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COURT FILE NUMBER	2101-04670
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	CALGARY
PLAINTIFF	BANK OF MONTREAL
RESPONDENTS	TRADESMEN ENTERPRISES LIMITED PARTNERSHIP, and TRADESMEN ENTERPRISES INC.
APPLICANT	KSV RESTRUCTURING INC., in its capacity as receiver and manager of TRADESMEN ENTERPRISES LIMITED PARTNERSHIP, and TRADESMEN ENTERPRISES INC.
MATTER	IN THE MATTER OF THE RECEIVERSHIP OF TRADESMEN ENTERPRISES LIMITED PARTNERSHIP, and TRADESMEN ENTERPRISES INC.
DOCUMENT	**BENCH BRIEF OF THE RECEIVER for the Application to be heard by the Honourable Mr. Justice P.R. Jeffrey at 2:00 p.m. on Friday, January 20, 2023**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** 4500 Bankers Hall East 855 2nd Street SW Calgary, AB T2P 4K7 Chris Simard/Sean Zweig/Joshua Foster Telephone: 403.298.3100 Facsimile: 403.265.7219 Email: simardc@bennettjones.com /zweigs@bennettjones.com/fosterj@bennettjones.com

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of Tradesmen Enterprises Limited Partnership ("**TELP**") and Tradesmen Enterprises Inc. (together with TELP, "**Tradesmen**") for an order (the "**Discharge Order**"), among other things:

(a) authorizing and approving the Minutes of Settlement between KSV, in its capacity as the Receiver and the Licensed Insolvency Trustee of TELP, and Teck Coal Limited ("**Teck**") dated November 30, 2022, and the Mutual Release between KSV,[1] each as attached to the Sixth Report of the Receiver dated January 9, 2023 (the "**Sixth Report**") as Appendices "D" and "E", respectively (collectively, the "**Settlement Agreement**");

(b) approving the fees and disbursements of the Receiver and its counsel, without the necessity of a formal passing of their accounts;

(c) ratifying and approving the Receiver's activities as set out in the Sixth Report and all of its other reports filed in these proceedings and not previously approved by this Court;

(d) authorizing and directing the Receiver to, after paying or providing for all of the Receiver's and its legal counsel's existing and final fees and disbursements, and all final estate expenses, distribute (i) $6.2 million plus interest and costs payable to Bank of Montreal ("**BMO**") for amounts borrowed by the Receiver in these proceedings and secured by the Receiver's Borrowings Charge (as defined below), (ii) $3.4 million plus interest and costs payable to BMO for amounts advanced by BMO in the NOI Proceedings (as defined below) and secured by the Interim Financing Charge (as defined below), and (iii) up to $16.3 million plus interest and costs to BMO in partial repayment of the BMO Pre-Filing Indebtedness (as defined below) (collectively, the "**Distributions**");

[1] In all its capacities: as Receiver, Proposal Trustee and Licensed Insolvency Trustee of Tradesmen, and also in its personal capacity.

(e) declaring that Kettle River Contracting Limited Partnership, by its general partner Kettle River GP Ltd. ("**Kettle River**"), has no entitlement to any of the funds comprising the Distributions;

(f) discharging the Receiver upon the filing of a certificate of completion (the "**Receiver's Completion Certificate**") confirming that (i) the distributions contemplated under the proposed Discharge Order have been completed and (ii) all administrative tasks or residual matters outlined in the Sixth Report have been completed (provided that notwithstanding its discharge (i) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (ii) the Receiver shall continue to have the benefit of the provisions of all Orders made in these proceedings, including all approvals, protections and stays of proceedings in favour of the Receiver in its capacity as Receiver); and

(g) releasing and holding the Receiver harmless from any liability for any act or omission on its part including, without limitation, any act or omission pertaining to the discharge of its duties in these proceedings, save and except for any liability arising out of any fraud, gross negligence or willful misconduct on the part of the Receiver.

II. FACTS

2. The facts supporting this proceeding are more fully set out in the Sixth Report. All capitalized terms not otherwise defined herein are intended to have the meaning ascribed to them in the Sixth Report.

A. Background

3. TELP and Tradesmen Enterprises Inc. each filed a Notice of Intention to Make a Proposal ("**NOI**") on February 1, 2021 pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"). KSV was appointed as proposal trustee under each NOI (in such capacity, the "**Proposal Trustee**").

4. TELP formerly carried on a mechanical contracting business specializing in facility and pipeline construction, piping and structure fabrication, module assembly and maintenance projects. TELP operated from two leased premises in Alberta, both of which were vacated on or around April 30, 2021. Its head office was located in Calgary and its fabrication facility in Grande Prairie.

5. Pursuant to an agreement dated May 28, 2019 (the "**Teck Contract**"), Teck retained TELP to act as the mechanical and piping general contractor on a project to construct the Fording River Operations Active Water Treatment Facility (South Project) located near Elkford, British Columbia (the "**Project**").

6. The Project was substantially over budget – TELP takes the position that the Teck Contract originally had a contractual scope of approximately $52 million. TELP's position is that due to the increased scope of, and the extraordinary number of changes on, the Project, TELP issued approximately 900 change order requests and 1,700 requests for information to Teck. By letter dated January 11, 2021, Teck terminated the Teck Contract. TELP's position is that the grounds relied upon by Teck to terminate the contract were improper. Teck disputes TELP's position. TELP commenced arbitration proceedings against Teck (the "**Arbitration**"), in which TELP has claimed $54 million against Teck. Teck filed a $54 million counterclaim against TELP in the Arbitration.

7. The termination of the Teck Contract caused the Companies to commence the NOI Proceedings. Principally, the NOI proceedings (the "**NOI Proceedings**") were commenced to:

(a) afford Tradesmen the time and stability required to advance litigation against Teck, Fluor Canada Ltd., Canadian Pacific Limited, the Province of British Columbia and FortisBC Energy (the "**Litigation**") (which was first pursued by way of an action in the Supreme Court of British Columbia and then ultimately in the Arbitration); and

(b) allow Tradesmen to access interim financing pursuant to an interim financing credit facility (the "**Interim Facility**") dated February 1, 2021 between

Tradesmen and BMO, as interim lender (in such capacity, the "**Interim Lender**").

8. In furtherance of these objectives, Tradesmen sought and on February 3, 2021, obtained an order (the "**NOI Order**") from this Court, which, among other things:

(a) approved the Interim Facility and authorized Tradesmen Enterprises Limited Partnership to borrow up to the maximum principal amount of $1.9 million thereunder;

(b) granted a priority charge (the "**Interim Financing Charge**") on all of Tradesmen's present and after-acquired assets, property and undertakings (collectively, the "**Property**") in favour of the Interim Lender to secure all of Tradesmen's obligations under the Interim Facility; and

(c) granted a priority charge on the Property to secure the professional fees and disbursements of counsel to Tradesmen and the Proposal Trustee up to the maximum amount of $300,000 (the "**Administration Charge**").

9. On March 2, 2021, the NOI Order was amended and restated to, among other things:

(a) authorize Tradesmen Enterprises Limited Partnership to borrow up to the maximum principal amount of $2.8 million under the Interim Facility and approve a corresponding increase in the Interim Lender's Charge; and

(b) approve a key employee retention plan (the "**KERP**") and grant a priority charge on the Property in the maximum amount of $202,500 (the "**KERP Charge**") as security for payment of the obligations under the KERP.

10. Given that the Litigation would not be resolved prior to August 1, 2021, being the date by which Tradesmen was required to file a proposal pursuant to subsection 50.4(9) of the BIA, BMO applied for and on April 15, 2021, this Court granted an order (the "**Receivership Order**") on consent to commence the Receivership Proceedings.

11. Among other things, the Receivership Order appointed KSV as the Receiver pursuant to subsections 243(1) of the BIA and 13(2) of the *Judicature Act,* R.S.A. 2000, c. J-2. continued

each of the Interim Lender's Charge, the Administration Charge and the KERP Charge. Further, the Receivership Order granted a charge on the Property up to the maximum amount of $1,000,000 (the "**Receiver's Charge**") as security for the professional fees and disbursements of the Receiver and its counsel, and authorized the Receiver to borrow such other monies as it deems necessary or desirable to fund the Receivership Proceedings.

12. The Receiver's borrowings required to advance the Receivership Proceedings and the Litigation were funded by BMO pursuant to receiver's certificates (the "**Receiver's Certificates**"). The Receiver's borrowings under the Receiver's Certificates are secured by the Receiver's Borrowings Charge (as defined in the Receivership Order). The limit which the Receiver can borrow via Receiver's Certificates is $6 million.

B. Tradesmen's Main Creditors

13. BMO is Tradesmen's principal secured creditor and the Plaintiff in these proceedings. As at December 21, 2022, BMO was owed approximately $25.9 million, plus interest and costs which continue to accrue, comprised of pre-filing (the "**BMO Pre-Filing Indebtedness**") and post-filing debt of approximately $16.3 million and $9.6 million, respectively. Tradesmen's other significant creditors are:

(a) 21 sub-contractors of TELP with claims totaling approximately $18.3 million (collectively, the "**Lien Claimants**"), each of which has filed liens against lands associated with the Project for their unpaid work performed on the Project;

(b) Fulcrum Capital Partners Inc. ("**Fulcrum**"), which was owed approximately $1.8 million at the commencement of the NOI Proceedings. Fulcrum also guaranteed a portion of the BMO debt, which guarantee it funded following the commencement of the NOI Proceedings; and

(c) Teck, as a contingent creditor in respect of its counter-claim in the Arbitration.

14. BMO has funded the NOI Proceedings and the receivership proceedings. As at December 21, 2022, the BMO Pre-Filing Indebtedness and BMO's post-filing indebtedness is comprised of the following:

(a) the BMO Pre-Filing Indebtedness, including interest and fees accrued to December 21, 2022, totals approximately $16.3 million, plus interest which continues to accrue thereafter. As noted, Fulcrum guaranteed a portion of this debt, which it has funded;

(b) during the NOI Proceedings, the Interim Financing Agreement was fully drawn, which indebtedness including interest and fees totaled a principal sum of approximately $3.4 million as at December 21, 2022, which is secured by the Interim Financing Charge; and

(c) BMO has funded a principal sum of $5.935 million pursuant to Receiver's Certificates, which amount including interest and fees totaled approximately $6.2 million as at December 21, 2022 (interest and costs continue to accrue). Pursuant to the Receivership Order, such advances are secured by the Receiver's Borrowings Charge. The Receiver's Borrowings Charge has been granted priority as against Tradesmen's property "in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA".[2]

15. In the Receivership Order, this Court ordered the relative priorities of the Court-ordered charges (including those granted in the NOI Proceedings) as follows:[3]

(a) first - the Receiver's Charge;

(b) second - the Administration Charge;

(c) third - the Receiver's Borrowings Charge;

(d) fourth - the Interim Financing Charge; and

(e) fifth - the KERP Charge.

[2] Receivership Order, para. 22
[3] Receivership Order, para. 29

C. The Arbitration and the Settlement Agreement

16. The various steps taken to date in the Arbitration are summarized in section 4.0 of the Sixth Report. As described therein, TELP and Teck have entered into the Settlement Agreement, which provides for a full resolution of all issues between the parties and will facilitate meaningful payments to BMO and the Lien Claimants, and the winding up of Tradesmen's insolvency proceedings.

17. The key terms and conditions of the Settlement Agreement[4] are provided in the table below.

Term	Description
Required Payment	Pursuant to the Settlement Agreement, Teck will pay the all-inclusive amount of $31 million (inclusive of GST), as follows: a) $12.4 million to the Lien Claimants, representing 67%[5] of the amount of their lien claims (the "**Lien Claimant Settlement**"); and b) $18.6 million to the Receiver (the "**Settlement Proceeds**"), which is to be paid by Teck to the Receiver within 30 days of Court approval, should the approval order be granted.
Conditions Precedent	The material conditions precedent to the Settlement Agreement are: a) the Lien Claimants' agreement to the Lien Claimant Settlement; and b) Court approval.
Mutual Release	The Settlement Agreement contemplates the Release, being a mutual release of all claims under, in relation to or in any way connected to the Teck Contract, the termination of the Teck Contract, the Project, the Litigation, the lien actions and the Arbitration, as between Teck and KSV, in its capacities as the Receiver and Trustee of TELP. The Release precludes, *inter alia*, any further action being taken by the Receiver or Trustee against the other defendants in the Litigation, including Fluor.
Lien Claimants' Release	The Lien Claimants are to provide a release of KSV,[6] TELP and TELP's directors and officers in the usual commercial terms for a settlement of that nature in British Columbia.
Dismissal of Proceedings	Subject to Court approval of the Settlement Agreement:

[4] Copies of the Settlement Agreement and the Release are attached as Appendices "D" and "E", respectively, to the Sixth Report.

[5] Calculated as follows: $12.4 million payable by Teck to the Lien Claimants divided by the total amount of their lien claims (approximately $18.4 million). The Lien Claimant Settlement, and the estimated recovery percentage, excludes the claim of Kettle River, as described below.

[6] In all of KSV's capacities: as Receiver, Proposal Trustee and Licensed Insolvency Trustee of Tradesmen and also in its personal capacity.

Term	Description
	a) the Litigation will be dismissed pursuant to a Consent Dismissal Order against all parties, including Fluor; b) Teck and the Receiver will bear their own costs, including their respective share of the Arbitrator's costs, and the Arbitration will be dismissed on a without costs basis; and c) all claims of lien and certificates of pending litigation filed by the Receiver or TELP are to be discharged and removed from title and the lien claims will be dismissed pursuant to Consent Dismissal Orders against all parties and named landowners on a without costs basis.
Other	The Settlement Agreement also provides for the return of $1 million from the Receiver to BMO, which amount was advanced by BMO and held in trust by the Receiver, as security for costs in the Arbitration.

18. The condition in respect of the Lien Claimant Settlement has been satisfied, as follows:

(a) on December 1, 2022, Teck's legal counsel sent a letter to each of the Lien Claimants setting out the terms of the proposed Lien Claimant Settlement, including a schedule reflecting the amount each Lien Claimant would receive (*i.e.*, their *pro rata* share of the Lien Claimant Settlement based on the amount of their lien claim);

(b) on December 12, 2022, Teck's counsel confirmed to the Receiver's counsel that each Lien Claimant had accepted the Lien Claimant Settlement and that the condition was satisfied; and

(c) on January 9, 2023, Teck confirmed to the Receiver the form of release[7] that it would be obtaining from the Lien Claimants as part of the Lien Settlement, which form is satisfactory to the Receiver.

D. KETTLE RIVER

19. Kettle River Contracting Limited Partnership by its general partner Kettle River GP Ltd. ("**Kettle River**") is a subcontractor of TELP who worked on the Project and has advanced a lien claim, but it has not been included in the Lien Settlement. The material facts regarding Kettle River are as follows:

[7] Appendix "C" to the Sixth Report.

(a) TELP engaged Kettle River on August 9, 2019 as a subcontractor to perform excavation work on a unit rate basis with respect to the Project;

(b) Kettle River completed its excavation work on the Project in early 2020. Kettle River claimed additional amounts from TELP pursuant to a variety of change orders, some of which were accepted and others of which were rejected. TELP paid Kettle River in full for the amounts TELP determined was due to it pursuant to the subcontract and approved change orders;[8]

(c) after Kettle River completed its work on the Project, Fluor and Teck conducted a reconciliation of the work performed by Kettle River (Kettle River was entitled to charge on a unit rate basis, for the amount of earth it excavated), and the amounts invoiced by Kettle River. Fluor and Teck carried out this reconciliation based on the survey of the volumes of earth removed, that had been provided by Kettle River. Teck and Fluor concluded that TELP had overpaid Kettle River by $158,899.29. TELP advised Kettle River of the results of this reconciliation on November 10, 2020;[9]

(d) on November 10, 2020, Kettle River replied to TELP that it disagreed with TELP's reconciliation and that it had "gathered project documents and data which contradict" TELP's reconciliation. On November 11, 2020, TELP replied to Kettle River, requesting that Kettle River provide such documents and data, failing which TELP would consider its reconciliation to be final, with the amount of $158,899.29 owing to TELP. Despite this request, Kettle River never provided any such documents or data to TELP;[10]

(e) on March 30, 2021, Kettle River registered a Claim of Lien claiming the amount of $1,132,738.41 against a statutory right of way associated with the Project;[11]

[8] The change order log TELP maintained with respect to Kettle River is attached as Appendix "F" to the Sixth Report
[9] Appendix "G" to the Sixth Report
[10] Appendix "H" to the Sixth Report
[11] Appendix "I" to the Sixth Report

(f) on March 29, 2022, Kettle River filed a Notice of Civil Claim in the Supreme Court of British Columbia;[12]

(g) on May 7, 2022, Kettle River's counsel served the Notice of Civil Claim on counsel for the Receiver; and

(h) on May 10, 2022, counsel for the Receiver wrote to counsel for Kettle River, advising of the stay of proceedings in place with respect to TELP.[13]

III. ISSUES

20. The issues that will be addressed in this Bench Brief are whether this Honourable Court should:

(a) approve the Settlement Agreement; and

(b) approve the Distributions.

IV. LAW AND ARGUMENT

A. Considerations for the Approval of the Settlement Agreement

21. In the Receivership Order, the Receiver has broad powers to settle claims by Tradesmen, and claims against Tradesmen, including to:[14]

> … settle, extend or compromise any indebtedness owing to or by [Tradesmen];
>
> …
>
> initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to [Tradesmen], the Property or the Receiver, and to settle or compromise any such proceedings…

22. There is no statutory test set out in the *Bankruptcy and Insolvency Act* that must be satisfied in an application to approve a settlement involving a debtor company. However, in

[12] Appendix "J" to the Sixth Report
[13] Appendix "K" to the Sixth Report
[14] Receivership Order, paras. 3(g) and (j)

approving settlements, supervising insolvency courts have stated that settlement agreements should be "fair and reasonable."[15]

23. The Receiver submits that the Settlement Agreement is fair and reasonable, for the following reasons:

(a) the Arbitration is complex and expensive. BMO has already funded approximately $6 million under Receiver's Certificates (in addition to the funding it provided under the Interim Financing Charge during the NOI Proceedings). If the Arbitration was to be pursued to its conclusion, additional costs of many millions of dollars would be incurred. These amounts would have to be funded by BMO, and would be afforded a super-priority pursuant to the Receivership order;

(b) because the ongoing costs of the Arbitration and these proceedings rank in priority to the Lien Claimants, the Lien Claimants' recovery would be at increasingly significant risk, particularly if TELP was unsuccessful or only partially successful in the Arbitration. The Settlement Agreement will see the Lien Claimants who have valid lien claims receive a distribution of approximately 67% of their lien claims;

(c) BMO supports approval of the Settlement Agreement notwithstanding that it will suffer a shortfall on the BMO Pre-Filing Indebtedness. BMO has been consulted throughout these proceedings, including by attending the mediation that resulted in the Settlement Agreement;

(d) all the Lien Claimants who have valid lien claims have accepted the Lien Claimant Settlement;

(e) Fulcrum, the Companies' subordinated secured creditor, is not opposed to the Settlement Agreement. Fulcrum will not receive any distributions in these proceedings;

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[15] See *e.g. Re Calpine Canada Energy Ltd.* 2007 ABQB 504 [**TAB 1**] at para. 59, *per* Romaine J. and *Re Nortel Networks Corp*, 2010 CarswellOnt 2077 [**TAB 2**] at para. 40, *per* Morawetz J.

(f) in the Receiver's view, the terms of the Settlement Agreement and the Release are fair and reasonable, and will fully and finally resolve the Litigation, the Arbitration and all valid claims of lien and claims related to the Project, the termination of the Teck Contract, and the Teck Contract, for the benefit of TELP and its stakeholders;

(g) the Settlement Agreement provides for an efficient resolution to these proceedings, including avoiding a potential priority dispute over any recoveries generated in these proceedings; and

(h) the two inspectors of TELP's bankrupt estate, being a representative from each of Fulcrum and BMO, have authorized the Trustee to enter into the Settlement Agreement and provide the Release.

B. The Distributions

24. The result of the Settlement Agreement and Distributions for which the Receiver is seeking approval in this application would result in the following payments:

(a) from Teck to the Lien Claimants with valid lien claims, $12.4 million, representing approximately 67% of the amounts claimed by the Lien Claimants;

(b) from Teck to the Receiver, $18.6 million, which would be paid out as follows:

(i) first, paying or providing for all of the Receiver's and its legal counsel's existing and final fees and disbursements, and all expenses incurred in the administration of the Receivership (including without limitation any final payments owed pursuant to the Key Employee Retention Plan approved by this Court in the Amended and Restated Order granted on March 2, 2021 in Action BK01-095189);

(ii) second, retaining an accrual for all professional fees, disbursements and expenses incurred or to be incurred from December 1, 2022 to the completion of the Debtors' bankruptcy proceedings (the "**Accrual**");

(iii) then, $6.2 million to BMO, being the principal sum borrowed by the Receiver in these proceedings and the unpaid interest and costs accrued to December 21, 2022, all of which is secured by the Receiver's Borrowings Charge, plus any accrued but unpaid interest and costs that accrue after December 21, 2022;

(iv) then, $3.4 million to BMO, being the principal sum borrowed by the Debtors in the NOI Proceedings and the unpaid interest and costs accrued to December 21, 2022, all of which is secured by the Interim Financing Charge plus any accrued but unpaid interest and costs that accrue after December 21, 2022; and

(v) then, up to $16.3 million to BMO in partial repayment of the BMO Pre-Filing Indebtedness (being the principal sum borrowed by the Debtors and the unpaid interest and costs accrued to December 21, 2022, less previous distributions) plus any accrued but unpaid interest and costs that accrue after December 21, 2022.

25. These proposed payments and Distributions will provide for the payment of all the expenses of these Receivership proceedings, and repayment in full of all Court-ordered charges, in order of their priority: the Receiver's Charge; the Administration Charge; the Receiver's Borrowings Charge; the Interim Financing Charge; and the KERP Charge. After that, BMO will receive a meaningful partial repayment of the BMO Pre-Filing Indebtedness, but it will suffer a shortfall of more than $9 million. Fulcrum, the second ranking secured creditor, will receive no repayment of its subordinated secured debt.

26. The Receiver's legal counsel Bennett Jones LLP has provided the Receiver with an opinion on BMO's security in respect of its pre-filing debt. The opinion confirms the validity and enforceability of BMO's security, subject to standard qualifications and assumptions.[16]

27. The Receiver also seeks a declaration that Kettle River has no entitlement to receive any funds from the Distributions, on the basis that:

[16] Sixth Report, para. 6.0.2

(a) Kettle River has no valid claim against TELP because it was overpaid for the work it completed, by $158,899.29. This was the conclusion of Fluor's and Teck's reconciliation;

(b) Kettle River has no valid lien because:

(i) it is not owed anything by TELP;

(ii) its purported registration of its Claim of Lien was out of time and failed to preserve any potential lien rights, under the *Builders' Lien Act* (British Columbia),[17] because it was made on March 30, 2021, which is more than 45 days after TELP's head contract with Teck was terminated.[18] The BLA requires liens to be registered within 45 days of the termination of a head contract[19]; and

(iii) its purported commencement of a Civil Claim failed to include the owner of the statutory right of way which is the property that was liened and thus it failed to preserve any potential lien rights, under the BLA.[20]

28. Based on the foregoing, the Receiver is of the view that not including Kettle River in the Lien Settlement is reasonable and is not unfair to Kettle River, nor to any other stakeholder. To the extent that Kettle River has lien rights, it can still assert those rights against Teck and the other defendants in its Civil Claim, including the real property owned by those defendants.

[17] S.B.C. 1997, C. 45 (the "**BLA**") [**TAB 3**]
[18] Teck terminated TELP's contract on January 11, 2021: Sixth Report at paragraph 2.0.3
[19] BLA, supra [**TAB 3**] at s. 20
[20] *Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd., 2005 BCCA 378* [**TAB 4**] at paras. 4 and 30

V. RELIEF SOUGHT

29. It is respectfully submitted that this Honourable Court ought to grant the Discharge Order, in the form requested by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 9th day of January, 2023.

BENNETT JONES LLP

Per: _____

TABLE OF AUTHORITIES

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TAB	DOCUMENT
1	*Re Calpine Canada Energy Ltd.* 2007 ABQB 504
2	*Re Nortel Networks Corp*, 2010 CarswellOnt 2077
3	*Builders Lien Act*, SBC 1997, C. 45
4	*Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd., 2005 BCCA 378*

TAB 1

2007 ABQB 504
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 1050, 2007 ABQB 504, [2007] A.J. No. 923, 161
A.C.W.S. (3d) 369, 33 B.L.R. (4th) 68, 35 C.B.R. (5th) 1, 415 A.R. 196

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

In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Heard: July 24, 2007
Judgment: July 31, 2007 *
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Sean F. Collins, Jay A. Carfagnini, Fred Myers, Brian Empey, Joseph Pasquariello for CCAA Debtors
Patrick McCarthy, Q.C., Josef A. Krueger for Monitor
Robert I. Thornton, John L. Finnigan, Rachelle F. Moncur for Ad Hoc Committee
Sean F. Dunphy, Elizabeth Pillon for ULC2 Trustee
Howard A. Gorman for ULC1 Noteholders Committee
Peter H. Griffin, Peter J. Osborne for U.S. Debtors
Peter T. Linder, Q.C., Emi R. Bossio for Fund
Ken Lenz for HSBC Bank USA, N.A., as ULC1 Indenture Trustee
Jay A. Swartz for Lehman Brothers
Rinus De Waal for Unsecured Creditors' Committee
Neil Rabinovitch for Unofficial Committee of 2nd Lien Debtholders
B.A.R. Smith, Q.C. for Alliance Pipelines
Douglas I. McLean for TransCanada Pipelines Limited

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Applicants obtained order granting them protection from their creditors under Companies' Creditors Arrangement Act ("CCAA") — Order appointed monitor and provided for stay of proceedings against applicants and against CESC Partnership, CCNG Partnership, and CCS Limited Partnership — Applicants and these three parties were together referred to as CCAA debtors — Parties negotiated terms of global settlement agreement ("GSA") — Monitor noted that GSA resolved all material issues that existed between applicants and US debtors — Monitor concluded that GSA was beneficial to CCAA debtors and their creditors and unequivocally endorsed GSA — CCAA applicants and US debtors brought application to this court and to United States Bankruptcy Court in joint hearing for approval of settlement of these major issues — Application granted — GSA was approved — GSA was not plan of compromise or arrangement with creditors and therefore, vote by creditors was not necessary — No rights were being confiscated under GSA — Some claims were eliminated, but only with full consent of parties directly involved in those specific claims — GSA resolved most of cross-border issues in reasonably equitable and rational manner, provided mechanism by which number of remaining issues could be resolved in court of one jurisdiction or other, and

provided likelihood of greatly enhanced recoveries and expectation that overwhelming majority of Canadian stakeholders would be paid in full — GSA eliminated substantial amount in claims against CCAA debtors and resolved major issues between CCAA debtors and US debtors that had stalled meaningful process in asset realization and claims resolution — GSA unlocked Canadian proceeding and provided mechanism for resolution by adjudication or settlement of remaining issues and significant creditor claims and clarification of priorities — GSA provided clear benefits to Canadian creditors of CCAA debtors and no creditor was worse off as result of GSA considered as whole — While GSA did not guarantee full payment of claims, it substantially reduced risk that this goal would not be achieved — Some risk did not make GSA unfair.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — considered

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (C.S. Que.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Menegon v. Philip Services Corp. (1999), 11 C.B.R. (4th) 262, 1999 CarswellOnt 3240, 39 C.P.C. (4th) 287 (Ont. S.C.J. [Commercial List]) — considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Fracmaster Ltd. (1999), *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.) — referred to

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — considered

T. Eaton Co., Re (1999), 1999 CarswellOnt 4112, 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — referred to

s. 4 — referred to

s. 5 — referred to

s. 6 — referred to

s. 11 — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

APPLICATION by debtors for approval of settlement.

***B.E. Romaine J.*:**

Introduction

1 This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number

of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

2 Both Courts approved the settlement. These are my reasons for that approval.

Background

3 Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

4 During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

5 In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

> a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 2% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
>
> b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;
>
> c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
>
> d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
>
> e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;
>
> f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");
>
> g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
>
> h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
>
> i. Marker claims filed by the ULC1 Indenture Trustee.

6 In the Report, the Monitor describes the settlement process that led to this application as follows:

> 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.
>
> 11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.
>
> 12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
>
> 13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
>
> 14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...
>
> 17. The [GSA] is subject to the following conditions:
>
> > a. The approval of both this Court and the U.S. Bankruptcy Court;
> >
> > b. The execution of the [GSA]; and
> >
> > c. The CCRC ULC1 Notes being sold.

7 As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the "key elements" of the GSA as follows:

> a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim ... against CORPX which results in a total claim against CORPX in the amount of US$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;
>
> b The withdrawal of the BDCs advanced by the U.S. Debtors...;
>
> c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;
>
> d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;
>
> e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the

right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;

ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;

iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;

iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");

v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and

vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;

g. The settlement of the Greenfield Action;

h. The withdrawal of the UL1 Indenture Trustee Marker Claim;

i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;

j The resolution of the quantum of the cross-border intercompany claims...;

k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;

l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan...;

n. Resolution of all jurisdictional issues between Canada and the U.S.; and

o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

8 The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

9 The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

10 The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

11 The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.". Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

12 The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

> a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of $7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:
>
> > ...While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.
>
> b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors' creditors. According to the Monitor's conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

13 The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

14 This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

15 The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

16 As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

17 The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of $25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately $2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately $23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

18 The shortfall, if any, to which the creditors of CESCA will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from $142 million to $378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth $200 million or less, all of the CESCA creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCA will receive full payment even if the CLP Toll Claim is worth as much as $300 million.

19 Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

20 The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

21 The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only $25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX guarantees under the "low" scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

22 The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

23 The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

24 Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

25 Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

26 I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

27 As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly $3^{1/2}$ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund's Objections

28 As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

29 The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

30 Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that $15 million of the possible $90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

31 The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

32 The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

33 The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application.

The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of $10.5 million on the "high" scenario basis or $19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

34 The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

35 The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

36 In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

37 I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

38 While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

39 With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

40 The ULC2 Trustee also objects to the timing of the payment of $75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the $75 million payment will not occur until the CCRC ULC1 Notes are

sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

41 It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 13.

42 The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J. [Commercial List]) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

43 The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

44 The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

45 The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

46 In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky ... contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal.".

47 The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

48 These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

49 Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

50 It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

51 The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

52 The Opposing Creditors rely on *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

53 There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

54 It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

55 I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of $25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

56 The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at paras. 11 and 23 and *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

57 In *Playdium Entertainment Corp., Re*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*.

58 Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium Entertainment Corp., Re* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

59 In *Air Canada, Re*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

> ... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd....* In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise

equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

60 The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

61 Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

62 This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

63 I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

64 The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

65 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

66 Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being

whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

67 The objecting claimants in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

68 Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

69 He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

70 Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

71 Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'."

72 At para. 45, Blair J. made the following comments, which resonate in this application:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
> >
> > The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[Emphasis in *Red Cross*.]

73 Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

74 While there are clear differences between the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* sale transaction and the GSA in this case, what the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *Air Canada, Re* and *Playdium Entertainment Corp., Re*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

75 That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

76 In this case, as in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

77 The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

78 At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

79 The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

80 Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

81 I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

82 The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Application granted.

Footnotes

* Leave to appeal refused *Calpine Canada Energy Ltd., Re* (2007), 2007 ABCA 266, 2007 CarswellAlta 1097, 35 C.B.R. (5th) 27, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]).

End of Document

TAB 2

2010 ONSC 1977
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re [Employee Settlement Approval Motion #2

2010 CarswellOnt 2077, 2010 ONSC 1977, 187 A.C.W.S. (3d) 396, 66 C.B.R. (5th) 77

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Morawetz J.

Heard: March 31, 2010
Judgment: March 31, 2010
Written reasons: April 8, 2010
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Applicants
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Kevin Zych for Informal Nortel Noteholder Group
Arthur Jacques for Nortel Canada Current Employees
Deborah McPhail for Superintendent of Financial Services (non-PBGF)
Alex MacFarlane for Official Unsecured Creditors' Committee of Nortel Networks Inc.
Ken Rosenberg, Lily Harmer for Superintendent of Financial Services of the Pension Benefit Guarantee Fund (PBGF)
Rupert Chartrand, Adam Hirsh for Nortel Board of Directors
Robin Schwill for Nortel Networks UK Limited (In Administration)
Pamela Huff for Northern Trust Company, Canada
Barry Wadsworth for CAW-Canada
Joel P. Rochon, Sakie Tambakos for Opposing Long-Term Disability Employees
Guy Martin for Marie Josee Perrault

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

2010 ONSC 1977, 2010 CarswellOnt 2077, 187 A.C.W.S. (3d) 396, 66 C.B.R. (5th) 77

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Sufficiency of notice of motion.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

N Corp. was granted stay of proceedings under Companies' Creditors' Arrangements Act and monitor was appointed — N Corp. continued to pay pensions and benefits to former employees and long-term disability (LTD) employees (benefits at issue) — N Corp. engaged in negotiations with monitor, former and LTD employees, and labour union regarding benefits at issue — Negotiations resulted in settlement agreement (SA), which provided for funding and payment of benefits at issue until specified dates and for ranking of allowable pension claims with those of unsecured creditors — SA also contained "no preclusion clause" — N Corp.'s motion for court approval of SA was dismissed — N Corp. negotiated amended and restated settlement agreement (ARSA) — ARSA was identical to SA except that preclusion clause was deleted — ARSA was opposed by approximately 10 percent of LTD employees (opposing LTD employees) — N Corp. brought motion to approve ARSA — Motion granted — ARSA balanced competing interests of all stakeholders and represented fair and reasonable compromise — ARSA was product of "best efforts" negotiations — Absent approval of ARSA, benefits at issue could cease as of date of hearing — It was not appropriate for objections of opposing LTD employees to override views of 90 percent majority — Proposal by opposing LTD employees to extend benefits at issue for 60 days while court-ordered negotiations transpired was not acceptable — Ordering payments out of health and welfare trust would deplete corpus of trust — Payment of benefits at issue outside of ARSA would be preferential and there was no statutory priority for former and LTD employees.

Table of Authorities

Cases considered by *Morawetz J.*:

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1754, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

MOTION by insolvent corporation under *Companies' Creditors Arrangement Act* for approval of settlement agreement regarding pension and benefit payments.

***Morawetz J.*:**

1 At the conclusion of argument, the record was endorsed:

Motion granted. Settlement Agreement approved. Reasons will follow. Order to go in the form presented, as amended.

2 These are those reasons.

3 The motion was brought by the Applicants to approve the Amended and Restated Settlement Agreement, dated as of March 30, 2010 (the "Amended and Restated Settlement Agreement"), entered into by the Settlement Parties.

4 The Amended and Restated Settlement Agreement was entered into following the release of my decision on March 26, 2010, in which I did not approve the original Settlement Agreement, which included the "No Preclusion Clause" found in Clause H.2.

5 The Amended and Restated Settlement Agreement is identical to the Settlement Agreement, except that Clause H.2 has been deleted and the schedules to the Settlement Agreement have been updated to account for the deletion of Clause H.2.

6 The court was advised that in connection with the Amended and Restated Settlement Agreement, the Applicants and the Superintendent, in his capacity as Administrator of the PBGF, also entered into a letter agreement with respect to certain matters pertaining to the Pension Plans.

7 In view of obvious overlap between the Settlement Agreement and the Amended and Restated Settlement Agreement, it is appropriate to incorporate, by reference, the March 26, 2010 reasons (the "March 26 Reasons") into this endorsement. The March 26 Reasons are reported at *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]).

8 The defined terms in this endorsement have the same meaning as set out in the March 26 Reasons.

9 In addition to the motion to approve the Amended and Restated Settlement Agreement, ancillary issues were raised, including issues of sufficiency of notice, an adjournment request and certain alternatives to the Amended and Restated Settlement Agreement.

Sufficiency of Notice

10 Concerns have been raised with respect to the short service of this motion. Counsel to the Monitor supports the expedited approval of the Amended and Restated Settlement Agreement and urges that the abridged notice be approved for two reasons. First, the pending cessation of benefits on March 31, 2010, in the absence of approval of the Amended and Restated Settlement Agreement, necessitated a hearing on an urgent basis, and second, the March 26 Reasons found that the Monitor (i) undertook a comprehensive notice process, (ii) gave the opportunity for any affected person to file a notice of appearance and appear before the court and, (iii) properly implemented the notice process.

11 In my view, this motion did not raise any new issues in respect of Clause H.2. Arguments with respect to Clause H.2 were detailed at the hearings from March 3 - 5, 2010 and were referenced in the March 26 Reasons commencing at [83]. Furthermore, all parties were represented in court and counsel were in a position to argue the matter on March 31, 2010. I accept that there was a degree of urgency to hear the motion.

12 In addition, there was a comprehensive notice process for the March 3, 2010 settlement approval motion properly implemented by the Monitor. Given that the only change from the Settlement Agreement, that was the subject of the March 3, 2010 settlement approval motion, and the Amended and Restated Settlement Agreement, is the removal of Clause H.2, notice and service with respect to the March 3, 2010 settlement approval motion is, in my view, sufficient for all purposes including, validating service of this motion.

13 In my view, it was both necessary and appropriate to hear the motion on short notice. Short service is validated.

Motion to Adjourn

14 Counsel for the Opposing LTD Employees requested an adjournment of this motion. The adjournment request was denied, with reasons to follow. The reasons for the denial are the same reasons which I rely upon to approve short service: urgency, full representation of employees in court and counsel were in a position to argue the motion on the merits.

Alternative Relief

15 Counsel for the Opposing LTD Employees also requested that the benefits in place at the time of the hearing be continued for another 60 days while the parties, including representatives from the Opposing LTD Employees, participate in court-ordered negotiations with Campbell J. This alternative requested relief is addressed in these reasons.

The Amended and Restated Settlement Agreement

16 Counsel to the Applicants makes four points:

1. Unless the Amended and Restated Settlement Agreement was approved, the Applicants had no authority to continue making preferred payments to the employees.

2. Without the settlement, the Applicants would wind up or terminate the Pension Plan and medical, dental and other benefits in the near future.

3. The approval of the Amended and Restated Settlement Agreement provides clarity and certainty to the parties who depend on receiving benefits on a daily basis.

4. The Amended and Restated Settlement Agreement is not only the best deal available, it is the only deal.

17 Counsel to the Applicants also submits that the concerns expressed by the court in the March 26 Reasons have been addressed in the Amended and Restated Settlement Agreement, and that this motion does not provide for an opportunity to re-argue the settlement approval motion heard on March 3, 4, and 5, 2010. Effectively, counsel submits that there is nothing new to consider in this motion.

18 The Applicants' position is supported by the Former and LTD Employees, the CAW, the Superintendent, in all capacities, the Nortel Canada Continuing Employees, the Nortel Board of Directors, the Noteholders, the Unsecured Creditors' Committee, and the Monitor.

19 The record in support of the motion includes the affidavit of Ms. Elena King, the Forty-Second Report of the Monitor, affidavits from Mr. Donald Sproule and Mr. Michael Campbell, two of the three court-appointed Former Employees' Representatives who were appointed on behalf of all Former Employees, including pensioners of Nortel, and the affidavit of Ms. Susan Kennedy, the court-appointed LTD Representative.

20 The affidavits stressed the importance of the continuation of the members' medical benefits and pension plans for a further period of time, as well as the anxiety of employees concerned with the imminent cessation or reduction in payments. The affidavits establish that the certainty associated with the preservation and continuation of benefits negotiated in the Settlement Agreement outweigh the limited concession associated with the deletion of Clause H.2.

21 In its recommendation in support of the requested relief, the Monitor states that it believes the Amended and Restated Settlement Agreement and the Settlement Approval Order take into account the March 26 Reasons, and represents a fair balancing of the interests of the Applicants' stakeholders. The Monitor is of the view that the Amended and Restated Settlement Agreement represents an important step in the implementation of the Applicants' restructuring, which was arrived at after extensive negotiations.

22 The Opposing LTD Employees request the continuation of benefits for another 60 days, and court-ordered mediation with Campbell J., or alternatively that the Amended and Restated Settlement Agreement not be approved. The motion record of the Opposing LTD Employees consists of the affidavit of Ms. Urquhart and various exhibits. Ms. Urquhart also swore an affidavit March 1, 2010 in support of the Opposing LTD Employees in respect of the hearing for the approval of the Settlement Agreement.

23 Counsel to the Opposing LTD Employees submits that the stated urgency of the March 31, 2010 "cutting off" of benefits was exaggerated and that the reality is that, while the income replacement benefits for the disabled may cease to be funded from Nortel's operations, the HWT remains in place as a source of funding for income replacement benefits for the LTD Employees.

24 Counsel also submits that, in terms of extending the payment of benefits from Nortel's operations, the evidence demonstrates that there are sufficient assets to do this. No specifics were provided in support of this statement.

25 Further, counsel submitted that there are additional facts to justify rejection of the deal and he summarizes from Ms. Urquhart's affidavit that there are legislative initiatives regarding the status of LTD Employee creditor claims that may be addressed by way of amendments to both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

26 Mr. Rochon also stated that the Opposing LTD Employees rely upon and incorporate by reference the submissions made in their factum submitted in opposition to the Settlement Agreement. These submissions primarily relate to the issue of Third Party Releases.

27 Submissions were also made in person by Mr. Guy Martin on behalf of Ms. Marie Josee Perrault. Mr. Martin also made submissions on the settlement approval motion. He remains passionate in his opposition to the Amended and Restated Settlement Agreement, for similar reasons to those expressed on the earlier settlement approval motion.

28 I cannot accept the Opposing LTD Employees' proposal to extend benefits for 60 days while court-ordered negotiations transpire as being an acceptable outcome. There is no evidence to suggest the March 31, 2010 deadline is not genuine. Further, ordering payments out of the HWT corpus will deplete the corpus of the trust, to the potential detriment of the LTD Employees. In addition, the payment by the Applicants of any benefits to the LTD Employees outside of the Amended and Restated Settlement Agreement would be preferential in nature and ignores the fact that there is no statutory priority for the Former and LTD Employees.

29 Circumstances require that the position of the Former and LTD Employees be considered in light of the current reality. The current reality is that Nortel is insolvent and the benefits and payments promised by Nortel cannot continue indefinitely. Absent approval of the Amended and Restated Settlement Agreement, benefits can cease as at March 31, 2010.

30 There is uncertainty as to what would occur if the Amended and Restated Settlement Agreement was not approved.

31 Counsel to the Opposing LTD Employees was specifically asked whether he had any assurances that the Amended and Restated Settlement Agreement, supported by a $57 million charge, would be on the table at the end of a 60-day extension period. Counsel could provide no such assurances.

32 In contrast, counsel to the Noteholders was emphatic in stating that either the Amended and Restated Settlement Agreement be approved or benefits should cease. This position was supported by counsel to the Unsecured Creditors' Committee. These two groups are significant creditors of the Applicants.

33 The reality is that, absent approval of the Amended and Restated Settlement Agreement, the Former and LTD Employees face cessation of benefits, or at best, uncertainty, a position that was consistently stated by Representative Counsel to be unacceptable.

34 It seems to me that the Former Employees' Representatives and the LTD Representative fully considered the impact of the March 26 Reasons and, after consultations with Representative Counsel and communications with a significant number of Former and LTD Employees, came to the conclusion that the Amended and Restated Settlement Agreement represented an acceptable compromise. The Amended and Restated Settlement Agreement does provide the Former and LTD Employees with preferential treatment, at the expense of the remaining unsecured creditors of the Applicants, in exchange for certain concessions.

35 The Opposing LTD Employees constitute between 37 and 39 people, all of whom, with one or two possible exceptions, are represented by Representative Counsel or the CAW, the latter of who particularly asserts exclusive representation rights for its members. The total number of former employees is approximately 20,000 and the total number of LTD Employees is about 350. The Opposing LTD Employees consist of approximately 10% of all LTD Employees. I have not been persuaded by the arguments of counsel to the Opposing LTD Employees that the matters in issue be deferred or that approval of the Amended and Restated Settlement Agreement be denied. In my view, it is not appropriate for the objections of a 10% minority override the views of 90% of the LTD Employees, who support the settlement through their court-appointed representative.

36 The Settlement Agreement and the Amended and Restated Settlement Agreement are products of extensive negotiations between the parties. The Settlement Parties participated in "best efforts" negotiations that resulted in these agreements. In my view, the very existence of the Amended and Restated Settlement Agreement indicates that effective mediation has occurred.

37 In the March 26 Reasons, I recognized that the Settlement Agreement was arrived at after hard-fought and lengthy negotiations and that the parties to the Settlement Agreement considered it to be the best agreement achievable under the circumstances. In my view, the same can be said with respect to the Amended and Restated Settlement Agreement.

38 In particular, I note that Representative Counsel consulted with the representatives immediately after the March 26 Reasons were released and there was significant communication with a number of the members of the group. There is strong evidence of support from the employees to the Amended and Restated Settlement Agreement. On the other hand, there are approximately 37 to 39 employees opposing court approval.

39 Finally, I note that this endorsement does not directly address the third party releases in the Amended and Restated Settlement Agreement, which the Opposing LTD Employees referenced in their submissions. The issue of third party releases was fully argued in the earlier motion and the March 26 Reasons reflect my findings. Nothing in the Amended and Restated Settlement Agreement alters these findings or conclusions.

Disposition

40 The Amended and Restated Settlement Agreement is not perfect but, in my view, under the circumstances, it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same.

41 A formal order giving effect to the foregoing was prepared by counsel to the Applicants. Nothing in the order granted, including in particular paragraphs 5 and 11, is intended to prevent the Northern Trust Company, Canada, from claiming and recovering its fees and expenses from the trust funds, as it may be entitled pursuant to law and the trust agreements. All rights of the Northern Trust Company, Canada to recover its fees and expenses and any right of indemnification from the HWT and Pension Plan trust assets that it may have under the terms of the HWT trust or the Pension Plan trusts or under applicable law are not affected or prejudiced by the order.

42 I would again like to express my appreciation to all counsel for the quality of their written and oral submissions. The efforts of the Former Employees' Representatives, the LTD Representative and Representative Counsel are specifically recognized for the dignified manner in which they have discharged their responsibilities.

Motion granted.

TAB 3

This Act is current to September 28, 2022
See the Tables of Legislative Changes for this Act's legislative history, including any changes not in force.

BUILDERS LIEN ACT

[SBC 1997] CHAPTER 45

Assented to July 30, 1997

Definitions and interpretation

1 (1) In this Act:

"certificate of completion" means a certificate under section 7 stating that work under a contract or subcontract has been completed and includes an order made under section 7 (5);

"claim of lien" means a claim of lien in the prescribed form;

"class of lien claimants" means all lien claimants engaged by the same person in connection with an improvement;

"completed", if used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed;

"contractor" means a person engaged by an owner to do one or more of the following in relation to an improvement:

(a) perform or provide work;

(b) supply material;

but does not include a worker;

"court" means the Supreme Court;

"head contractor" means a contractor who is engaged to do substantially all of the work respecting an improvement, whether or not others are engaged as subcontractors, material suppliers or workers;

"holdback period" means the period of time calculated under section 8;

"improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

"land title office" means the land title office for the land title district or districts in which the land or any part of it is located and on which the improvement is made or is being made;

"lien claimant" means a person who files a claim of lien under this Act;

"lien holder" means a person entitled to a lien under this Act;

"material" means movable property that is delivered to the land on which the improvement is located and is intended to become part of the improvement, either directly or in a transformed state, or is consumed or used in the making of the improvement, including equipment rented without an operator;

"material supplier" means a contractor or subcontractor who supplies only material in relation to an improvement;

"notice of certification of completion" means a notice in the prescribed form stating that a certificate of completion or a court order to the same effect has been issued;

"notice of interest" means a notice in the prescribed form warning other persons that the owner's interest in the land described in the notice is not bound by a lien claimed under this Act in respect of an improvement on the land unless that improvement is undertaken at the express request of the owner;

"notice to commence an action" means a notice in the prescribed form requiring a claim holder to commence an action to enforce a claim of lien;

"operator" means an individual who operates equipment at an improvement site but does not include an individual who temporarily or periodically is present at the improvement site to install, inspect, service, empty or remove equipment;

"owner" includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and

(a) on whose credit,

(b) on whose behalf,

(c) with whose knowledge or consent, or

(d) for whose direct benefit

work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land;

"registrar" means the registrar of a land title office;

"required holdback" means, in relation to a contract or subcontract, the amount required under section 4 to be retained from payments

under that contract or subcontract, less any payments made under an entitlement to payment arising under section 9;

"services" includes

(a) services as an architect or engineer whether provided before or after the construction of an improvement has begun, and

(b) the rental of equipment, with an operator, for use in making an improvement;

"subcontractor" means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:

(a) perform or provide work;

(b) supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier;

"wages" means money earned by a worker for work and includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and that relates to hours of work, production or efficiency,

(c) money, including the amount of any liability under section 63 of the *Employment Standards Act*, required to be paid by an employer to an employee under that Act,

(d) money required to be paid in accordance with a determination or an order of the tribunal under the *Employment Standards Act*,

(e) money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person and includes money payable under Parts 10 and 11 of the *Employment Standards Act*, and

(f) money required to be paid under a collective agreement;

"work" means work, labour or services, skilled or unskilled, on an improvement;

"worker" means an individual engaged by an owner, contractor or subcontractor for wages in any kind of work, whether engaged under a contract of service or not, but does not include an architect or engineer or a person engaged by an architect or engineer.

(2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than

(a) 3% of the first $500 000 of the contract price,

(b) 2% of the next $500 000 of the contract price, and

(c) 1% of the balance of the contract price.

(3) For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

(4) For the purposes of this Act, the construction of a strata lot, as defined by the *Strata Property Act*, is completed, or a contract for

its construction is substantially performed, not later than the date the strata lot is first occupied.

(4.1) With respect to common property or common assets held by a strata corporation under the *Strata Property Act*, for the purposes of sections 7 and 41 of this Act, and any other provision of this Act specified in the regulations, the strata corporation is deemed to be the owner.

(4.2) With respect to common property or common assets held by a strata corporation under the *Strata Property Act*, for the purposes of section 25 of this Act and any other provision of this Act specified in the regulations, a reference to an owner includes the strata corporation.

(5) For the purposes of this Act, a contract or improvement is deemed to be abandoned on the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, a court order, shortage of material or other similar cause.

(6) Anything that may be done under this Act by or with reference to an owner, contractor, subcontractor, worker or mortgagee is valid if done by or with reference to an agent of that person.

Exemptions

1.1 Nothing in this Act extends to any of the following:

(a) a highway, as defined by the *Transportation Act*, or to any improvement done or caused to be done on it by a municipality, the minister responsible for the administration of the *Transportation Act*, the

Transportation Investment Corporation, a concessionaire as defined by the *Transportation Investment Act*, the BC Transportation Financing Authority or its subsidiaries, the South Coast British Columbia Transportation Authority or its subsidiaries or any other public body designated by regulation;

(a.1) continuing highway properties, as defined in section 30 (1) of the *Coastal Ferry Act*, or any improvement done or caused to be done on them by a municipality, the minister responsible for the administration of the *Transportation Act* or BC Transportation Financing Authority or its subsidiaries or by the ferry operator, within the meaning of the *Coastal Ferry Act*, to which those properties are leased under that Act;

(b) a forest service road, as defined in the *Forest Act*, or any improvement done or caused to be done by or for the minister responsible for the administration of the *Ministry of Forests and Range Act*.

Lien for work and material

2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,

(a) performs or provides work,

(b) supplies material, or

(c) does any combination of those things referred to in paragraphs (a) and (b)

has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:

(d) the interest of the owner in the improvement;

(e) the improvement itself;

(f) the land in, on or under which the improvement is located;

(g) the material delivered to or placed on the land.

(2) Subsection (1) does not create a lien in favour of a person who performs or provides work or supplies material to an architect, engineer or material supplier.

Deemed authorization

3 (1) An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

(2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.

(3) Subsection (1) does not apply to an improvement on land owned by the government.

Holdback

4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

(a) the value of the work or material as they are actually provided under the contract or subcontract, and

(b) the amount of any payment made on account of the contract or subcontract price.

(2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.

(3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.

(4) Subject to section 5 (4), if a mortgagee is a savings institution and is authorized by the owner to disburse the money secured by a mortgage, the mortgagee may retain as a holdback the amount required to be retained by the owner as the payor on the contract and the retention by the mortgagee of that amount is deemed to be compliance with this section by the owner.

(5) Subject to section 5 (4), a mortgagee who retains or agrees to retain a holdback under subsection (4) of this section

(a) has the same rights and obligations in relation to the holdback as if it had been retained by the owner, and

(b) is liable to the owner or any lien holder who suffers loss or damage as a result of the failure of the mortgagee

(i) to retain the holdback as agreed, or

(ii) to fulfill the mortgagee's obligations in relation to the holdback.

(6) Despite subsection (1) (a), a holdback must not be retained from a worker, material supplier, architect or engineer.

(7) and (8) [Not in force.]

(9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with

the improvement, by or under the person from whom the holdback is retained.

Holdback account

5 (1) Subject to subsection (8), an owner must

(a) establish at a savings institution a holdback account for each contract under which a lien may arise,

(b) pay into the holdback account the amount the owner is required to retain under section 4, and

(c) administer the holdback account together with the contractor from whom the holdback was retained.

(2) Subject to sections 9 and 34, all amounts deposited into a holdback account

(a) are charged with payment of all liens arising under the contractor from whom the holdback was retained,

(b) subject to paragraph (a), are held in trust for the contractor referred to in paragraph (a), and

(c) must not be paid out of the account without the agreement of all the persons who administer the account.

(3) An administrator of a holdback account may apply to the court for directions respecting administration of the account, and the court may make any order it considers appropriate, including one or more of the following orders:

(a) that the owner establish and maintain a holdback account as sole administrator;

(b) that some or all of the money in the holdback account be paid into court under section 23 for the removal of claims of lien;

(c) that an administrator be removed or replaced;

(d) that a lien holder be paid.

(4) If the mortgagee retains a holdback under section 4 (4), this section other than this subsection does not apply.

(5) If there is more than one owner, only one of the owners is required to establish and administer the holdback account.

(6) Unless otherwise agreed, interest on the holdback account accrues to the owner during the holdback period and after that accrues to the credit of the contractor from whom the holdback was retained.

(7) Failure by the owner to comply with subsection (l) (b) constitutes an act of default under the contract and the contractor, on 10 days' notice, may suspend operations for as long as the default continues.

(8) This section does not apply to

(a) if it is an owner, the government, a government corporation as defined in the *Financial Administration Act* or any other public body designated, by name or by class, by regulation, or

(b) a contract in respect of an improvement, if the aggregate value of work and material provided is less than $100 000.

Prohibited application of holdback

6 (1) If a contractor or subcontractor defaults under a contract or subcontract, the required holdback must not be applied to the

completion of the contract or subcontract, or for the payment of damages, or for any other purpose until the possibility of any lien arising under the person in default is exhausted.

(2) A payment applied contrary to this section does not reduce the liability under this Act of the person making the payment.

(3) This section does not apply to money held in excess of the required holdback.

Certificate of completion

7 (1) In this section, **"payment certifier"** means

(a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or

(b) if there is no person as described in paragraph (a),

(i) the owner acting alone in respect of amounts due to the contractor, or

(ii) the owner and the contractor acting together in respect of amounts due to any subcontractor.

(2) A lien holder in respect of an improvement may, by making a written request, require that the payment certifier for the improvement deliver to the lien holder

(a) particulars of any certificate of completion issued under this section before and after the request, or

(b) particulars of certificates of completion issued, before and after the request, with respect to stipulated contracts or subcontracts.

(3) On the request of a contractor or subcontractor, the payment certifier must, within 10 days after the date of the request, determine whether the contract or subcontract has been completed and, if the payment certifier determines that it has been completed, the payment certifier must issue a certificate of completion.

(4) If a certificate of completion is issued, the payment certifier must, within 7 days,

(a) deliver a copy of the certificate to the owner, the head contractor, if any, and the person at whose request the certificate was issued,

(b) deliver a notice of certification of completion to all persons who submitted a request under subsection (2) in relation to the contract or subcontract, and

(c) post, in a prominent place on the improvement, a notice of certification of completion.

(5) If the payment certifier fails or refuses to issue a certificate of completion as provided in subsection (3), the court may, on application by the person who requested the certificate and on being satisfied that the contract or subcontract has been completed, make an order declaring that the contract or subcontract has been completed.

(6) An order under subsection (5)

(a) may be made on terms and conditions as to costs or otherwise that the court considers just, and

(b) has the same effect as a certificate of completion issued by a payment certifier.

(7) If an order is made under subsection (5) declaring that a contract or subcontract has been completed, the payment certifier must comply with subsection (4) as if the order were a certificate of completion.

(8) A payment certifier who receives a request under subsection (3) and who fails or refuses, without reasonable excuse and within the time specified in that subsection, to issue a certificate of completion respecting the contract or subcontract is liable to anyone who suffers loss or damage as a result.

(9) A payment certifier who fails or refuses to comply with subsection (4) or (7) is liable to anyone who suffers loss or damage as a result.

(10) A certificate of completion may be in the prescribed form and, if it is in the prescribed form, it is sufficient to comply with this Act.

Holdback period

8 (1) If a certificate of completion is issued with respect to a contract or subcontract, the holdback period in relation to

(a) the contract or subcontract, and

(b) any subcontract under the contract or subcontract

expires at the end of 55 days after the certificate of completion is issued.

(2) The holdback period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after

(a) the head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or

(b) the improvement is completed or abandoned, if paragraph (a) does not apply.

(3) [Not in force.]

(4) Payment of a holdback required to be retained under section 4 may be made after expiry of the holdback period, and all liens of the person to whom the holdback is paid, and of any person engaged by or under the person to whom the holdback is paid, are then discharged unless in the meantime a claim of lien is filed by one of those persons or proceedings are commenced to enforce a lien against the holdback.

Rights on payment of holdback

9 (1) A contractor is entitled to receive, from the holdback retained by the owner from the contractor, an amount equal to the holdback amount applicable to a subcontract if

(a) a certificate of completion has been issued in respect of the subcontract to which the contractor was a party, and

(b) the holdback period established under section 8 (1) has expired without any claims of lien being filed that arose under the subcontract.

(2) An owner is deemed to have complied with the requirements of section 4 even if the amount retained has been reduced to a lesser percentage than is required by that section if

(a) an amount is paid to a contractor in accordance with subsection (1) of this section, and

(b) the amount retained by the owner would have complied with the requirements of section 4 had no payments been made under this section.

(3) Subsections (1) and (2) apply if a certificate of completion is given in relation to a subcontract to which a contractor is not a party.

(4) If a contractor is entitled to an amount under subsection (1), payment may be made from the holdback account established under section 5.

Contract money received constitutes trust fund

10 (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

(3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.

(4) Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

Certain applications of trust fund deemed not to be appropriation or conversion

11 (1) A contractor or subcontractor commits an offence if that person

(a) appropriates or converts any part of a fund in contravention of section 10, or

(b) contravenes section 13 (2).

(2) A person who commits an offence under subsection (1) (a) is liable to a fine of not more than $10 000 or to imprisonment for a term of not more than 2 years, or both.

(3) If a contractor or subcontractor is a corporation, a director or officer of the corporation who knowingly assents to or acquiesces in an offence under subsection (1) (a) by the corporation commits the offence in addition to the corporation.

(4) Despite subsections (1) to (3),

(a) to the extent that a contractor or subcontractor has paid for work or material supplied under a contract or subcontract, the retention by the contractor or subcontractor of trust money in an amount equal to the amount paid is not an appropriation or conversion that contravenes section 10, and

(b) if money is loaned to a person on whom a trust is imposed by section 10 and is used to pay for all or part of work or material supplied, trust money may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and money so applied is not an appropriation or conversion that contravenes section 10.

(5) An information must not be laid in respect of an alleged offence under subsection (1) or (3) more than 3 years after the alleged offence occurred.

(6) Subsection (4) (b) does not limit the rights of a lender who, in the ordinary course of business, receives money in good faith from a person on whom a trust is imposed under section 10.

(7) If a contractor or subcontractor commingles, with other money, any part of the fund referred to in section 10, that, of itself, does not constitute a breach of the trust created under section 10 (1) or a contravention of section 10 (2).

Crediting of money earmarked for particular improvement

12 If a person makes a payment from money in a trust fund constituted in respect of a particular improvement, a person who receives the money must credit it against the debt in respect of the improvement.

Garnishment and money in court

13 (1) In the case of money owing to a contractor or subcontractor that would, if paid to the contractor or subcontractor, be subject to a trust under section 10, the money, if it is paid into court under an attachment under the *Court Order Enforcement Act*, is subject to a trust as if it had been paid to the contractor or subcontractor, and the interest of the garnishor is subordinate to the interest of the beneficiaries of the trust.

(2) A garnishee under an attachment referred to in subsection (1) must, at the time of payment into court, file in the court registry a notice in the prescribed form and deliver a copy of the notice to the garnishor.

(3) If a notice is filed under subsection (2), the registrar of the court must not pay out of court without an order of the court any money paid into court under subsection (1).

(4) Money held in a holdback account established under section 5 is not subject to garnishment.

(5) If money is paid into court under this Act by a contractor, subcontractor or owner, the money becomes or remains subject to the trust imposed by section 10.

Limitation period

14 An action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after

(a) the head contract is completed, abandoned or terminated, or

(b) if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available.

Claim of lien to be in prescribed form

15 (1) Except as provided in section 18, a claim of lien is made by filing in the land title office a claim of lien in the prescribed form.

(2) An agent who represents more than one lien claimant may, with respect to a particular improvement, make a single claim of lien on behalf of all of the lien claimants represented, and the prescribed form may be altered accordingly for that purpose.

(3) The registrar must not allow a claim of lien to be filed unless satisfied that the land is adequately described.

(4) On the filing of the claim of lien in the land title office, the registrar must endorse a memorandum of the filing on the register of title to

the land or against the estate or interest in the land described in the claim of lien.

General lien

16 (1) If an owner enters into a single contract for improvements on more than one parcel of land, a lien claimant providing work or material under that contract, or under a subcontract under that contract, may choose to have the lien follow the form of the contract and be a lien against each parcel for the price of all work and material provided to all of the parcels of land.

(2) If a lien is claimed under subsection (1) against several parcels of land, on application to the court by any person with an interest in or charge on the land, the court may apportion the lien among the parcels for the purpose of determining the lien claimant's rights as against persons having rights in particular parcels.

No claim under $200

17 A claim of lien must not be filed if the amount of the claim or aggregate of joined claims is less than $200.

Procedure to file a claim of lien under the *Mineral Tenure Act*

18 (1) In order to file a claim of lien in respect of a mineral title held under the *Mineral Tenure Act* other than a Crown granted mineral claim, the lien claimant must

(a) file in the office of the gold commissioner in which the mineral title is recorded a claim of lien in the prescribed form, and

(b) if the property that is the subject of a mineral title is registered in a land title office, also file in the land title office a copy of the claim of lien.

(2) On the filing of the claim of lien under subsection (1), the gold commissioner must endorse a memorandum of the filing on the record of the mineral title in the gold commissioner's office.

(3) If the property that is the subject of a mineral title described in the claim of lien is registered in a land title office, the registrar must endorse a memorandum of the filing on the register of title to the land or against the estate or interest in the land or mineral title described in the claim of lien.

Liability for wrongful filing

19 A person who files a claim of lien against an estate or interest in land to which the lien claimed does not attach is liable for costs and damages incurred by an owner of any estate or interest in the land as a result of the wrongful filing of the claim of lien.

Time for filing claim of lien

20 (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of

(a) the contractor or subcontractor, and

(b) any persons engaged by or under the contractor or subcontractor

may be filed no later than 45 days after the date on which the certificate of completion was issued.

(2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after

(a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or

(b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

(3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if

(a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or

(b) time had started to run under subsection (2).

(4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

When claim of lien takes effect

21 A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

Lien extinguished if not filed as required by Act

22 A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.

Removal of claims of lien by payment of total amount recoverable

23 (1) If a claim of lien is filed by one or more members of a class of lien claimants, other than a class of lien claimants engaged by an owner, the owner, contractor, subcontractor or mortgagee authorized by the owner to disburse money secured by a mortgage may, on application, pay into court the lesser of

(a) the total amount of the claim or claims filed, and

(b) the amount owing by the payor to the person engaged by the payor through whom the liens are claimed provided the amount is at least equal to the required holdback in relation to the contract or subcontract between the payor and that person or, if the payment is made by a purchaser to whom section 35 applies, 10% of the purchase price of the improvement.

(2) Payment into court under an order made under subsection (1) discharges the owner from liability in respect of the claims of lien filed and

(a) the money paid into court stands in place of the improvement and the land or mineral title, and

(b) the order must provide that the claims of lien be removed from the title to the land or mineral title.

(3) If an application has been made under subsection (1) and the claims of lien have been removed under subsection (2), and if additional claims of lien are filed by persons claiming through the same person engaged by the payor with respect to the lien claimants whose claims of lien were removed under subsection (2), application may be made under subsection (1) to have the additional claims of lien removed under subsection (2) on payment into court of whatever additional sum is necessary to bring the amount in court up to the

amount that would have been paid into court if the additional claims of lien had been filed at the time of the prior application.

(4) An application under subsection (1) or (3) may be brought by an application in proceedings that have been commenced to enforce a claim of lien, or by petition, and the court may

(a) hear and receive evidence, by affidavit or orally or otherwise, that it considers necessary in order to determine the proper amount to be paid into court,

(b) direct the trial of an issue to determine the amount to be paid into court, and

(c) refuse the application if it is of the opinion that the determination of the total amount that may be recovered by lien claimants should be made at the trial of the action.

(5) If the amount held back by the payor from the person engaged by the payor through whom the liens are claimed exceeds the required holdback in relation to the contract or subcontract between the payor and that person, and that person has defaulted in completing or carrying out the contract or subcontract with the payor, for the purposes of subsections (1) and (3) the amount owing by the payor to that person does not include any amount that the payor is entitled to apply to remedy the default or complete the contract or subcontract.

Cancellation of claim of lien by giving security

24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may

apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

(2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.

(3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.

(4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.

(5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

Powers of court, registrar or gold commissioner to remove claim of lien

25 (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

(a) a lien is extinguished under section 22 or 33,

(b) an action to enforce the claim of lien has been dismissed and no appeal from the dismissal has been taken within the time limited for the appeal,

(c) an action to enforce the claim of lien has been discontinued, or

(d) the claim of lien has been satisfied.

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

(a) the claim of lien does not relate to the land against which it is filed, or

(b) the claim of lien is vexatious, frivolous or an abuse of process.

(3) An application under subsection (1) or (2) may be made without notice to any other person.

Enforcement of claim

26 A claim of lien may be enforced by an action according to the Supreme Court Civil Rules.

Local venue for proceedings under this Act

27 Section 21 of the *Law and Equity Act* applies to a proceeding in respect of a claim of lien or other proceeding under this Act in the same way that section applies to a foreclosure proceeding on a mortgage.

Proof of filing of claim of lien

28 In a proceeding to enforce a claim of lien, the production of a copy of the claim of lien disclosing the date of its filing and certified by the registrar or gold commissioner is proof, in the absence of evidence to the contrary, of the filing of the claim of lien and the date of its filing.

Evidence of delivery of material

29 If a person to whom material is supplied signs an acknowledgement of receipt of the material stating that it is received for inclusion in an

improvement at a named address, the acknowledgement is proof, in the absence of evidence to the contrary, that the material was delivered to the land described by the address.

Counterclaim and judgment for creditor

30 (1) Subject to the rights of lien claimants engaged by or under the plaintiff, a defendant in an action to enforce a claim of lien may set up by way of counterclaim any right or claim arising out of the same transaction for any amount, whether the counterclaim is for damages or not.

(2) On the trial of an action to enforce a claim of lien, the court may, so far as the parties before it are debtor and creditor, give judgment for any indebtedness or liability arising out of the claim of lien in the same manner as if the indebtedness or liability had been the subject of an action in the court without reference to this Act.

Court may order sale

31 (1) In an action to enforce a claim of lien, the court may declare that the lien claimant is entitled to a lien for the amount found to be due.

(2) If the owner has not been discharged under section 23 (2) of all liability for claims of lien, the court may order the sale of the land or the improvement, or the material supplied or the interest of the owner in any of them.

(3) If an estate or interest sold in proceedings under this Act is a leasehold interest, the purchaser at the sale is conclusively deemed to be an assignee of the lease.

(4) For the purpose of effecting a sale of the land, the court may order that any or all claims of lien filed in connection with the

improvement be removed from the title subject to conditions that it considers appropriate.

(5) The proceeds of the sale under this section must be paid into court and must be allocated in accordance with section 36.

(6) No order for the sale of an interest in land owned by the Crown or a municipality may be made, but the court may give judgment for an amount equal to the maximum liability under this Act, as owner against either of them, and any money realized on the judgment must be dealt with as if it were the proceeds of a sale of the interest in land.

Priority of secured lender

32 (1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.

(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

(3) In a proceeding for the enforcement of a claim of lien,

(a) the court may order the sale of mortgaged land at an upset price of at least the amount secured by all registered mortgages that have priority over the claim of lien, court ordered costs and the costs of the sale, and

(b) the amount secured by any registered mortgages must be satisfied out of the proceeds of the sale in the order of

their priorities and in priority over the claim of lien to the extent provided under this section.

(4) A mortgagee who applies mortgage money in payment of a claim of lien that has been filed is subrogated to the rights and priority of the lien claimant to the extent of the money applied.

(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that

(a) the advances will be applied to complete the improvement, and

(b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

(7) An amount secured in good faith by a registered right to purchase land has the same priority over the amount secured by a claim of lien as has the amount secured by a registered mortgage under subsections (1) and (2).

(8) For the purposes of this Act, the vendor under a registered right to purchase is deemed to be a mortgagee under a registered mortgage, and the amount secured in good faith by the registered right to purchase is subject to this section as though the amount had been secured in good faith under a registered mortgage.

Limitation and notice to commence an action

33 (1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered, not later than one year from the date of its filing, in the land title office or gold commissioner's office in which the claim has been filed.

(2) Despite subsection (1),

(a) an owner, or

(b) a lien claimant who has commenced an action

may serve on a lien claimant, or other lien claimants, as the case may be, a notice to commence an action to enforce the claim of lien and to register in the land title office or in the gold commissioner's office, as the case may be, a certificate of pending litigation within 21 days after service of the notice.

(3) The notice served under subsection (2) must be in the prescribed form, and service is validly effected if the notice is

(a) served personally on the lien claimant, or

(b) mailed or delivered to the address for service given in the claim of lien.

(4) If service is by mail the notice is conclusively deemed to have been served on the eighth day after deposit of the notice in the Canada Post Office at any place in Canada.

(5) Unless an action to enforce a claim of lien is commenced and a certificate of pending litigation is registered within the time provided in this section, the lien is extinguished.

Limit of claims

34 (1) The maximum aggregate amount that may be recovered under this Act by all lien holders who claim under the same contractor or subcontractor is equal to the greater of

(a) the amount owing to the contractor or subcontractor by the person who engaged the contractor or subcontractor, and

(b) the amount of the required holdback in relation to the contract between the contractor or subcontractor and the person who engaged the contractor or subcontractor.

(2) For the purposes of subsection (1) (a),

(a) an amount claimed by way of counterclaim against a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person,

(b) a payment that is made in bad faith to a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person, and

(c) a payment to a contractor or subcontractor by the person who engaged the contractor or subcontractor that is made

(i) after a claim of lien has been filed by a lien holder claiming under the contractor or subcontractor,

(ii) if the person has actual notice of the claim of lien, and

(iii) if the claim of lien has not been removed or cancelled from the title to the land,
under section 23 or 24 or otherwise, at the time the payment was made,

does not, to the extent of the lien, reduce the amount owing to the contractor or subcontractor by that person.

(3) Despite subsection (2), a person may, on the default of another person that the first person engaged, apply money held by the first person in excess of the required holdback in order to remedy that default or compensate for damage caused by the default.

Maximum claim against purchaser's interest

35 The amount that may be claimed under this Act against the interest of a purchaser in good faith of an improvement in respect of claims of lien filed after the latest of

(a) acceptance for registration of the purchaser's interest at a land title office or gold commissioner's office,

(b) completion, abandonment or termination of the head contract for construction of the improvement, and

(c) completion or abandonment of the improvement if the owner did not engage a head contractor

must not exceed 10% of the purchase price of the improvement.

Allocation of proceeds from sale

36 (1) In this section, **"owner's discharge sum"** means an amount that, if paid into court by the owner under section 23, would be sufficient to discharge the owner from liability with respect to all claims of

lien filed by persons other than contractors or workers engaged by the owner.

(2) Subject to any order of the court in relation to the discharge of any prior encumbrances or an order under section 32 (3), the proceeds from a sale under section 31 must be distributed as follows:

(a) the lesser of

(i) the difference between the owner's discharge sum and any amount previously paid into court by or on behalf of the owner under section 23, and

(ii) the proceeds from the sale under section 31

must be applied to the payments of the claims of persons other than persons engaged by the owner and be distributed under section 37;

(b) proceeds in excess of the amount allocated under paragraph (a) must be applied to pay the claims of lien of persons engaged by the owner and to pay the owner, and be distributed under section 38.

Distribution among claimants not engaged by owner

37 (1) In this section:

"available holdback fund" or **"holdback funds available"** means

(a) the amount paid into court under section 23, and

(b) the amount available for distribution under this section as calculated under section 36 (2) (a);

"priority computation base" of a class of lien claimants means the lesser of

(a) the amount owing to the person who engaged the class of lien claimants, and

(b) the total amount of the claims of the class members.

(2) The available holdback funds must be applied to pay and be distributed to subcontractors and workers other than workers engaged by the owner according to the following priority:

(a) the costs of the lien claimants of and incidental to the proceedings of filing and enforcing their claims of lien;

(b) up to 6 weeks' wages, if that much is owed, to workers;

(c) the amount of money owed

(i) to the workers in excess of 6 weeks' wages, and

(ii) to the subcontractors.

(3) The holdback funds available to a category of lien claimants constituted under subsection (2) (a) or (b) must be distributed proportionally among the members of the category so that a single member of the category is entitled to that proportion of the amount recovered that the amount of the member's lien bears to the aggregate amount of the liens of all members of the category.

(4) Before the holdback funds available to lien claimants in the category constituted under subsection (2) (c) are distributed, the holdback funds must be allocated proportionally among the classes of lien claimants so that each class is allocated that proportion of the available holdback funds that the priority computation base of the class bears to the aggregate amount of the priority computation

bases of all classes, including that of the class whose allocation is being assessed.

(5) The portion of the available holdback funds allocated to a class under subsection (4) must be distributed proportionally among the members of the class so that a single member of the class is entitled to that proportion of the allocated funds that the amount of the member's lien bears to the aggregate amount of the liens of all members of the class.

(6) In a distribution under this section a lien claimant is not entitled to recover more than the amount of the claimant's lien claim and entitlement to costs under subsection (2) (a).

(7) Money distributed under this section is subject to sections 10, 11 and 14.

Distribution among claimants engaged by owner

38 (1) The portion of the proceeds of sale allocated under section 36 (2) (b) must be applied to pay the claims of lien of contractors and workers engaged by the owner, and to pay the owner, and distributed according to the following priority:

(a) the costs of lien claimants of and incidental to the proceedings of filing and enforcing their claims of lien;

(b) up to 6 weeks' wages, if that much is owed, to workers;

(c) the amount of money owed

(i) to the workers in excess of 6 weeks' wages, and

(ii) to the contractors;

(d) the owner.

(2) The funds available to the members of a category of lien claimants constituted under each of subsection (1) (a), (b) or (c) must be distributed proportionally among the members of that category so that a single member of the category is entitled to that proportion of the amount recovered that the amount of the member's lien bears to the aggregate amount of the liens of all members of the category, but a lien claimant is not entitled to recover more than the amount of the claimant's lien and entitlement to costs under subsection (1) (a).

(3) Money distributed under this section is subject to sections 10, 11 and 14.

During continuance of lien, property not to be removed

39 (1) During the continuance of a lien, material must not be removed from the land or the improvement to the prejudice of a lien holder.

(2) An attempt at removal may be restrained on application to the court.

Subcontractor's lien enforceable despite noncompletion by another

40 A subcontractor may enforce the subcontractor's lien despite the noncompletion or abandonment of the contract or subcontract by the contractor or other subcontractor under whom the first subcontractor claims.

Right to information

41 (1) A lien holder or a beneficiary of a trust under this Act may, at any time, by delivering a written request, require

(a) from the owner

(i) the terms of the head contract or contract under which the lien holder of beneficiary claims, including the names of the parties to the contract, the contract price and the state of accounts between the owner and the head contractor,

(ii) the name and address of the savings institution in which a holdback account has been opened, and the account number,

(iii) particulars of credits to and payments from the holdback account, including the dates of credits and payments, and the balance at the time the information is given, and

(iv) particulars of any labour and material payment bond posted by the contractor with the owner in respect of the head contract or contract under which the lien holder or beneficiary claims, and

(b) from a mortgagee or an unpaid vendor

(i) the terms of the mortgage or agreement for sale,

(ii) in the case of a mortgage, particulars of the amount advanced under the mortgage, including the dates of advances, and of any arrears in payment, and

(iii) in the case of an agreement for sale, particulars of the amount secured under the agreement for sale and any arrears in payment.

(2) The owner may request in writing from

(a) a subcontractor when a claim of lien has been filed or a written notice of a claim of lien has been received by the

owner, and

(b) the contractor, at any time,

the following information:

(c) the terms of any subcontract, including the names of the parties to the subcontract, the subcontract price and the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor, or any other person providing work or material;

(d) particulars of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor.

(3) The person to whom a request is made under subsection (1) or (2) must comply within 10 days after the day the request is delivered.

(4) A person who fails to comply in writing with a request within the time provided in subsection (3), or who knowingly or negligently misstates the information requested, is liable to the person requesting the information for any resulting loss or damage.

(5) On the failure of a person to comply with a request made under subsection (2) within the time provided, the owner may also, if the request is made of

(a) a contractor, withhold further payments to the contractor, or

(b) a subcontractor, instruct the contractor or another subcontractor to withhold further payments to the subcontractor

until the contractor or subcontractor, as the case may be, has complied with the request.

(6) The court may, on application by an interested person at any time before or after an action is commenced for the enforcement of a claim of lien,

(a) order that the owner, mortgagee, vendor, contractor or subcontractor produce for inspection all contracts, subcontracts, documents, books or records relating to the contract or subcontract or to the payment of the contract or subcontract price,

(b) order that any person referred to in paragraph (a) deliver to the applicant copies of any documents referred to in that paragraph, and

(c) make an order as to the costs of the application.

Certain acts, agreements, assignments void

42 (1) A conveyance, mortgage or charge of or on land given for the purpose of granting a lien holder a preference or priority is void for that purpose.

(2) An agreement that this Act is not to apply, or that the remedies provided by it are not to be available for a person's benefit, is void.

(3) A device by an owner, contractor or subcontractor adopted to defeat the priority given by this Act to a worker for the worker's wages is void as against the worker.

(4) No assignment by the contractor or subcontractor of any money due in respect of the contract or subcontract is valid as against any lien or trust created by this Act.

Lien may be assigned

43 A lien holder may assign in writing the lien holder's lien rights and, if not assigned, lien rights may pass by operation of law.

Insurance money

44 If all or part of property subject to a lien under this Act is destroyed by fire, insurance money receivable by the owner, mortgagee or other encumbrancer as a result of the fire stands in place of the property so destroyed, and is, after satisfying any mortgage, charge or encumbrance, in the manner and to the extent set out in section 36, subject to the claims of all persons for liens to the same extent as if the insurance money were realized by the sale of the property in an action to enforce a claim of lien.

Offence

45 (1) A person who knowingly files or causes an agent to file a claim of lien containing a false statement commits an offence.

(2) A person who commits an offence under subsection (1) is liable to a fine not exceeding the greater of $2 000 and the amount by which the stated claim exceeds the actual claim.

Application of *Offence Act*

46 Section 5 of the *Offence Act* does not apply to this Act or to the regulations.

Power to make regulations

47 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing forms for the purposes of this Act;

(b) prescribing a fee to be paid for filing a claim of lien, and providing for the fee to be calculated on

(i) the number of parcels of land to which the claim of lien purports to attach, or

(ii) the amount of the claim of lien;

(c) respecting the administration of holdback accounts;

(d) governing rights in relation to holdback accounts on a sale of an improvement by an owner.

(3) The Lieutenant Governor in Council may make regulations the Lieutenant Governor in Council considers necessary or advisable for meeting or removing any difficulty arising out of the transition to this Act from the Act repealed by this Act and for preserving and giving effect to the rights of persons arising under the repealed Act except as those rights are expressly varied by this Act, and the regulations may be made to apply generally or to a particular case or class of cases.

Transition

48 (1) In this section, **"transition project"** means an improvement for which the time for filing liens has not yet expired under the Act repealed by this Act.

(2) This Act applies to a transition project unless all parties agree that the Act repealed by this Act continues to apply.

(3) Despite this Act there is no obligation to create or maintain a holdback account under section 5 on a transition project.

(4) If this Act requires a person not previously required to retain a holdback under the Act repealed by this Act to retain a holdback, it is sufficient compliance with this Act if, in relation to a transition project, the person retains a holdback only with respect to advances or payments made after this Act comes into force.

(5) Despite subsection (4), for the purposes of sections 23 and 34, in relation to a transition project, **"required holdback"** means the amount that would have been retained if this Act had applied to the transition project from the time the improvement was started.

(6) In respect of a transition project, nothing done in compliance with the law in force immediately before this Act comes into force is invalidated by subsection (2).

(7) [Not in force.]

(8) In respect of a transition project, on the coming into force of this Act money paid into court under section 20 (4) of the Act repealed by this Act or under an order of the court under section 33 (2) of the Act repealed by this Act is deemed to be money paid into court under section 23 of this Act.

(9) Parties to a dispute respecting a transition project may apply to the court for directions as to the application of this section and the regulations to the circumstances of the dispute.

Spent

49-54 *[Consequential amendments and repeal. Spent. 1997-45-49 to 54.]*

Commencement

55 This Act comes into force by regulation of the Lieutenant Governor in Council.

TAB 4

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd.,*** 2005 BCCA 378

Date: 20050715
Docket: CA031992; CA032017

Docket: CA031992

Between:

Paramount Drilling and Blasting Ltd.

Respondent
(Plaintiff)

And

North Pacific Roadbuilders Ltd.

Respondent
(Defendant)

And

Arrow Lakes Power Development Corporation and Columbia Power Corporation

Appellants
(Defendants)

- and -

Docket: CA032017

Between:

Paramount Drilling and Blasting Ltd.

Respondent
(Plaintiff)

And

North Pacific Roadbuilders Ltd., Arrow Lakes Power Development Corporation and Columbia Power Corporation

Respondents
(Defendants)

And

Peter Kiewit Sons Co.

Appellant

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Smith

M. G. Demers	Counsel for the Appellants, Arrow Lakes Power Development Corp. and Columbia Power Corp.
W. S. McLean	Counsel for the Appellant, Peter Kiewit Sons Co.
J. G. Howard	Counsel for the Respondent, Paramount Drilling and Blasting Ltd.
Place and Date of Hearing:	Vancouver, British Columbia 20th May, 2005
Place and Date of Judgment:	Vancouver, British Columbia 15th July, 2005

Written Reasons by:
The Honourable Madam Justice Southin

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] On 30th July, 1997, the "new" ***Builders Lien Act*** received Royal Assent (S.B.C. 1997, c. 45).

[2] One would have thought that after the many years that legislation *in pari materia* has been in force in this province – the first such legislation was the ***Mechanics' Lien Act***, S.B.C. 1879, c. 24 – there would be no issue to which the Act itself did not give a simple and clear answer.

[3] But as this case shows, that is not so.

[4] The question here is who are the proper and necessary parties in a builder's lien action by a subcontractor in which the claim of lien has been discharged from the owner's certificate of title upon the head contractor securing the claim. Is the owner, who was a proper and necessary party, although there is no claim *in personam* against it at the outset, to remain as a party or may the head contractor be substituted for the owner under Rule 15(5) of the Rules of Court, at least where, as here, the head contractor has a contractual obligation to the owner to defend a lien claim?

[5] In December 1998, Peter Kiewit Sons Co. Ltd. entered into a contract for the construction of a 170 megawatt power plant near Castlegar on lands owned by Arrow Lakes Power Development Corporation and Columbia Power Corporation, which I assume have some connection with the British Columbia Hydro & Power Authority, for a cost of approximately $210,000,000.

[6] Kiewit subcontracted, among other things, the road building to one of the defendants below, here the respondent, North Pacific Roadbuilders Ltd., who, in turn, subcontracted the provision of materials and services for the necessary drilling and blasting to Paramount Drilling and Blasting Ltd., the plaintiff below, here a respondent.

[7] As against North Pacific, Paramount, in an action commenced the 27th September, 2002, in which the owners were also defendants, has pleaded in part:

> 10. It was a term of the North Pacific Sub-Contract that the Work would be performed in accordance with the terms and conditions of the Prime Contract, and that Paramount would complete the Work under the North Pacific Sub-Contract on or before the 31st day of December, 2002.
>
> 11. By Change Orders issued pursuant to the terms of the governing agreement(s) and through extra work requested by Arrow Lakes, Peter Kiewit and North Pacific, or any combination thereof, the North Pacific Sub-Contract was amended to include the provision of further materials, work and services provided by Paramount for the benefit of Arrow Lakes, Arrow Lakes Corporation, Columbia, Peter Kiewit and North Pacific, or any of them, in the amount of $2,383,236.28, exclusive of GST, particulars of which are outlined below:

Invoice	Description	Amount
01-7570	Holdback	$425,082.55
Progress	September progress	$38,934.72
01-7569	Supply breaker for rip-rap extra work record	$27,330.00
01-7568	Shotcrete preparation	$4,725.92
01-7567	Rock bolts/butterflies price increase	$68,190.00
01-7566	Shotcrete unit price increase	$149,850.00
00-7538	Interest calculated to December 2000 on overdue progress payments for work performed in 1999	$65,640.00
00-7537	CFRD additional costs – labour, fuel, equipment, travel, tools	$844,087.50

00-7536	Mark-up 2000 – slope stabilization extra work	$35,140.85
00-7535	Mark-up 1999 – invoice for fair mark-up on extra work performed	$18,635.15
00-7534R	Plinth foundation excavation	$135,000.00
99-2589	Plinth foundation excavation	$167,142.00
99-2588	Channel design revision	$149,372.00
99-2587	North slope stabilization	$96,947.50
99-2602	Clean & blow off rock	$24,758.09
99-2586	Powerhouse design change	$106,400.00
99-2585	Crane pad excavation	$26,000.00
		$2,383,236.28

12. Paramount provided the drilling and blasting services referred to in the preceding paragraph, including labour, machinery and related materials and supplies in connection with construction, *inter alia*, of the Powerhouse, Rockfill Dam, Approach Channel, as well as other facets of the Project.

13. Pursuant to the terms of the North Pacific Sub-Contract, the Plaintiff supplied materials and services in respect to the Work to North Pacific for the improvement of the Lands during the period May, 1999 to October 2001.

14. Further, or in the alternative, the Plaintiff performed the alternations, changes, additions and extras referred to in the preceding paragraphs in reliance on the misrepresentations made by Peter Kiewit and North Pacific, or either of them, that the Plaintiff would be fully and properly compensated for the value of the additional materials and services provided in connection with construction of the Project.

15. Paramount last provided labour, supplies and services on the Project on or about October, 2001, and a Certificate of Completion was issued pursuant to the *Builders' Lien Act*, S.B. [sic] 1997, C. 45 and amendments thereto, declaring the Project substantially completed or performed as of June 12th, 2002.

16. Paramount has forwarded invoices for a total sum of $2,383,236.28 (exclusive of GST) to North Pacific, but North Pacific has neglected, refused or omitted to pay the said claim or any part thereof, which monies are due and payable.

* * *

> 20. On or about the 3rd day of October, 2001, and pursuant to the provisions of the *Builders' Lien Act*, S.B.C. 1997, c. 45, Paramount caused to be registered in the Land Titles Office in Kamloops, British Columbia, a Builders' Lien against the above described Lands and Premises registered as Instrument No. KR092777 in respect to said services and materials (the "Lien").
>
> 21. By reason of furnishing the said services and materials, Paramount became entitled to and is entitled to a valid Builders' Lien upon the said Lands for the sum of $2,383,236.28 plus interest and costs, exclusive of GST.

[8] This, however, is the prayer for relief:

> THE PLAINTIFF, PARAMOUNT DRILLING AND BLASTING LTD., CLAIMS AGAINST THE DEFENDANTS, NORTH PACIFIC ROADBUILDERS LTD., ARROW LAKES POWER COMPANY a joint venture between CBT ARROW LAKES POWER DEVELOPMENT CORP. and COLUMBIA POWER CORPORATION, ARROW LAKES POWER DEVELOPMENT CORPORATION, and COLUMBIA POWER CORPORATION, AS THE CASE MAY BE:
>
> (a) Judgment or, in the alternative, damages in the sum of $2,383,236.28;
>
> * * *
>
> (d) A Declaration that the Plaintiff is entitled to a valid Builders' Lien registered against the Lands in the sum claimed plus, costs and all applicable taxes;
>
> * * *
>
> (g) A Declaration that the claim of lien of the Plaintiff is a first charge, lien and encumbrance against the Lands in priority to all right, title and interest of Arrow Lakes Power Company a joint venture between CBT Arrow Lakes Power Development Corp. and Columbia Power Corporation, Arrow Lakes Power Development Corporation and Columbia Power Corporation;...

[9] As Paramount, in its statement of claim, asserts a right *in personam* only against North Pacific, prayer (a) is, as against the other defendants, ill founded.

[10] Paramount duly filed a claim of lien in the Kamloops Land Title Office.

[11] On 24th October, 2002, in a proceeding by petition brought by Kiewit, as petitioner, and Paramount and other lien claimants, as respondents, Master Brine pronounced this order:

> THIS COURT ORDERS that:
>
> 1. The following claims of lien filed by the Respondents in the Kamloops Land Title Office against those lands and premises known and described in Schedule "A" attached (the "Properties") and any related Certificates of Pending Litigation be cancelled pursuant to Section 24 of the *Builders Lien Act* (the "Act") upon the Petitioner depositing with the Registrar of this Honourable Court security in the form of a lien bond substantially in the form attached hereto as Schedule "B" in the amount of $2,620,286.08 plus an additional $262,029 as security for costs, totalling together $2,882,315.08:
>
> | NAME | CHARGE | REGISTRATION NO. |
> |---|---|---|
> | Paramount Drilling & Blasting Ltd. | Claim of Builders Lien | KR092777 |
> | Paramount Drilling & Blasting Ltd. | Certificate of Pending Litigation | KT106681 |
> | Ace Explosives ETI Ltd. | Claim of Builders Lien | KR118641 |
> | Korpack Cement Products Co. Ltd. | Claim of Builders Lien | KT072322 |
>
> 2. The Registrar of the Land Titles at the Kamloops Land Title Office shall cause the above-referenced claims of lien and any Certificates of Pending Litigation filed in relation thereto to be wholly cancelled against the Properties upon production of a certified copy of this Order together with a Certificate of the Registrar of this Honourable Court certifying that the security required in respect of the claims of lien has been lodged with the Registrar.
>
> 3. Cancellation of the liens and any Certificates of Pending Litigation filed in relation thereto against the Properties pursuant to the provisions of the Act shall not deprive the lien claimants of

the benefit of the provision of the Act applicable to their lien claims, the security being in substitution for the Properties.

4. Nothing in this Order shall affect the rights of any Owner of the Properties or other party entitled in the lien actions to claim that the liens and any Certificates of Pending Litigation filed in relation thereto are improper or defective, or that the filing of the liens or any Certificates of Pending Litigation filed in relation thereto is defective, or otherwise affect any right of the Petitioner or any other person under the Act.

5. The Petitioner, or the owner of the Properties, is at liberty, at their option, to make application upon notice pursuant to Section 23 of the Act in respect of any of the claims of builders lien.

6. The Petitioner is at liberty, at its option, to make application upon notice to substitute other security for the security posted hereunder or to make application to reduce the amount of security. The Respondents are at liberty to apply upon notice to increase the amount of security for costs.

[12] The right of Kiewit to seek such an order is said by the appellants, and the respondents do not take issue with this, to be given by section 24 of the Act:

Cancellation of claim of lien by giving security

24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

(2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.

(3) The value of the security required under an order under subsection (2) may be less than the amount of the claim of lien.

(4) The registrar or gold commissioner in whose office a claim of lien is filed must, on receiving an order or certified copy of the

order made under subsection (2), file it and cancel the claim of lien as to the property affected by the order.

(5) The giving of security for the payment of a claim of lien under subsection (1) does not make the owner liable for a greater sum than provided for in section 34.

[13] The lien bond was in these terms:

KNOW ALL MEN BY THESE PRESENTS that we Peter Kiewit Sons Co. Ltd., as Principal and Travelers Casualty and Surety Company of Canada, a corporation created and existing under the laws of Canada and duly authorized to transact business of suretyship in the Province of British Columbia, as Surety, are jointly and severally bound unto the REGISTRAR OF THE SUPREME COURT OF BRITISH COLUMBIA, NELSON REGISTRY, British Columbia, as Obligee, in the amount of TWO MILLION SIX HUNDRED TWENTY THOUSAND, TWO HUNDRED EIGHTY SIX and 08/100 ($2,620,286.08) DOLLARS plus TWO HUNDRED SIXTY TWO THOUSAND, TWENTY NINE and 00/100 ($262,029.00) DOLLARS as security for costs totalling together $2,882,315.08 of good and lawful money of Canada for the payment of which sum, well and truly to be made, the Principal and the Surety bind themselves, their successors and assigns, joint and severally, firmly by these presents.

WHEREAS, Paramount Drilling & Blasting Ltd. ("Paramount") has registered a claim of builders lien in the sum of $2,620,286.08 dated October 3, 2001; AND WHEREAS Ace Explosives ETI Ltd. ("Ace") has registered a claim of builders lien in the sum of $54,652.53 dated December 14, 2001; AND WHEREAS Korpack Cement Products Co. Ltd. ("Korpack") has registered a claim of builders lien in the sum of $23,287.91 dated December 14, 2001 against those properties legally described in Schedule "I" hereto (the "Lands").

NOW THEREFORE, the condition of this obligation is that this bond stands in lieu of and in place of the Lands.

To the intent and condition that if the Principal shall promptly pay any judgment for the liens and costs as may be obtained by one or more of the above lien claimants in any action upon the liens as herein before described, to which Paramount, Ace and Korpack shall by judgment or order of the Supreme Court of British Columbia be found to be entitled in respect of any of the liens herein before described upon all or any of the Lands, or in respect of any charge under the *Builders Lien Act*

> upon the security of the Lands, then this obligation shall be null and void; otherwise it shall remain in full force and effect.
>
> IN THE EVENT that the Principal shall fail to satisfy any such judgment or order for Lien, the surety shall forthwith pay to the Registrar of the SUPREME COURT OF BRITISH COLUMBIA, NELSON REGISTRY, British Columbia, the amount of any such judgment or order including costs not to exceed the specified penalty of this bond.

The reader will note that this bond contemplates "judgment ... in respect of any of the liens".

[14] Kiewit made the application because of certain terms in its contract with the owners:

> **41.4 Removal of Liens**
>
> (a) ...
>
> (b) Except to the extent caused by the Owner if the Owner is in default in making payment to the Contractor as required under the Contract, the Contractor will indemnify and save the Owner harmless from and against all costs and liabilities of the Owner as a result of any and all actions commenced by any Lien claimant who was engaged by or through the Contractor on the Project, including solicitor and client costs, and the Contractor shall indemnify and save the Owner harmless from and against the amounts of any declarations of Lien. To mitigate the costs for which the Contractor may be liable in accordance with the foregoing, the Owner in its discretion, not to be unreasonably withheld, may agree to allow the Contractor, in the Owner's name, to defend a lien action ("Lien Action") against the Owner subject to the following:
>
> (i) The issues in the Lien Action must be limited to claims for unpaid labour, work or materials supplied under or pursuant to the Contract and for which the Contractor has already been paid. If any other issues are or become included or involved in the Lien Action, the Owner shall be promptly notified and the Owner, in its discretion but acting reasonably, may allow the Contractor to continue to defend the Lien Action in the Owner's name or may

take over the conduct of its defence through its own legal counsel;

(ii) If at any time a conflict arises between the positions of the Contractor and the Owner in relation to the Lien Action, the Owner will be promptly notified and the Owner, in its discretion but acting reasonably, may agree to waive the conflict and have the Contractor continue to defend the Lien Action or may take over the conduct of its defence through its own legal counsel;

(iii) The Contractor shall forthwith post appropriate security for the Lien, including security for the costs of the Lien claimant, in an amount sufficient to fully protect the Owner, which security shall be in an amount, in a form and held by such Person as the Owner may reasonably require;

(iv) All significant pleadings, and all admissions to be made by or on behalf of the Owner, shall be subject to review and approval by the Owner's legal advisors, acting reasonably and promptly, prior to filing of same with the court or their delivery to opposing counsel;

(v) The Contractor shall cause its legal counsel to report periodically and at least semi-annually, to the Owner on the general status of the action.

[15] The Registrar at the Kamloops Land Title Office duly discharged the claims of lien and the certificate of pending litigation from the certificates of title of the owners.

[16] On the 21st April, 2004, this application was brought:

> TAKE NOTICE that an application will be made by the Defendants, ARROW LAKES POWER COMPANY a joint venture between CBT ARROW LAKES POWER DEVELOPMENT CORP. and COLUMBIA POWER CORPORATION, ARROW LAKES POWER DEVELOPMENT CORPORATION and COLUMBIA POWER CORPORATION and by PETER KIEWIT SONS CO. to the presiding judge or master at the courthouse at 320 Ward Street, Nelson, British Columbia, L1L 1S6 at a date and time to be set for an order in the form attached as Schedule "A" hereto [seeking, *inter alia*, to dismiss the action against the owners and to add Peter Kiewit Sons Co. as a defendant to the proceeding].

> The applicants will rely on Rules 15, 18, 19 and 57 of the Rules of Court.
>
> At the hearing of the application, the applicant will rely on the following affidavit(s) and other documents:
>
> 1. Affidavit of Rose Fazio sworn February 13, 2004;
> 2. Order of Master Brine pronounced October 24, 2002, in Nelson Registry No. 10524.
> 3. Registrar's Certificate dated October 24, 2002, in Nelson Registry No. 10524.
> 4. Writ of Summons and Statement of Claim filed herein.

[17] The affidavit referred to exhibited the order of Master Brine, the Lien Bond, the Registrar's Certificate of 24th October, 2002, the Certificate of Pending Litigation, and the Cancellation of Charge.

[18] Further affidavits were then filed on behalf of both the appellants and Paramount going to the question of who was in possession of relevant documents.

[19] An officer of Paramount deposed:

> 13. Arrow Lakes, as the owner of the Project, employed consulting engineers and personnel to oversee the design and construction of the Project and, as such, where [sic] directly involved in the design aspects of the Project, inspecting the work performed by Peter Kiewit and North Pacific, and overseeing construction and approving change orders for the Project.
>
> 14. The personnel retained by Arrow Lakes to oversee the Project have direct knowledge concerning the design changes that were approved in connection with this Project, and the additional costs that were incurred, which information should have a direct bearing on the claims being advanced by Paramount Drilling in the within litigation.
>
> 15. Furthermore, we have reason to believe that Arrow Lakes is in possession of records and documents that have a direct bearing

> on the issues involved in this litigation, including the following types of records normally kept on large construction projects, namely:
>
> (a) inspection reports prepared by the consulting engineers;
> (b) records of quantities;
> (c) project diaries;
> (d) detailed pictures of the various facets of the Project;
> (e) project reports;
> (f) correspondence;
> (g) drawings;
> (h) inspection reports;
> (i) progress payment records;
> (j) preliminary design work;
> (k) project completion operational reports;
> (l) deficiency lists; and
> (m) project summaries;
>
> 16. I do verily believe that for the foregoing reasons, the owner of this Project, Arrow Lakes, is a necessary and proper party to the within litigation, and will assist Paramount Drilling in resolving many of the outstanding issues involved in the within action.

[20] In response, the project engineer for Kiewit deposed as follows:

> 3. Since reviewing the McLean Affidavit, I have made inquiries as to the volume of documents which exist in relation to this project and which will have to be reviewed by Kiewit in order to produce relevant documents in its possession or control.
>
> 4. Kiewit has 2 1/2 containers in Edmonton which contain project records. There is another approximately 1/2 of a container of boxes of project records still on site in Castlegar. Between the Castlegar Project Site and Edmonton Office there are approximately:
>
> a) 521 boxes of archived documents.
>
> b) 25 boxes of active project documents.
>
> c) 3 Filing drawers of active project documents.
>
> d) 32 Filing drawers of archived project documents.
>
> e) 5 shelves of active documents (8 1/2" by 6' wide).
>
> f) 47 shelves of archived documents (10" by 3' wide).

5. In respect of the document types identified in paragraph 15 of the McLean Affidavit:

a) Inspection reports prepared by the consulting engineers – The only such reports Klohn-Crippen (the "Consultant") prepared and transmitted to Kiewit were Non-Conformance Reports. These would be in the quality control ("QC") documents in one of the containers;

b) Records of quantities – The only quantities used by the owner for the contract with Kiewit was a lump sum for each pay item progressed on a percent complete basis. North Pacific Roadbuilders Ltd. ("NPRB") usually provided monthly survey/estimated quantities in order to progress the percent complete of its work for billing purposes against its subcontract values. Kiewit has those documents. Those would be part of the documents in the containers or still at site;

c) Project Diaries – Kiewit has some daily diaries and the inspection forms prepared by Kiewit's QC inspectors.

d) Pictures – There are approximately 5 banker boxes full of photographs plus an additional approximately 6,000 electronic photos of the project work;

e) Project Reports – Kiewit has monthly & bi-monthly reports that were prepared by Kiewit and others on the project and submitted to the Owner. Those are the only project reports of which I am aware;

f) Correspondence – in the containers and at the site, Kiewit logged over 15,200 individual pieces of correspondence and documents that include correspondence sent to, or received from, the owner, the Consultant, NPRB and Paramount on the project;

g) Drawings – because the agreement between Kiewit and the owner was of the design/build variety, it was Kiewit and not the owner which had responsibility for all design aspects of this project. In terms of the drawings:

   i) Kiewit has the design drawings prepared by it or on its behalf, including those submitted to the Consultant for review as required by the design/build contract.

   ii) Kiewit has the drawings provided to it by the owner through the Consultant. These are limited to the

proposal documents since the Consultant did not provide subsequent drawings for the project, with the exception of occasional sketches. These sketches would be referenced in, and attached to, the correspondence.

iii) Kiewit has the drawings provided to NPRB and Paramount.

h) Inspection reports – as per item (c);

i) Progress payment records – Kiewit has these, both between Kiewit and the Owner, as well as Kiewit and NPRB;

j) Preliminary Design Work – this work was done by Harza, Kiewit's engineering and design partner and Kiewit has the preliminary drawings & specifications;

k) Project completion operational reports – Kiewit has many of these but, given the nature of the project and the operations, none of them have anything to do with any part of the earthworks on the project, which is the portion of the project with which Paramount and NPRB were involved with;

l) Deficiency List – Kiewit has the interim deficiency list prepared by the Consultant as part of the substantial completion process. It is unlikely that any of these items on the list have anything to do with the work done by Paramount because Kiewit was required to correct QC issues and non-conformance pertaining to earthworks as work progressed.

m) Kiewit has not prepared any project summary and, to the best of my knowledge, neither has the owner or the Consultant.

[21] No affidavit was filed by or on behalf of the owners.

[22] Of the Rules referred to in the application, only Rules 15(5) and 19(24) are of any real relevance:

RULE 15 – CHANGE OF PARTIES

...

(5) (a) At any stage of a proceeding, the court on application by any person may

(i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,

(ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and

(iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

(b) No person shall be added or substituted as a plaintiff or petitioner without the person's consent.

* * *

RULE 19 – PLEADINGS GENERALLY

...

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[23] The thrust of the appellants' position is that, as the owners are no longer at any direct risk, security having been given for the claims of lien and the certificate of pending litigation, and as Kiewit is essentially at risk under the terms of the bond, Kiewit should be substituted for the owners.

[24] In considering this question, one must have regard to the whole of the ***Builders Lien Act***.

[25] In my opinion, relevant to the issue before this Court are these provisions:

> **2** (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement,
>
> (a) performs or provides work,
>
> (b) supplies material, or
>
> (c) does any combination of those things referred to in paragraphs (a) and (b)
>
> has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
>
> (d) the interest of the owner in the improvement;
>
> (e) the improvement itself;
>
> (f) the land in, on or under which the improvement is located;
>
> (g) the material delivered to or placed on the land.
>
> * * *
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> **15** (1) Except as provided in section 18, a claim of lien is made by filing in the land title office a claim of lien in the prescribed form.
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> **21** A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.
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> * * *
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> **23** (1) If a claim of lien is filed by one or more members of a class of lien claimants, other than a class of lien claimants engaged by an owner, the owner, contractor, subcontractor or mortgagee authorized by the owner to disburse money secured by a mortgage may, on application, pay into court the lesser of
>
> (a) the total amount of the claim or claims filed, and
>
> (b) the amount owing by the payor to the person engaged by the payor through whom the liens are claimed provided

> the amount is at least equal to the required holdback in relation to the contract or subcontract between the payor and that person or, if the payment is made by a purchaser to whom section 35 applies, 10% of the purchase price of the improvement.
>
> (2) Payment into court under an order made under subsection (1) discharges the owner from liability in respect of the claims of lien filed and
>
> (a) the money paid into court stands in place of the improvement and the land or mineral title, and
>
> (b) the order must provide that the claims of lien be removed from the title to the land or mineral title.
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> * * *
>
> **26** A claim of lien may be enforced by an action according to the Rules of Court.

[26] Unlike, for instance, the Saskatchewan ***Builders' Lien Act***, S.S. 1984-85-86, c. B-7.1, considered by the Saskatchewan Court of Appeal in ***Wellington Insurance Co. v. Saskferco Products Inc.*** (1999), 170 D.L.R. (4th) 625, [1999] 7 W.W.R. 473, which contained an express provision as to who shall be parties to a lien action, the British Columbia statute contains no such procedural instructions.

[27] The learned chambers judge, Williamson J., dismissed both branches of the application: (2004), 33 B.C.L.R. (4th) 394 and 2004 CarswellBC 2152 (S.C.). After stating the factual background and referring to section 24, he addressed the question of whether there is a difference of significance in the matter of putting up of security between the present Act and its immediate predecessor, c. 41 of R.S.B.C. 1996.

[28] Section 33 of the 1996 Act read:

> **33** (1) Any person against whose property a claim of lien has been filed under this Act may apply to have the claim of lien cancelled on payment of the claim, or sufficient security for the payment being given.
>
> (2) The court hearing the application may order the cancellation of the claim of lien, either in whole or in part, on payment, or on the giving of security, by the party against whose property the claim of lien is registered, in an amount satisfactory to the court and on terms, if any, the court sees fit to impose.
>
> (3) The registrar or the gold commissioner in whose office a claim of lien is filed must, on production of the order or an office copy of it, file it and cause the claim of lien and a certificate of pending litigation in respect of it to be cancelled as to the property affected by the order.

[29] The learned judge concluded that section 24 did not expressly change the law with respect to owners as necessary parties in lien claim actions.

[30] He then turned to the decision of this Court in ***Nanaimo Contractors Ltd. v. Patterson*** (1964), 46 D.L.R. (2d) 649 (B.C.C.A.) and read that case as saying that the owner continues as a proper party to the action even if security has been posted pursuant to a section *in pari materia* with section 33 of the Act of 1996. He concluded that the law expressed by the Court of Appeal in ***Nanaimo Contractors*** remains binding and said:

> [17] I find as a result that when a lien claim is cancelled pursuant to s. 24, that is all that happens. The registered claim is cancelled, but the lien itself is not extinguished, and the claim remains an action *in rem* against the property. The posted security replaces the land as security for that claim, but the claim remains a claim against the land.

[31] He put his conclusion in these words:

> [25] I conclude that after the depositing, pursuant to s. 24, of sufficient security for the payment of the claim, the lien remains an action *in rem* against the property. All that has occurred is that the registered claim has been cancelled and the land as security for the claim is replaced with the security which was posted in court.
>
> [26] The owners of the property remain necessary parties to any action to enforce the lien, as the action is enforcing a claim *in rem* against their property. Under s. 24 they remain possibly liable for amounts not covered by the security, even though the statutory scheme of the current *Act* overall will often make their participation in the litigation 'nominal or notional' where the security is posted by another party. While in such situations it may be undesirable to force the owners to participate in an action which is almost certain to result in no liability on their part, the changes manifest in the current version of the *Act* do not render the owners unnecessary parties. The requisite change in the law advocated by the applicants is a significant one, and should be left to higher authority or to the legislature.

[32] For their part, the appellants, who filed a joint factum, although they appeared separately before us, assert that the learned chambers judge erred in law in failing:

> (a) ... to order pursuant to one or more of Rule 15(5)(a)(i), Rule 18(6), and Rule 19(24) that Arrow Lakes and Columbia Power should cease to be parties in the Paramount action, and the action against them dismissed.
>
> (b) ... to order pursuant to one or more of Rule 15(5)(a)(ii) and Rule 15(5)(a)(iii) that Kiewit should be added as a Defendant in the Paramount action.

[33] For its part, Paramount puts the issues in somewhat different terms:

> (a) did the learned Chambers Judge err in law in refusing to remove the Owners as defendants in this action?; and
>
> (b) was the learned Chambers Judge clearly wrong in exercising his discretion to refuse to add PKS as party defendant even when, as a result of his decision not to remove the Owners as

> defendants, PKS was required to continue to defend the lien claim in the name and on behalf of the Owners?

[34] North Pacific, which was not represented by counsel at the hearing of this appeal, filed a factum in which it put its position thus:

> The Respondent North Pacific Roadbuilders Ltd. ("NRPB"):
>
> (a) opposes the appeal of the Order of Mr. Justice Williamson dismissing the application of the Owners to be removed as parties, and adopts the position of the Respondent Paramount Drilling and Blasting Ltd. ("Paramount") in respect of that appeal; and
>
> (b) takes no position on the appeal of the Order of Mr. Justice Williamson dismissing the application of Peter Kiewit & Sons Co. ("PKS") to be added as a defendant, except that it agrees with Paramount that if it is decided that the Owners should be removed as Defendants, PKS should be substituted as a defendant in place of the Owners, with the same obligations as the Owners.

[35] In my opinion, it is convenient to first consider whether an order could be made adding Kiewit as a defendant. If such an order ought not to be made, then I cannot think that either Kiewit or the owners would wish an order made that the owners no longer be a party to the proceeding, for such a result would deprive Kiewit of any right in the name of the owner to protect the fund which it has put up to secure the liens.

[36] In ***Robson Bulldozing Ltd. v. Royal Bank of Canada*** (1985), 62 B.C.L.R. 267 (B.C.S.C.), McLachlin J., then a judge of the Supreme Court of British Columbia, upon an application by defendants by counterclaim to be added as plaintiffs, set out this principle, at 270-71:

> In the case at bar, the first question is whether there is a possible cause of action between the proposed plaintiffs and the defendants. Unless a cause of action is suggested, it cannot be said that they ought to have been joined as parties, that their participation is necessary to ensure effectual adjudication, or that there is an issue between them which it is just and convenient be tried with the others: R. 15(5). Only if a cause of action is made out, do the conditions set out under R. 15(5) become relevant.

[37] In the case at bar, no cause of action exists between Paramount and Kiewit. That, it seems to me, is the complete answer to the application. Coming to that conclusion, I do not find it necessary to address the point made by counsel as to the applicability of the judgment of this Court in the ***Nanaimo*** case.

[38] What order might be appropriate in those cases in which a cause of action exists between the lien claimant and the person who puts up the security is not before us. Such a case is for another day.

[39] I would dismiss the appeal.

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Mr. Justice Smith"