commenced 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 billion.

**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 became 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 Petroleum 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 than the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, supra:

As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

**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 remained 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 consid-



er whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect to 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 interna-

tional 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 Narita 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 pub-

lic 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 enhance-



ments 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 unable 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.B.Q.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

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**BRIEF OF AUTHORITIES**

**LENCZNER SLAGHT ROYCE  
SMITH GRIFFIN LLP**

Barristers  
Suite 2600  
130 Adelaide Street West  
Toronto ON M5H 3P5

**Peter H. Griffin (19527Q)**

Tel: (416) 865-2921

Fax: (416) 865-3558

Email: [pgriffin@litigate.com](mailto:pgriffin@litigate.com)

**Peter J. Osborne (33420C)**

Tel: (416) 865-3094

Fax: (416) 865-3974

Email: [posborne@litigate.com](mailto:posborne@litigate.com)

**Shara N. Roy (49950H)**

Tel: (416) 865-2942

Fax: (416) 865-3973

Email: [sroy@litigate.com](mailto:sroy@litigate.com)

**Brendan Gray (58586B)**

Tel: (416) 865-2945

Fax: (416) 865-2878

Email: [bgray@litigate.com](mailto:bgray@litigate.com)

Lawyers for the Moving Party, Ernst & Young LLP