Court File No.: CV-11-9283-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BOOK OF AUTHORITIES
(returnable 14 February, 2012)

Dated: 13 February 2012

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Case Name:
Gold Reserve Inc. v. Rusoro Mining Ltd.

Between
Gold Reserve Inc., Plaintiff, and
Rusoro Mining Ltd. and Endeavour Financial
International Corporation, Defendants

[2009] O.J. No. 533

54 B.L.R. (4th) 226

2009 CarswellOnt 660

Court File No. CV-08-7904-00 CL

Ontario Superior Court of Justice
Commercial List

P.A. Cumming J.

Heard: February 4 and 5, 2009.
Judgment: February 10, 2009.

(88 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Serious issue to be tried or strong prima facie case -- Sufficiency of damages in lieu of injunction -- Interlocutory or interim injunctions -- Application by the plaintiff for an interlocutory injunction to restrain the first defendant from proceeding with a hostile take-over bid to acquire its shares and to restrain the second defendant, who had formerly acted as its financial advisor and who had been provided with confidential information, from assisting the first defendant in that bid, allowed -- Plaintiff raised a serious issue about the impropriety of the defendants' conduct -- It established irreparable harm from the defendants' use of the confidential information -- Balance of convenience favoured it -- Confidential information was to be returned to the plaintiff.

Corporations, partnerships and associations law -- Corporations -- Compulsory and compelled acquisitions -- Take-over bids -- Application by the plaintiff for an interlocutory injunction to restrain the first defendant from proceeding with a hostile take-over bid to acquire its shares and to restrain the second defendant, who had formerly acted as its financial advisor and who had been provided with confidential information, from assisting the first defendant in that bid, allowed -- Plaintiff raised a serious issue about the impropriety of the defendants' conduct -- It established irreparable harm from the defendants' use of the confidential information -- Balance of convenience favoured it -- Confidential information was to be returned to the plaintiff.

Application by the plaintiff Gold Reserve Inc. for an injunction to restrain the defendant Rusoro Mining Ltd. from proceeding with a hostile take-over bid to acquire shares of Gold. Gold also applied for an injunction to restrain the defendant Endeavour Financial International Corporation from having any involvement on behalf of Rusoro, or at all, with the hostile take-over bid for Gold. An order was also sought for the return of all confidential information related to Gold in the possession of Rusoro or Endeavour. Gold was a reporting issuer that was incorporated in the Yukon. Its shares traded on the Toronto Stock Exchange. Rusoro was a British Columbia corporation and was a TSX Venture Exchange listed issuer. It carried on a gold mining business in Venezuela. Endeavour was incorporated in Grand Cayman. It was associated with a public company whose shares traded on the Toronto Stock Exchange. Endeavour performed financial advisory services and it acted as a merchant bank that invested in the junior mining sector. Gold explored and developed mining projects, particularly in Venezuela. Rusoro initially made a friendly offer to acquire Gold but it was rejected. It was then determined to make a hostile take-over bid and proceeded with Endeavour as its financial advisor. Once it made the bid Gold advised it and Endeavour that the bid could not proceed because it was tainted by Endeavour's possession of confidential information that belonged to Gold and by Rusoro's benefitting from that information in advancing the bid. Endeavour had obtained this information as it acted as a financial advisor for Gold. It had been provided with the information on the condition that it kept it confidential. This application then followed.

HELD: Application allowed. An interlocutory injunction was granted restraining Rusoro from proceeding with the hostile take-over bid until the conclusion and disposition at trial of the pending action commenced by Gold. An interlocutory injunction was granted restraining Endeavour from being involved in Rusoro's take-over bid until the conclusion and disposition of the trial. Rusoro and Endeavour were required to return the confidential information and were not to keep any copies of it. When Endeavour advised Rusoro on the hostile take-over bid there was a prima facie case that Endeavour knowingly acted against the interests of Gold in a material way. The intertwined relationships between Endeavour and Rusoro raised a serious issue that Endeavour improperly preferred the interests of its client Rusoro to those of its client Gold and it breached its duties to Gold. A serious issue was established that Endeavour was properly subject to equitable intervention based upon breach of confidence, with the Court having the flexibility to fashion a suitable remedy. There was also a serious issue established that Endeavour breached the express contractual terms of its advisory agreement with Gold and its implicit duties of loyalty and maintaining confidence as a professional advisor to its client Gold by acting as Rusoro's financial advisor in the hostile bid. Rusoro was arguably liable as a knowing and willing recipient of those services in breach of Endeavour's duties to Gold. Gold established it would suffer irreparable harm. The nature of the harm caused to Gold from the improper use of the confidential information could not be quantified. Rusoro and Endeavour created an unfair imbalance of knowledge. They had knowledge of confidential information which other potential bidders did not have. Given the uneven knowledge base, other potential bidders and Gold's own shareholders were at an unfair disadvantage relative to Rusoro and Endeavour. Rusoro also improperly obtained an unfair timing and tactical advantage. The balance of convenience also favoured Gold. Endeavour agreed not to misuse Gold's confidential information. It was obliged to honour that promise. Endeavour could not be permitted to make any use of the information, including acting as an advisor to any person who made a hostile take-over bid for Gold. Rusoro knew about Endeavour's relationship as Gold's advisor and that it had access to confidential information. Rusoro could not be in a better position than Endeavour itself and therefore could not benefit from Endeavour's use of Gold's confidential information. Rusoro would not suffer any harm if it was a participant in an auction which provided a level playing field with equal access to Gold's confidential information for all bidders.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Counsel:

R.S. Harrison, Berkley D. Sells and ***Shelley D. Babin***, for the Plaintiff.

R. Seumas M. Woods and ***Bryn Gray***, for the Defendant Rusoro Mining Ltd.

Eliot N. Kolers, Alexander D. Rose and ***Erica Tait*** for the Defendant Endeavour Financial International Corporation.

[Editor's note: An amended judgment was released by the Court February 26, 2009. The changes were not indicated. This document contains the amended text.]

REASONS FOR DECISION AMENDED

P.A. CUMMING J.:--

The Motion

1 The plaintiff Gold Reserve Inc. ("Gold Reserve") moves for an injunction (1) restraining the defendant Rusoro Mining Ltd. ("Rusoro") from proceeding with a hostile takeover bid (the "Rusoro Offer") to acquire shares of the plaintiff and (2) restraining the defendant Endeavour Financial International Corporation ("Endeavour") from having any involvement on behalf of Rusoro, or at all, with a hostile takeover bid for Gold Reserve. An order is also sought for the return of all confidential information relating to Gold Reserve in the possession of Rusoro or Endeavour.

2 Interlocutory injunctive relief may be granted where the moving party establishes that (1) there is a serious issue to be tried with respect to an infringement of rights; (2) there will be irreparable harm if an injunction is not granted, and (3) the balance of convenience favours granting the relief sought i.e. the irreparable harm to be suffered if the injunction is denied is not outweighed by irreparable harm to the respondent by the injunction being granted. *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) at para. 43.

The Parties

3 Gold Reserve, incorporated in Yukon Territory, is a reporting issuer whose common shares are traded on the TSX and NYSE Alternex Exchange. Mr. A. Douglas Belanger, the President of Gold Reserve, is an affiant on its behalf.

4 Rusoro is a British Columbia corporation and is a TSX Venture Exchange listed issuer. Rusoro carries on a gold mining business in Venezuela. Rusoro is reportedly controlled by Andre Agapov as CEO and his father, Vladimir Agapov, as the non-executive Chairman. On June 10, 2008, Rusoro announced that a strategic investment of US$80 million had been made in Rusoro by the second largest Russian gold mining company together with a syndicate.

5 Endeavour is incorporated in Grand Cayman. It is affiliated with Endeavour Financial Corporation, a public company, the shares of which trade on the Toronto Stock Exchange. Endeavour has two main facets to its business: it performs financial advisory services on a fee-for-service basis and it acts as a merchant bank investing in the junior mining sector.

Background

6 Gold Reserve is engaged in the exploration and development of mining projects, in particular the Las Brisas del Cuyuni property, a gold and copper project ("Brisas Project"), and the Choco 5 property, both being located in Bolivar State, Venezuela. Gold Reserve states that it has expended approximately $230 million towards the Brisas Project since 1993. The Brisas Project reportedly has a gross in-situ value of over $10 billion with gold ore reserves of some 10.2 million ounces and 1.4 billion pounds of copper.

7 Debt financing arrangements for some $425 million, subject to conditions, in respect of the Brisas Project, were reportedly put in place by Gold Reserve with a syndicate of lead banks in November, 2006. Equity financing by way of prospectus for some $30 million closed on November 4, 2004, with a further $30 million which closed May 15, 2006. Having obtained the Construction Permit in May, 2007, Gold Reserve raised a further $183 million through a cross border convertible debt and equity financing.

8 The Construction Permit for the Brisas Project was revoked May 5, 2008, (notwithstanding Venezuelan Government approval in 2003 of the operating plan and in 2007 of the environmental and social impact statement and the issuance of the Construction Permit March 28. 2007) with the result that the construction phase toward production by way of an open pit mine has now been halted pending resolution of the Government of Venezuela's intentions for the Brisas Project going forward. The record indicates the market price for Gold Reserve's shares fell very significantly in May, 2008 with the cancellation of the Construction Permit.

9 A press report (translated from Spanish) from the newspaper EL UNIVERSAL of November 6, 2008 suggests that Venezuela

> will offer Russian RUSORO an association to develop the huge gold mines Las Cristinas and Brisas, and plans to rescind its bonds with Canadian companies Crystallex and Gold Reserve, which have waited for years for the government permits to operate them.

10 As of the date of the hearing of the motion, Venezuela's position vis-à-vis Gold Reserve and the Brisas Project has reportedly not been clarified by the Minister of the People's Power for Basic Industries and Mining.

The unsolicited hostile takeover bid by Rusoro

11 On April 3, 2007 Rusoro engaged Endeavour to provide financial advisory services. Key Endeavour employees who had worked on a retainer with Gold Reserve since 2004 also became engaged in the Rusoro retainer.

12 Rusoro made a friendly offer August 21, 2008 to acquire Gold Reserve which Gold Reserve rejected August 26, 2008. Endeavour contacted Gold Reserve over September and early October, 2008 with respect to a possible business combination with Rusoro but Gold Reserve remained uninterested.

13 Rusoro determined to make a hostile takeover bid and to proceed with Endeavour as its financial advisor. Neither Rusoro nor Endeavour told anyone at Gold Reserve of Rusoro's intention until December 12, 2008. Final instructions to proceed with a hostile bid were given about November 16, 2008. On November 19, 2008 Endeavour had the Gold Reserve files located on Endeavour's computer server locked down. Endeavour, as advisor to Rusoro, opined to the board of directors of Rusoro in its presentation December 10, 2008 that 'three Rusoro shares to one Gold Reserve share' was a fair offer. (This would result in the shareholders of Gold Reserve having 30%, and the shareholders of Rusoro having 70%, of the post-takeover entity.)

14 On December 12, 2008 Mr. David Farrell at Endeavour telephoned Mr. Belanger to advise that an offer to acquire Gold Reserve would be delivered and that Gold Reserve would have 36 hours to evaluate it and accept it, failing which an unsolicited/hostile bid would be launched Monday, December 15, 2008.

15 Gold Reserve became the target of an unsolicited take-over bid (the "Rusoro Offer") that the defendant Rusoro commenced at 5:27 a.m. December 15, 2008. The offer is at a premium; however, as stated above, the current market valuation for the shares of Gold Reserve is particularly depressed.

16 On Sunday, December 14, 2008 Gold Reserve informed both Endeavour and Rusoro that the proposed takeover bid could not proceed because it was tainted by Endeavour's possession of confidential information belonging to Gold Reserve and Rusoro's benefiting from that information in advancing the bid. Gold Reserve filed its Statement of Claim against Endeavour and Rusoro December 16, 2008, seeking both injunctive relief and damages.

17 On December 30, 2008 Gold Reserve's board of directors released a circular recommending that shareholders reject the Rusoro Offer. Two unfairness opinions were given, by RBC Dominion Securities Inc. and JP Morgan Securities Inc., to the effect that the Rusoro Offer was inadequate from a financial standpoint.

18 By January 19, 2009 only 2.7% of Gold Reserve's shares had been tendered to the Rusoro Offer. The bid was to expire January 21, 2009 but has been extended to February 18, 2009.

19 As disclosed in Rusoro's takeover bid circular, Endeavour acts as Rusoro's financial advisor in connection with the Rusoro Offer. Mr. Gordon Keep, a Rusoro director and member of several committees including its Executive Committee, was the former Managing Director of Corporate Finance at Endeavour from 2001 to 2007. He is also the Executive Vice-President of Fiore Financial Corporation ("Fiore"). Fiore is an exclusive advisor to Endeavour, which shares office space with Fiore. Mr. Frank Giustra, a successful mining entrepreneur, the former chair of Endeavour, controls Fiore. Mr. Neil Woodyer, the CEO for Endeavour, in a conference call of November 13, 2008 referred to Mr. Giustra as remaining "a close and exclusive advisor to Endeavour. ..."

20 Mr. Douglas Belanger in his affidavit of January 16 traces the history of Messrs. Keep and Giustra and related entities and their connection to Rusoro through a business combination which resulted in Rusoro becoming a public entity. The record establishes that Mr. Giustra, together with the Agapovs, must agree on the terms of the release from escrow of a pool of 97,960,667 shares of Rusoro.

21 Gold Reserve asserts that about the fall of 2006 Mr. Giustra advanced the possibility of doing a business combination between Gold Reserve and Rusoro, without disclosing that both he and Endeavour had a financial interest in Rusoro. Gold Reserve advised Endeavour that it did not have any interest in a business combination with Rusoro.

22 Mr. Belanger in his affidavit states that he was informed by representatives of investment banks in New York that Mr. Giustra and Mr. Agapov expressed an interest to them in 2007 in seeking a business combination between Gold Reserve and Endeavour.

23 Endeavour is a creditor, shareholder and financial advisor of Rusoro. Endeavour or its affiliates hold about 7.5 million shares of Rusoro (with total issued shares of some 390.8 million), have some 7 million warrants to purchase shares of Rusoro and are due a fee payable of approximately 5.5 million shares in connection with the Rusoro Offer. Rusoro or its affiliates owe Endeavour or its affiliates some US $10 million of debt.

Endeavour's relationship with Gold Reserve

24 Endeavour also acted as Gold Reserve's advisor for more than four years pursuant to Advisory Agreements until Endeavour terminated the so-called Second Advisory Agreement with Gold Reserve by email December 15, 2008 some seven minutes after Rusoro publicly announced its intention to commence the Rusoro Offer.

25 Gold Reserve entered into an Advisory Agreement with Endeavour October 1, 2004 (the "First Advisory Agreement"). Endeavour was paid a monthly fee in exchange for its services (and ultimately received some $1.2 million over the 2004 to 2008 period), which included making presentations to potential lenders and investors, advising on potential business transactions and advising on project debt financing in respect of the Brisas project. Endeavour was provided access to Gold Reserve's confidential financial, technical, geological and operational records, analyses and data to enable Endeavour to develop a detailed knowledge of the potential costs and revenues for Gold Reserve's Brisas Project mining property.

26 The confidential information included experts' feasibility studies for the Brisas Project and back-up details, drill data, ore data, reserves and quality of reserves, engineering, mill design and throughput data, capital cost information, data regarding mining options, hydrology and water quality studies, metallurgical reports and data, the Micron International Limited expert report on Gold Reserve prepared for the banks as potential lenders, SNC-Lavalin's engineering procurement and construction management work and reports, project start-up plans and many cash flow models.

27 The First Advisory Agreement dated October 1, 2004 includes a "Confidentiality" provision. (This provision is repeated with identical wording in the Second Advisory Agreement of September 19, 2007 and, indeed, is seen also in the April 3, 2007 Advisory Agreement entered into between Endeavour and Rusoro.) As well, a September 3, 2004 Confidentiality Agreement (the record is unclear as to whether this was actually signed by the parties but seems at the least to have been agreed upon) contains covenants in sections 2 to 4.1 which impose strict conditions to maintain confidentiality in respect of Gold Reserve's confidential information.

28 Most importantly, the First Advisory Agreement provides as follows (which can be referred to as the "Confidentiality negative covenant" for ease of reference):

> Confidentiality
>
> Endeavour acknowledges that the business carried on by Gold Reserve and its subsidiaries is an extremely competitive business and that disclosure of any confidential information about the business or financial affairs of Gold Reserve and its subsidiaries would place them at a competitive disadvantage. Endeavour shall use its reasonable commercial efforts to preserve and protect the confidential nature of any information concerning the business or financial affairs of Gold Reserve or any of its dealings, transactions or affairs which may be disclosed to Endeavour by employees, officers or agents of Gold Reserve during the duration of this agreement. Without restricting the generality of the foregoing, Endeavour shall not;
>
> (i) Disclose any of the aforesaid information to third parties without the prior

written consent of Gold Reserve, provided that such consent shall not be required where the information is disclosed:

a. to the employees, officers, representatives, agents or professional advisors of Endeavour to enable such persons to assist Endeavour in providing consulting services to Gold Reserve hereunder, so long as such individuals are informed of the confidentiality covering such information and Endeavour remains liable to Gold Reserve for any breach of confidentiality by such persons; and/or
b. to the employees, officers, agents or professional advisors of Gold Reserve or such other persons as Gold Reserve management may designate; and/or
c. pursuant to any law, statute or regulation, ordinance or administrative, regulatory or judicial order.

(ii) Use any of the aforesaid information for its own purpose or benefit or to the detriment or intended probable detriment of Gold Reserve.

The foregoing covenants of Endeavour shall not apply to information which:

(i) through no act or omission of Endeavour is or becomes generally known or part of the public domain;
(ii) is furnished to others by Gold Reserve without restriction on disclosure; or
(iii) is furnished to Endeavour by a third party without Endeavour's knowledge of a breach of any restriction on disclosure owed to Gold Reserve.

Endeavour acknowledges that any breach of the foregoing obligations of confidentiality may not be fully compensable by monetary damages and therefore Endeavour consents to Gold Reserve obtaining such injunctive relief as may be necessary to protect its interests from such breach.

29 The First Advisory Agreement (as does the Second Advisory Agreement) also provides an "Acknowledgement" as follows (which can be referred to as the "Acknowledgment negative covenant" for ease of reference):

Acknowledgement

Gold Reserve acknowledges that:

(i) Endeavour may have clients who are shareholders of Gold Reserve (the "Clients");
(ii) Endeavour acts, and will act, as consultant or financial advisor to other companies ("Competitors") in the same business as Gold Reserve; and
(iii) The interests of the Clients or the Competitors may come into conflict with those of Gold Reserve.

Notwithstanding the foregoing acknowledgement, Endeavour shall not knowingly act against the interests of Gold Reserve in a material way. Endeavour shall be under no liability to Gold Reserve for, or as a result of, its acting as consultant or financial advisor to Competitors and Clients or the manner in which it resolves conflicts of interests deriving therefrom, unless

> Endeavour has acted in any manner which is dishonest or grossly negligent. In the event of a potential material conflict between the interests of Gold Reserve and those of Endeavour or its Clients or Competitors, Endeavour will inform Gold Reserve of the conflict and will either act solely for Gold Reserve, agree with Gold Reserve an appropriate resolution to the matter at hand or it will terminate this Agreement in accordant with its terms. [Emphasis added]

30 However, it is to be noted that the emphasized passage "*Notwithstanding the foregoing acknowledgment, Endeavour shall not knowingly act against the interests of Gold Reserve in a material way*" is not seen in the agreement between Endeavour and Rusoro of April 3, 2007. A reasonable inference is that the emphasized words were of particular importance to Gold Reserve and probably inserted at its request. This negative covenant is separate and independent from the Confidentiality negative covenant.

31 In my view, in advising Rusoro on the hostile takeover bid, i.e. the Rusoro Offer, there is a *prima facie* case that Endeavour was knowingly acting against the interests of Gold Reserve in a material way. Although the wording following the emphasized passage may provide arguable mitigating defences by Endeavour as to the consequences of its transgression, this does not alter the fact of the *prima facie* breach by Endeavour of the Acknowledgment negative covenant.

32 Moreover, in my view, the record indicates that Endeavour did not inform Gold Reserve of its conflict in advising Rusoro with respect to the preparation of the hostile takeover bid, nor did Endeavour terminate the Second Advisory Agreement prior to the making of the Rusoro Offer. Endeavour argues that it could have terminated the Advisory Agreements with Gold Reserve on a month's notice. Leaving aside whether the Confidentiality and Acknowledgment negative covenants would extend post-termination of the Advisory Agreement, the record indicates that there was in fact no termination until minutes after the Rusoro Offer was announced.

33 The practice of the mining industry reportedly is that confidential information is not provided to any third party in the absence of a confidentiality agreement. If it is anticipated that the recipient of the confidential information might be in a position to make an offer to acquire the shares of the mining company then the confidentiality agreement typically also contains additional so-called "standstill" provisions, that is, the company receiving the confidential information will not acquire the shares of the disclosing company for a specified period of time.

34 As seen above, the First Advisory Agreement contained extensive confidentiality provisions. It contained a Confidentiality negative covenant prohibiting Endeavour from using confidential information to the detriment of its client, Gold Reserve. There was no need for a standstill provision because Endeavour, acting as financial advisor to Gold Reserve, would not reasonably be expected to be a bidder for Gold Reserve. In a September 3, 2004 email to Gold Reserve (referring to the Confidentiality Agreement mentioned above in paragraph 27), Endeavour noted that "we've taken out the Standstill section as we feel it is inappropriate for us as industry advisors ... *we are still restricted from using the info for any such purpose*." [Emphasis added]

35 A friendly bidder who has access to a data room after signing a confidentiality and standstill agreement has an advantage over an unsolicited bidder relying only on public information because the friendly bidder is able to determine the nature, breadth and reliability of the underlying data used to support the publicly available information. Thus, given its intimate knowledge of Gold Reserve's confidential information, Endeavour is in the position of being able to significantly reduce the risk for a bidder in circumstances where the bidder itself only has access to the public record.

36 Three of Endeavour's principals, Messrs. David Laing (its Director of Mining), Doug Bowlby and

David Farrell, obtained extensive access to Gold Reserve's confidential information. Messrs. Laing and Bowlby were actively engaged by Rusoro to provide an opinion as to the value of Gold Reserve and to advise Rusoro generally on the prospective hostile takeover bid. Messrs. Farrell and Laing continued to have Gold Reserve information on their own computers as recently as the dates of their cross-examination in the two weeks preceding the return of the motion.

37 Gold Reserve alleges that Endeavour as an advisor to Gold Reserve had access to, and retains, confidential information of Gold Reserve which has been improperly shared with Rusoro, or knowingly used for the benefit of Rusoro, and which has resulted in Rusoro having an improper advantage over other potential bidders for Gold Reserve.

38 In my view, and I so find, the intertwined relationships between Endeavour and Rusoro raise a serious issue that Endeavour improperly preferred the interests of its client Rusoro to those of its client Gold Reserve and led Endeavour to breach its duties to Gold Reserve, as discussed below.

39 Mr. Belanger states that he and Mr. Rockne Timm, CEO of Gold Reserve, met with Mr. Giustra June 27, 2007 to express their concerns that Endeavour was not performing in advancing Gold Reserve's interests. Mr. Belanger states in his affidavit that Mr. Giustra responded that he did not have a "vested interest" in Gold Reserve and hence did not have time to spend assisting Gold Reserve.

40 In September 2007 Gold Reserve and Endeavour agreed to an amendment and restatement of the First Advisory Agreement in what is called the Second Advisory Agreement whereby Endeavour was not to initiate any merger or acquisition activity without Gold Reserve's approval and was to focus on project debt financing going forward.

41 Mr. George Salamis, the President and a director of Rusoro, testified that in the fall of 2007 Mr. Andre Agapov told him that Endeavour had an engagement to arrange debt financing for Gold Reserve. Mr. Laing testified that in August of 2008 he was told by Mr. Douglas Bowlby, Endeavour's Managing Director of Analysis and Research, that Rusoro wanted to look at modeling a combination of Gold Reserve and Rusoro.

42 There was a public release of a 43-101 report (National Instrument 43-101 Standards of Disclosure for Mineral Projects (2005) 28 OSCB 165) on March 31, 2008 by Gold Reserve but its content would not come as a surprise to Mr. Laing. He knew from his prior knowledge of Gold Reserve's confidential information that the public information had a substantive basis.

43 Mr. Laing admitted in cross-examination that Mr. Bowlby provided him with a production schedule which contained numbers relating to "total ore mined' and "total waste mined" off a cash flow relating to Gold Reserve which "were too precise" such that, one infers, he suspected Mr. Bowlby got the spreadsheet from a Gold Reserve cash flow. Mr. Laing testified he did not use the numbers but rather, took the "information contained in the 43-101 report and reverse-engineered a production schedule", creating new numbers. The reasonable inference is that Mr. Laing's new numbers would, at the least, be measured against, and fixed to approximate, the numbers from Gold Reserve's confidential information so as to derive a net present value of the best estimate of Gold Reserve's cash flow.

44 Mr. Farrell, a lawyer, admits on cross-examination he did not look at Endeavour's Second Advisory Agreement with Gold Reserve (the terms of which he had negotiated with Gold Reserve) prior to Endeavour deciding to act for Rusoro in making its hostile bid. It apparently did not occur to anyone at Endeavour to contact Gold Reserve and ask if Gold Reserve had any objection to Endeavour acting for Rusoro on a hostile bid.

45 The Advisory Agreements state that "[i]n the event of a potential material conflict .... Endeavour will inform Gold Reserve. ..." In my view, a potential conflict was obvious and should have been obvious to Mr. Farrell.

Gold Reserve's Choco 5 Site

46 On June 4, 2008 Gold Reserve determined that Rusoro had put four drill holes in Gold Reserve's Choco 5 concession. Mr. Greg Smith of Rusoro admitted on cross-examination that the drilling took place May 6, 8 and 9, 2008, that the person in charge of the drilling for Rusoro knew Rusoro was drilling on Gold Reserve's land, that Rusoro had not advised Gold Reserve it was doing so and that Rusoro never obtained a permit from the Venezuelan government to clear the land or to drill on Choco 5.

47 Moreover, Gold Reserve asserts that Rusoro has only provided Gold Reserve with some of the information from the drilling results after the commencement of the litigation at hand. Assay certificates have not been provided. Mr. Smith testified that Rusoro was conducting "geotechnical drilling". However, this seems improbable given Gold Reserve's evidence, and Mr. Smith's admissions on cross-examination, which indicate that the drilling was "reverse circulation" drilling to produce rock chips which can be tested for minerals such as gold.

48 The presentation of Endeavour to the board of directors of Rusoro December 10, 2008 setting forth the advantages of a takeover bid included as one highlight of success that there was "[a]dditional exploration upside at [Gold Reserve's] Choco 5 Project. ..."

49 Rusoro's trespass to Gold Reserve's Choco 5 property raises a serious issue that Rusoro was attempting to improperly gain information as to the mineral potential of the Choco 5 site for the purpose of gaining more knowledge as to the possible value of Gold Reserve. See generally *ORG Ltd and another v. Allan and others; Douglas and others v. Hello! Ltd. and others (No. 3); Mainstream Properties Ltd. v. Young*, [2007] UKHL 21; [2008] AC 1.

50 However, the Choco 5 drilling issue is somewhat of a sidewind to the main issues raised by the motion at hand. The incident is perhaps more generally indicative of the approach of Rusoro in its business dealings.

Disposition

51 The Court can make interlocutory orders when it is just and convenient to do so: *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 101. This enables the court to preserve rights that might otherwise be defeated pending a full trial of the claims advanced.

52 As stated at the outset, interlocutory injunctive relief may be granted where the moving party establishes that (1) there is a serious issue to be tried with respect to an infringement of rights; (2) there will be irreparable harm if an injunction is not granted, and (3) the balance of convenience favours granting the relief sought i.e. the irreparable harm to be suffered if the injunction is denied is not outweighed by irreparable harm to the respondent by the injunction being granted.

Serious issue to be tried

53 The first stage looks to the merits of the moving party's claim.

54 Endeavour and Rusoro respond to the motion by submitting that there is no, or at the least insufficient, evidence that Rusoro actually misused confidential information of Gold Reserve, that all the relevant information was public information or stale-dated, that Gold Reserve does not have the right to preclude Endeavour from working on a conflicting mandate with Rusoro, that Gold Reserve has not adduced any evidence as to irreparable harm and that the balance of convenience favours the denial of an injunction.

55 Endeavour says that Gold Reserve gave no non-public information to Endeavour after the beginning of 2007. Mr. Laing says that he used only publicly available information and made assumptions to perform the work he did for Rusoro.

56 Gold Reserve's confidential information was only shared with Endeavour because of its position of trust as financial advisor and because it had contracted to treat such information in confidence and not place itself in a position of conflict of interest.

57 In my view, a serious issue is established that Endeavour is properly subject to equitable intervention based upon breach of confidence, with the Court having the flexibility to fashion a suitable remedy. *Lac Minerals Ltd. v. International Corona Resources Ltd., (* 1989), 61 D.L.R. (4th) 14 (S.C.C.) p. 75 para. 74, per Sopinka J. and at p. 46 para. 186 per La Forest J. The law relating to breach of confidence is based upon concepts of good conscience and vulnerability. Equitable relief depends upon the circumstances of both the person confiding and the recipient of the confidential information. The relief can also apply in respect of third party recipients who did not have direct dealings with the plaintiff. In *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (1999),167 D.L.R. (4th) 577 (S.C.C.) the Supreme Court of Canada stated at pp. 587-588:

> Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

58 There is a serious issue established that Endeavour breached the express contractual terms of the Second Advisory Agreement and its implicit duties of loyalty and maintaining confidence as a professional advisor to its client, Gold Reserve, by acting as expert financial advisor to Rusoro's hostile takeover bid against Gold Reserve. A person in Endeavour's position must avoid conflicting interests and must not act against the interests of the person confiding in him by utilizing confidential information without the informed consent of that person. Rusoro is arguably liable as a knowing and willing recipient of these services in breach of Endeavour's duties to Gold Reserve. See *Hodgkinson v. Simms,* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

59 Once Rusoro decided to make a hostile takeover bid, Rusoro knew or ought reasonably to have known that Endeavour was acting in conflict and quite possibly in breach of confidence. As known to Rusoro, the very same people at Endeavour were advising Rusoro in respect of the hostile takeover bid against Gold Reserve as had been advising Gold Reserve for some four years and receiving relevant confidential information in doing so.

60 If a confidence arises out of a fiduciary relationship or involves the public interest (for example, the public interest in the integrity of the capital markets recognized by securities laws which is promoted by enforcing confidentiality agreements) then equitable intervention is even more forcefully called for, to protect the public interest. See generally *Schering Chemicals Ltd. v. Falman Ltd.* [1981] 2 All ER 321 at 338, [1982] Q.B.1 at 27.

61 The defendants' argument that their officers and employees can compartmentalize their minds so as to segregate and not use the confidential information given to them in the past lacks reality.

McDonald Estate v. Martin (1990), 77 D.L.R. (4th) 249 (S.C.C.) at 268 per Sopinka J.; *Hivac Ltd. Royal Park Scientific Instruments Ltd.*, [1946] 1 Ch. 169 at 173-74 (Eng. C.A.). Absent special measures such as institutionalized ethical walls the reasonable presumption is that confidential information will be taken into account and used, whether intentionally or inadvertently, to the disadvantage of the provider of the confidential information. An adverse inference is properly drawn against any assertion by Endeavour that it did not make use of Gold Reserve's confidential information in formulating advice for Rusoro. Indeed, the cross-examination of Mr. Laing indicates that Mr. Bowlby proposed to use confidential information. There is not any affidavit from Mr. Bowlby in this proceeding.

62 A fiduciary in possession of potentially relevant confidential information from a client or former client cannot properly act against the client in a hostile takeover bid. *Chapters Inc. v. Davies, Ward & Beck L.L.P.*, [2000] O.J. No. 4973, 2000 CanLII 22673 (ON S.C.) at paragraphs 6 and 12-13, [2001] O.J. No. 206, 2001 CanLII 24189 (ON C.A.) at paragraph 42.

63 Endeavour and Rusoro submit that an injunction will, in effect, result in a final determination of the action against them. Hence, they submit, Gold Reserve must establish more than merely that there is a serious issue, that is, that Gold Reserve must establish a *prima facie case.* See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311 at 337-339; *Mannesmann Aktiengesellschaft (a firm) v. Goldman Sachs International and others*, [1994] EWHC (Ch) unreported, 18 November 1999.

64 In my view, proof of a serious issue for trial is sufficient. However, it is also my view that Gold Reserve has established a *prima facie* case that Endeavour was in breach of the Acknowledgement negative covenant with Gold Reserve in knowingly acting against the interests of Gold Reserve in a material way in advising on, preparing and recommending the Rusoro Offer.

65 As well, in my view, Gold Reserve has established that there is a serious issue to be tried as to whether Endeavour did in fact use Gold Reserve's confidential information in breach of its contractual obligations and the Confidentiality negative covenant.

66 This motion is being decided upon affidavit evidence alone so that there cannot, of course, be findings of credibility and I do not make any. All of the several affiants of Endeavour and Rusoro proclaim that any confidential information of Gold Reserve was not used in the preparation of the Rusoro Offer. As an aside, I say that these proclamations of innocence are suspicious. The very same team at Endeavour (Messrs. Laing, Bowlby and Farrell) who gained the confidential information of Gold Reserve then acted for Rusoro in preparing and advising in respect of the Rusoro Offer, the merits of which would be aided significantly by their intimate knowledge and evaluation of the confidential detailed information of Gold Reserve. Endeavour had a significant existing financial stake in Rusoro as both a creditor and a shareholder. Endeavour was also to gain very significantly in compensation if the Rusoro Offer was successful. A great deal of potential monetary gain was at stake for both Endeavour and Reserve. There is an intertwined relationship between Endeavour and Rusoro. The self-interest of the personnel of Endeavour and Rusoro suggests that the protestations of innocence are disingenuous.

67 In all events, given the extensive confidential information as known to Messrs. Laing and Bowlby, it is a reasonable inference that it would be impossible for them to not rely upon such knowledge of confidential information to some extent in making their evaluation of Gold Reserve. At the very least, they would have greater confidence in the public information available because they knew from the confidential private information that the public information was solidly underpinned and reliable. In particular, Mr. Laing, the Director of Mining for Endeavour, had set up the data room for Gold Reserve and knew all of the critical confidential information of Gold Reserve. Mr. Belanger states in his affidavit of December 30, 2008, that, for example, while the executive summary of the detailed expert feasibility study for the Brisas Project was made at the end of 2005, "the full report was never made public because of the confidential nature of its contents".

68 Mr. Laing was involved in the preparation of confidential cash flow models relating to the Brisas Project from 2004 until early 2007. Mr. Laing and Mr. Bowlby prepared a discounted cash flow model of the Brisas Project in August, 2008 for Rusoro for the purpose of a possible acquisition.

69 As discussed above, there is some evidence that confidential information may in fact have been used. Mr. Laing stated that Mr. Bowlby brought to Mr. Laing some production figures in developing the projected cash flow. Mr. Laing said he suspected the figures had been pulled from another source because they were too precise. The inference is that the figures were from Gold Reserve's confidential information. Mr. Laing says he did not use the figures offered to him but rather used public information.

70 Mr. Laing was also cross-examined at length on his approach to transportation cost inputs in developing his cash flow. His use of the nomenclature of the three subset inputs is suggestive of the language of Gold Reserve's own confidential information.

71 A claim for breach of confidence is available where there is a breach of a confidentiality agreement. In such a situation, the reasonable expectations of the person confiding, created by the contractual promise of the person receiving the information in confidence, are defeated. The contractual provisions imposed a duty upon Endeavour not to act to Gold Reserve's detriment through the misuse of the confidential information.

72 Indeed, even where there is not a confidentiality agreement fiduciary obligations can arise. *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.).

73 The law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations but in certain situations fiduciary obligations are present, including in situations of professional advisory relationships. See, for example, *Hodgkinson v. Simms et al.* (1994), 117 D. L. R. (4th) 161 (S.C.C.) at 178-9, 181-2.

74 Trust and confidence were placed in Endeavour, as evidenced by the contractual provisions and in being given access to Gold Reserve's confidential information. A claim for breach of confidence will be made out if it is shown that Endeavour has misused the confidential information to the detriment of Gold Reserve. Gold Reserve was entitled to expect that Endeavour would act protectively of its interests in respect of the confidential information communicated or available only within the cloak of confidentiality through the financial advisor relationship pursuant to the Advisory Agreements beginning October 1, 2004. In my view, the particular circumstances of the specific factual situation at hand give rise to the fiduciary duty of loyalty on the part of Endeavour. *Lac Minerals Limited v. International Corona Resources Ltd. supra* per La Forest J. at pp. 28-44. The evidentiary record raises as a serous issue for trial that there was a breach of the duty of loyalty and the maintaining of confidentiality on the part of Endeavour.

Irreparable harm

75 There is authority that where an injunction is sought to prevent a party from violating a negative covenant that the proof of irreparable harm will not be required. *Doherty v. Allman* (1878), 3 App. Cas. 707 (H.L.) at 720; but see *Jet Print Inc. v. Cohen* (1999), 43 C.P.C. (4th) 123 at paras 27 and 28 (Ont. S.C.).

76 However, Endeavour has expressly contractually acknowledged in the Second Advisory Agreement that any breach of its obligations of confidentiality

> may not be fully compensated by monetary damages and therefore Endeavour

> consents to Gold Reserve obtaining such injunctive relief as may be necessary to protect its interests from such breach.

77 The nature of the harm caused to Gold Reserve (and to the interests of its shareholders in value-maximization) from the improper use of the confidential information cannot be quantified.

78 Rusoro and Endeavour have created an unfair imbalance of knowledge. They have knowledge of confidential information which other potential bidders do not have. Given the uneven knowledge base, other potential bidders, and Gold Reserve's own shareholders, are all at an unfair disadvantage relative to Rusoro and Endeavour.

79 Mr. Stanley M. D. Beck, former Chair of the Ontario Securities Commission has given expert opinion evidence on normal commercial practice with respect to standstill agreements, emphasizing that absent a level playing field, in terms of equal access to confidential information, a corporation's shareholders are not likely to achieve an active auction that maximizes value. He opines that in a factual situation as the one at hand that

> the commercial expectation would be that the hostile bidder would be bound by its financial advisor's confidentiality agreement with the target company. Accordingly, the bidder would not make use of the confidential information, including for the purposes of making a hostile bid, at least during the normal standstill period.

80 Rusoro has also improperly obtained an unfair timing and tactical advantage. Any other bidder would have to conduct appropriate due diligence and in doing so would be obliged to enter into a confidentiality agreement with a customary "standstill" provision. Gold Reserve may well ultimately have to conduct an auction in respect of its shares but cannot be in a position to consider this possible course of action until it knows where it stands with the Government of Venezuela in respect of the development of the Brisas Project.

81 Gold Reserve reportedly has been endeavouring to meet with the Government but has not been able to arrange a meeting to this point in time. If Gold Reserve is unsuccessful in obtaining the requisite permits, or alternatively compensation, its only recourse would appear to be a possible arbitration under international treaty and/or an auction of its shares.

82 As Rusoro's factum states about Gold Reserve:

> The company has one significant asset, a gold project in Venezuela, a country with a challenging political situation for most mining companies. The real issue in valuing Gold Reserve is not how much ore is in the ground at its property, it is whether the Venezuelan government will allow it to exploit that ore and how long it will take the company to obtain the necessary permissions and build the necessary infrastructure.

83 The record establishes that Rusoro is fully aware of this dilemma confronting Gold Reserve. Rusoro's preference in utilizing Endeavour as its advisor (given Endeavour's knowledge of Gold Reserve's position due to its past access to confidential information) enabled Rusoro to make a hostile takeover bid which discounts the Brisas Project as having any significant value to Gold Reserve and reduces the time available to Gold Reserve to determine a course of action that is in the best interests of the corporation and its shareholders in maximizing the value of their shares.

84 It is noted incidentally that Rusoro might not be able to satisfy an award of damages as indicated by the December 29, 2008 expert opinion of Rosen & Associates Limited that "[t]he financial viability of Rusoro is uncertain at best".

Balance of Convenience

85 Endeavour agreed not to misuse Gold Reserve's confidential information. It is obliged to honour that promise. Endeavour must not be permitted to make any use thereof, including acting as an advisor to any person making a hostile takeover bid for Gold Reserve.

86 The record indicates that Rusoro knew full well as to Endeavour's relationship as an advisor to Gold Reserve. Rusoro knew that Endeavour had access to confidential information. Rusoro knew that Endeavour had obliged itself in respect of the Confidentiality negative covenant. Rusoro cannot be in a better position than Endeavour itself. Rusoro cannot benefit from Endeavour's use of the confidential information of Gold Reserve. Rusoro would not suffer any harm if it was a participant in an auction which provided a level playing field with equal access to Gold Reserve's confidential information for all bidders.

The Appropriate Remedy

87 Rusoro, in effect, bought the assurance and advantage of using Gold Reserve's trusted financial advisor, Endeavour, and its possession of relevant confidential information, in substitution for its own due diligence. Commercial practice recognizes that access to confidential information required for due diligence necessitates a confidentiality agreement which may well incorporate a standstill commitment. See generally *Certicom corp. v. Research In Motion Limited*, [2009] O.J. No. 252, 2009 CanLII 1651 (ON S.C.). Rusoro should properly be bound to respect and not benefit from a breach by Endeavour of the Confidentiality negative covenant contained in the Second Financial Advisory Agreement with Gold Reserve.

88 For the reasons given, an Order will issue:

(1) granting an interlocutory injunction restraining Rusoro from proceeding with any hostile takeover bid to acquire the shares of Gold Reserve until the conclusion and disposition at trial of the pending action commenced by Gold Reserve (subject to any standstill or other agreement entered into by the parties in the interim period);

(2) granting an interlocutory injunction restraining Endeavour from having any involvement on behalf of Rusoro, or at all, with a hostile takeover bid for Gold Reserve until the conclusion and disposition at trial of the pending action commenced by Gold Reserve (subject to the agreement of Gold Reserve consenting to such involvement by Endeavour in the interim period);

(3) requiring that Rusoro, Endeavour and their agents return to the plaintiff both all the confidential information of the plaintiff, without retaining copies, and also anything produced from such confidential information and pending such return, the materials are to be kept in confidence under the control of counsel for Endeavour.

(4) Granting costs in respect of this motion on a partial indemnity basis to Gold Reserve in the amount of $75,000.00, inclusive of GST and all disbursements, such costs award to be payable forthwith on a joint and several basis by Endeavour and Rusoro.

P.A. CUMMING J.

cp/e/qlrpv/qlmxb/qlrxc/qlesm/qlaxw/qlaxr/qlhcs

Case Name:
Gold Reserve Inc. v. Rusoro Mining Ltd.

Between
Gold Reserve Inc., and
Rusoro Mining Ltd. and Endeavour Financial International Corporation

[2009] O.J. No. 1442

251 O.A.C. 127

176 A.C.W.S. (3d) 832

Divisional Court File Nos. 065/09 and 066/09

Court File No. CV-08-7904-00 CL

Ontario Superior Court of Justice
Toronto, Ontario

D.E. Bellamy J.

Heard: April 2, 2009.
Judgment: April 6, 2009.

(24 paras.)

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Injunctions -- Circumstances when granted -- Motion by defendants for leave to appeal interlocutory injunction restraining them from proceedings with hostile takeover dismissed -- Motions judge alive to all issues and applied well-established law -- Motions judge aware of defendants' submissions that order resulted in final determination but found serious issue test was sufficient and plaintiff had prima facie case -- While motions judge unhelpfully quoted 16 pages of dissenting reasons, he did not state agreement or reliance on them -- Motions judge examined all facts before finding a fiduciary duty owed -- No reason to doubt correctness of decision and not issue of general importance.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 62.02(4) (b)

Counsel:

Robert S. Harrison, Berkley D. Sells and Shelley Babin, for the Plaintiff/Respondent.

R. Seumas, M. Woods and Bryn Gray, for the Defendant/Moving Party Rusoro Mining Ltd.

Eliot N. Kolers and Alexander D. Rose, for the Defendant/Moving Party Endeavour Financial International Corporation.

ENDORSEMENT

1 **D.E. BELLAMY J.**:-- The moving parties seek leave to appeal a decision of Cumming J. dated February 10, 2009 and reported at [2009] O.J. No. 533 (Sup. Ct. J.), in which he granted an interlocutory injunction to Gold Reserve Inc. ("Gold Reserve").

2 That interlocutory injunction restrained Rusoro Mining Ltd. ("Rusoro") from proceeding with any hostile takeover bid to acquire the shares of Gold Reserve until the end of the trial, and restrained Endeavour Financial International Corporation ("Endeavour") from having any involvement at all, including any involvement on behalf of Rusoro, with any hostile takeover bid to acquire the shares of Gold Reserve until the end of the trial. Neither of the moving parties seeks leave to appeal the third term of the injunction which requires them both to return to Gold Reserve its confidential information and anything produced from that information. That term has now been fulfilled.

3 The moving parties seek leave to appeal under rule 62.02(4)(b) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 which reads as follows:

> (4) Leave to appeal shall not be granted unless,
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

4 Both Rusoro and Endeavour submit the motions judge erred for the following reasons:

(a) He failed to recognize the order as a final determination which necessitated an analysis more stringent that merely "a serious issue to be tried";
(b) He made a finding of fiduciary duty based on a dissenting opinion in *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.) (*"Lac Minerals")*;
(c) He reversed the onus, effectively requiring the moving parties to disprove a breach of confidence; and
(d) He incorrectly concluded that Gold Reserve had adduced evidence of irreparable harm.

5 Rusoro submits the motions judge erred for the following additional reasons:

(e) He failed to properly balance and consider the respective harm to the Gold Reserve shareholders;
(f) He failed to apply the equitable defences of laches and acquiescence; and
(g) Even if the motions judge was correct in granting an injunction, the order he made was overly broad and punitive because he failed to limit the length of the injunction to a period proportionate to the alleged unfair timing advantage gained.

6 The motions for leave to appeal are dismissed. The motions judge was very much alive to all the issues raised by the moving parties and, in conducting his analysis, he carefully analyzed the facts, then applied well-established principles of law. In granting this discretionary remedy, he made no error that would result in my doubting the correctness of his order.

7 The moving parties first contend that the motions judge used an inappropriate test on the merits. They submit that he failed to recognize this interlocutory order as one that results in a final determination of the issue, and is therefore an exception to the general rule that the moving party must only establish there is a serious issue to be tried. Rather, the motions judge was required to undertake an extensive review of the merits of Gold Reserve's case and to apply a test establishing a strong *prima facie* case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311 at 337-339 ("*RJR-MacDonald*").

8 The motions judge was aware of the defendants' submissions but concluded that proof of a serious issue for trial was sufficient. However, having said that, he went further and said at para. 64, "it is also my view that Gold Reserve has established a *prima facie* case." He then proceeded to engage in a lengthy, meticulous and careful examination of the evidence and the merits of the case. The end result is that he conducted a much more extensive examination of the merits than he was required to conduct had he been following the more general approach suggested in *RJR-MacDonald* where the Supreme Court of Canada said at p. 337 that "[A]prolonged examination of the merits is generally neither necessary nor desirable." The motions judge's wide-ranging, detailed review covered not only the merits of the plaintiff's case but also that of the defendants. In the final analysis, he concluded that the first prong of the *RJR-MacDonald* test had been established. I cannot say that he was in error in so concluding.

9 The moving parties assert also that the motions judge decided that a fiduciary duty will arise based solely upon the disclosure of confidential information, and that he based his reason for that proposition on the dissenting opinion of La Forest J. in *Lac Minerals.*

10 The motions judge, in citing *Lac Minerals,* unhelpfully refers to sixteen pages (page 28-44) of part of La Forest J.'s lengthy discussion regarding fiduciary duty. It is true that La Forest J.'s dissenting conclusion is contained in that part, but it is not clear to me that the motions judge was agreeing with that conclusion. Because he did not specify what in the sixteen pages he was agreeing with, the motions judge could equally have been referring to other propositions contained in the citation: for example, that a fiduciary relationship does not normally arise between arm's length commercial parties, or that it is a question of fact in each case whether the relationship between the parties creates a fiduciary relationship. Or, as the responding party suggests, the reference to the very lengthy analysis of La Forest J. was intended to indicate the nature of the analysis that the motions judge had conducted in reaching his conclusion. That is equally plausible. It simply is not clear to me from the motions judge's reasons that this very experienced judge was citing a 20-year old seminal case to stand for the reverse of its *ratio.*

11 What is clear, though, is that the motions judge did recognize that "the law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations" (para. 73), that it is not necessary to have a confidentiality agreement to trigger a fiduciary obligation (para. 72), and, importantly, that it is necessary to thoroughly examine the facts to determine whether they demonstrate the existence of a fiduciary duty. In my view, that is exactly what the motions judge did. He conducted a painstaking examination of the facts and, at para. 74, concluded that "the <u>particular circumstances</u> of the <u>specific factual situation at hand</u> give rise to the fiduciary duty of loyalty on the part of Endeavour" [emphasis added].

12 The motions judge's comments do not stand for the proposition that all financial advisors who provide advice to clients and who have signed a confidentiality agreement are necessarily in a fiduciary relationship. His findings, made after he had fully examined the unique relationship between the parties, were clearly limited to the ample evidence of the indicia of a fiduciary relationship facing him. Having found a fiduciary relationship between Gold Reserve and Endeavour, he then concluded that Rusoro was equally liable as a knowing and willing recipient of services in breach of the existing contract and of Endeavour's duties to Gold Reserve. Again, I cannot say the motions judge erred in his conclusions.

13 Next, the moving parties assert that the motions judge reversed the onus, effectively requiring the moving parties to disprove a breach of confidence. I do not agree. Clearly the onus of satisfying the three-part test from *RJR-MacDonald* rests with the plaintiff and nothing in the motions judge's reasons suggest that he thought otherwise or that he applied the evidence in a way that derogated from that onus. The motions judge reviewed all the evidence. He referred to actions and beliefs of both the plaintiff and the defendants. He also drew inferences based on that evidence. In doing so, he did not reverse the plaintiff's onus or disregard evidence.

14 The moving parties also submit the motions judge concluded incorrectly that Gold Reserve had adduced evidence of irreparable harm. In my view, there was ample evidence before the motions judge to support his findings, especially as Gold Reserve's only significant asset was a gold project in Venezuela whose future is uncertain, and Rusoro was fully aware of this. He correctly noted that Endeavour had expressly acknowledged in its contract with Gold Reserve that any breach of its obligations of confidentiality might not be fully compensated by monetary damages. He also correctly observed that the nature of the harm caused to Gold Reserve could not be quantified. There was evidence to support his conclusions with respect to irreparable harm.

15 As mentioned above, Rusoro submitted there were three additional errors.

16 First, Rusoro submits that the motions judge failed to consider the harm to shareholders. The motions judge did consider the impact on Gold Reserve's shareholders. He also considered the prospect of an auction and decided that the actions of Endeavour and Rusoro made it impractical for Gold Reserve to arrange an auction for competing bids or to otherwise maximize value for Gold Reserve shareholders. While another judge might have come to a different conclusion, it was not an error for him to reach this one.

17 Second, Rusoro submits that the motions judge does not appear to have taken into account its argument with respect to the equitable defences of laches and acquiescence, and that this is potentially an error because Rusoro does not know whether the motions judge considered its argument. While it might have been preferable for the motions judge to specifically refer to this argument of Rusoro's, his failure to do so is not an error of such proportion that would warrant sending this matter for appellate review. In any case, the motions judge certainly grasped the chronological significance of this argument. He knew, for example, that Gold Reserve did not object to Rusoro using Endeavour as its financial advisor in the context of a friendly offer. When the offer became hostile, though, Gold Reserve immediately objected, and the evidence disclosed that Gold Reserve considered Endeavour's involvement in a hostile takeover bid as being a conflict with their Second Advisory Agreement. It was open, therefore, to the motions judge to conclude that there had been no acquiescence on Gold Reserve's part to have Endeavour act as a financial advisor to Rusoro on this hostile bid and that there had been no delay in bringing its opposition to the moving parties' attention.

18 Finally, Rusoro argues that the order is overly broad and punitive because it fails to limit the length of the injunction to a period proportionate to the alleged unfair timing advantage gained. It submits that by granting an injunction to restrain any hostile bid until trial, the motions judge has overcompensated Gold Reserve. It suggests that if the motions judge were going to grant relief, he should have limited it to no more than 30 days. This decision was entirely within the motions judge's discretion and, on the basis of the unique facts he had before him, the injunctive relief seems appropriately tailored to these facts. I cannot say that he erred.

19 Finally, and perhaps more importantly given the exceptional fact situation here, even if I were to conclude that the motions judge's decision was open to serious debate, it would still be necessary for the moving parties to demonstrate under the second part of rule 62.02 (4)(b) that the proposed appeals involve matters of such importance that leave to appeal should be granted. This conjunctive test requires both parts to be satisfied. They have not both been satisfied.

20 The value of the proposed appeals is limited to the distinctive facts involving these three corporate entities, with no broad conclusions or questions of principle. Rusoro and Endeavour are extremely closely linked. The motions judge listed numerous illustrations of how significantly intertwined their relationship was and how, because of this cohesive and entangled relationship, both stood to gain financially from the hostile takeover bid. As a result, these proposed appeals do not transcend the immediate interests of the parties in this case and raise no issues of general public interest.

21 The motions judge had before him the uncontradicted expert opinion of Mr. Stanley M. D. Beck, former Chair of the Ontario Securities Commission. In that opinion, Mr. Beck colourfully observed that "Endeavour now appears as Rusoro's agent in making a hostile bid for Gold Reserve while pregnant with the information it obtained from Gold Reserve." In illustrating just how unique the facts of this case are, he went on to say the following:

> I am not aware of any case in which the financial advisor of a company, who is subject to a confidentiality agreement, has subsequently appeared as the financial advisor to a hostile bidder for that same company. If such a thing were to occur, the commercial expectation would be that the hostile bidder would be bound by its financial advisor's confidentiality agreement with the target company. Accordingly, the bidder would not make use of the confidential information, including for the purposes of making a hostile bid, at least during the normal standstill period.

22 In my view, this is a further manifestation of how the proposed appeals do not transcend the interests of the parties and would not affect this industry's standards. The unique fact-specific nature of this case does not necessitate the establishment or clarification of legal principles requiring appellate review.

23 As a result, the motions for leave to appeal are dismissed. There is no reason to doubt the correctness of the order and, in any event, the appeals do not involve matters of such importance that leave to appeal should be granted.

24 If the parties are unable to agree on the issue of costs, they will make brief written submissions to be delivered to my office by April 24, 2009.

D.E. BELLAMY J.

cp/e/qlcct/qlmxb/qlaxw/qlmxl/qljyw

Case Name:
Certicom Corp. v. Research In Motion Ltd.

Between
Certicom Corp., Applicant, and
Research In Motion Limited and Research In Motion Acquisition Corporation, Respondents

[2009] O.J. No. 252

53 B.L.R. (4th) 286

2009 CanLII 1651

71 C.P.R. (4th) 278

94 O.R. (3d) 511

2009 CarswellOnt 331

Court File No. CV-08-7914-00CL

Ontario Superior Court of Justice

A. Hoy J.

Heard: January 9, 2009.
Judgment: January 19, 2009.

(99 paras.)

Corporations, associations and partnerships law -- Corporations -- Compulsory and compelled acquisitions -- Transactions that give rise to rights -- Take-over bids -- Procedure -- Offeror's obligations -- Powers of the court -- Application for permanent injunction allowed -- The applicant sought a permanent injunction enjoining the respondent from advancing its hostile take-over bid on the basis that the bid was crafted using confidential information in breach of non-disclosure confidentiality agreements -- The court found that the agreements were signed in contemplation of a friendly acquisition and did not permit the use of information made by the respondents -- The public policy rationale in enforcing confidentiality agreements and the inadequacy of damages as a remedy warranted the grant of injunctive relief.

Civil litigation -- Civil procedure -- Injunctions -- Permanent injunctions -- Circumstances when granted -- Considerations affecting grant -- Public interest -- Sufficiency of damages in lieu of injunction -- Application for permanent injunction allowed -- The applicant sought a permanent injunction enjoining the respondent from advancing its hostile take-over bid on the basis that the bid was crafted using confidential information in breach of non-disclosure confidentiality agreements -- The *court found that the agreements were signed in contemplation of a friendly acquisition and did not permit the use of information made by the respondents -- The public policy rationale in enforcing confidentiality agreements and the inadequacy of damages as a remedy warranted the grant of injunctive relief.*

Application by Certicom for a permanent injunction enjoining the respondent, Research In Motion, from taking any steps to advance its hostile take-over bid of the applicant. The respondent was a leading designer, manufacturer and marketer in the mobile communications industry. The applicant was a leading authority for the cryptography required by software vendors and device manufacturers to embed security in their products. The respondent had been a customer of the applicant since 2000 and they had exchanged commercial information in the ordinary course of their relationship. In 2007, the parties discussed the possible acquisition of the applicant by the respondent. The parties entered into a non-disclosure agreement in order to facilitate the due diligence process. No acquisition agreement was reached. A second non-disclosure agreement was entered into in 2008 in the course of the parties' ordinary commercial relationship. The parties relied on that agreement when acquisition discussions recommenced. Again, no agreement was reached. Subsequently, the respondent launched an unsolicited hostile bid for the applicant through a subsidiary. Prior to the bid, the respondent had obtained confidential information about the applicant under the terms the two non-disclosure disagreements. The respondent considered that information in assessing the desirability of launching its bid. The applicant contended that the use of the confidential information for such purpose breached the non-disclosure agreements. The respondent submitted that the agreements permitted its use of the information. In the alternative, it argued that the relief sought was an inappropriate remedy for breach of the agreements.

HELD: Application allowed. The respondent's use of the confidential information to assess the desirability of a hostile take-over bid breached the parties' non-disclosure agreements. The 2007 agreement contemplated use of the information for a friendly acquisition transaction between the parties, but did not include use for a hostile take-over. The non-disclosure provision did not conflict with the standstill provision, as the former provided commercially reasonable long-term protection of the applicant's patents. In addition, the factual matrix underlying the negotiation of the 2008 agreement left no ambiguity as to its purpose. The public policy rationale in enforcing confidentiality agreements and the inadequacy of damages as a remedy warranted the grant of injunctive relief. The respondent was still free to launch a friendly bid, or re-craft a hostile bid without breaching its non-disclosure obligations.

Counsel:

Neil Finkelstein, R. Seumas M. Woods and Ryder Gilliland for the Applicant.

Robert W. Staley and Lincoln Caylor, for the Respondents.

REASONS FOR DECISION

A. HOY J.:--

INTRODUCTION

1 This Application turns on the interpretation of two non-disclosure agreements and raises the issue of the appropriate remedy for the breach of such an agreement in the context of a hostile take-over bid.

2 Research In Motion Limited ("RIM"), through its wholly-owned subsidiary, Research In Motion

Acquisition Corporation Inc. ("RIMAC"), launched a hostile (or "unsolicited") take-over bid for Certicom Corp. on December 10, 2008. Before launching its hostile bid, RIM obtained confidential information about Certicom under the terms of two non-disclosure agreements it had entered into with Certicom. RIM considered that information in assessing the desirability of launching a bid for Certicom. Certicom asserts that the use of the confidential information for this purpose breached the two non-disclosure agreements and, to remedy this breach, RIM and RIMAC should be permanently enjoined from taking any steps to advance their bid.

3 Certicom is clear that it does not seek to enjoin RIM from making any hostile bid. RIM was not precluded from launching a hostile bid at this time, Certicom argues. It could have properly done so, had it set up a "firewall" so that no use was made of the confidential information. Alternatively, Certicom says, RIM could make a "friendly bid".

4 RIM argues that the use of the confidential information to make a hostile bid was permitted by the two non-disclosure agreements and, in the alternative, in the circumstances the injunction sought by Certicom is not an appropriate remedy for a breach of those agreements.

5 In its Application, Certicom also sought a declaration that the circular filed by RIM in connection with its hostile bid is materially false and fails to disclose material facts that would reasonably be expected to affect the decision of Certicom shareholders. Given the limited time available for submissions, that relief was not pursued before me and Certicom was left to reschedule that portion of its Application if unsuccessful on the issues before me.

6 While I expressed doubts to counsel before they began their submissions that this matter could be resolved without a trial, after hearing their submissions and reviewing all of the evidence, I accept that the determination of this time-sensitive matter can properly be made on the extensive application record before me, and that there is no necessity for *viva voce* evidence. I note that in arguing the merits of its case, Certicom relied on the evidence of RIM's own deponents.

CONCLUSION

7 The use of the confidential information provided pursuant to the two non-disclosure agreements at issue - referred to in these reasons as the "2007 NDA" and the "20008 NDA" - to assess the desirability of a hostile take-over bid breached those agreements. RIM and RIMAC shall be enjoined from taking any steps to advance the hostile take-over bid launched by them on December 10, 2008.

BACKGROUND

8 RIM is a well known and highly successful company with a current market capitalization of over $20 Billion. It is a leading designer, manufacturer and marketer of innovative wireless solutions for the worldwide mobile communications market. The BlackBerry is one of its products.

9 Certicom, a much smaller company, is a leading authority for the cryptography required by software vendors and device manufacturers to embed security in their products.

10 RIM has been a customer of Certicom since 2000. RIM and Certicom exchanged commercial information in the ordinary course of their relationship pursuant to standard form non-disclosure agreements signed in 2002 and 2005. These agreements are not at issue in this Application.

The 2007 NDA

11 In February of 2007, Certicom and RIM first discussed the possible acquisition of Certicom by

RIM. At the time, the price of Certicom's shares was between $5.00 and $6.00. In order to facilitate due diligence of Certicom, Certicom and RIM entered into the "2007 NDA" - the first of the two non-disclosure agreements at issue - on July 11, 2007 At the time that Certicom and RIM entered into the 2007 NDA, the non-disclosure agreement executed by the parties in 2005 (the "2005 NDA") was in effect. The 2005 NDA was RIM's standard form, reciprocal non-disclosure agreement for commercial use.

12 The 2007 NDA limited the use of "Confidential Information" disclosed pursuant to the 2007 NDA to certain permitted purposes during a five-year term and provided that the disclosing party would have the right to seek injunctive relief for any use of the Confidential Information that was contrary to the terms of the 2007 NDA.

13 Section 4 of the 2007 NDA provides that, "Recipient shall use and reproduce the Confidential Information only to the extent reasonably required to fulfill the Purpose." Section 3 of the 2007 NDA defines "Purpose" to mean, "(i) assessing the desirability or viability of establishing or furthering a business or contractual relationship between the Parties which may include, without limitation, some form of business combination between the Parties; and (ii) to the extent this Agreement is incorporated by reference into any other agreement between the Parties, achieving the objectives of that agreement." At issue on this Application is whether a hostile take-over bid is some form of a business combination between the parties and therefore whether the Confidential Information could be used for the purpose of assessing the desirability of a hostile bid.

14 By its terms, the 2007 NDA only applies to information provided within six months of its execution.

15 At Certicom's request, the 2007 NDA also contained a "standstill" provision pursuant to which RIM specifically agreed, among other things, not to make a hostile take-over bid for Certicom for a 12-month period. The precise wording of this clause, reproduced as Schedule A, was negotiated by the parties. The standstill provision expired before RIM launched its bid and is not at issue, except to the extent it affects the interpretation of the definition of the Purpose for which RIM is permitted to use the Confidential Information.

16 The 2007 NDA contains an "entire agreement clause", which provides that it contains the entire agreement of the parties with respect to the subject matter of the 2007 NDA.

17 The 2007 NDA is the same as the 2005 NDA except that: the recitals are modified to indicate that it was entered into by the parties in order to protect certain Confidential Information "*and provide for certain other obligations of the parties*"; the purpose for which the confidential information may be used is broadened to permit the use of the information to assess the desirability or viability of establishing or furthering "some form of business combination between the parties"; disclosure to the disclosees' advisors, consultants, agents, officers and directors (and not just its employees) is permitted; it applies to confidential information disclosed within six months, as opposed to three years, of its execution; it includes the standstill provision, referred to above, and a clause restricting solicitation by RIM of Certicom's founder, Scott Vanstone, during a 12 month period; and the wording of the "entire agreement" clause is somewhat different.

The First Tranche of Disclosure

18 In September of 2007, Certicom provided RIM with a large package of disclosure pursuant to the 2007 NDA. This package was the first of three tranches of confidential information provided. It included: Certicom's financial year 2008 strategic growth plan and business plan; a detailed list of Certicom patents pending and issued; patent licence agreements, including confidential agreements with

Certicom's key customers; a breakdown of Certicom's patent licence revenue; Certicom's patent infringement information; and Certicom's litigation information. The information provided was specifically deemed Confidential Information pursuant to the 2007 NDA.

19 Mr. Wormwald, RIM's Vice-President of Strategic Alliances, conceded on his cross-examination that RIM did not have information of the nature provided before this disclosure, the information was protected by the 2007 NDA, and the information was important for its assessment of a potential acquisition of Certicom. The licensing agreements were reviewed by competent people at RIM, including patent counsel. Mr. Wormwald acknowledged that the customer agreements continue to constitute "Confidential Information"; they are still not available to the public.

20 In November of 2007, Certicom's interim Chief Executive Officer put the possible acquisition "on hold" because Certicom anticipated that a permanent CEO would be named by year-end, and the matter should be left to the new CEO.

21 A new CEO of Certicom, Karna Gupta, was appointed in January of 2008.

The Second Tranche of Disclosure

22 Certicom's founder, Scott Vanstone, was not aware that Certicom's interim CEO had shut down RIM's due diligence and acquisition discussions. In February of 2008, he met with Chris Wormwald of RIM and asked why RIM appeared disinterested in making an acquisition of Certicom. He provided Mr. Wormwald with an e-mail with a summary of certain licences, and later, a memory stick containing some, but not all, licensing agreements. The parties agreed to treat this information as though it was provided pursuant to the 2007 NDA, even though the 2007 NDA only applied to information provided within six months after the agreement was executed.

23 Following Mr. Gupta's appointment, Certicom began to pursue a new strategic direction. In March of 2008, RIM's CEO, Jim Balsillie, spoke to Mr. Gupta about the potential acquisition. Mr. Gupta advised him, by e-mail, that he was focusing on fixing the business fundamentals and would only turn his attention to the potential acquisition in a few quarters.

The 2008 NDA

24 Certicom and RIM executed the second non-disclosure agreement at issue - what I refer to as the "2008 NDA" - on June 17, 2008. This agreement was signed in the ordinary course of the parties' commercial relationship and not in contemplation of an acquisition. Like the 2005 NDA, it is RIM's standard form, reciprocal non-disclosure agreement for commercial use. It does not contain a standstill provision. It limits the use of Confidential Information disclosed within three years following execution to certain permitted purposes during a five-year term and provides that an aggrieved party is entitled to seek injunctive relief. It provides that Confidential Information disclosed may be used only for the Purpose of "(i) assessing the desirability or viability of establishing or furthering a business or contractual relationship between the Parties; and (ii) to the extent this agreement is incorporated by reference into any other agreement between the Parties, achieving the objectives or that agreement." "Purpose" in the 2008 NDA does not include the language, "some form of a business combination between the Parties" which was added to the 2007 NDA.

Discussions Resume

25 Certicom approached RIM again about a potential acquisition in September 2008, after Certicom had commenced discussions with an unidentified multinational company. That company signed a non-disclosure agreement with Certicom that contained a 12-month standstill provision.

26 RIM expressed interest but indicated that it wanted to undertake further due diligence. It wanted information about Certicom's patent portfolio and its new business plan. At this point, neither Mr. Gupta, on the one hand, nor Mr. Wormwald and Jamie Belcher of RIM, on the other, were aware that the 2008 NDA had been signed. Mr. Gupta indicated that while a non-disclosure agreement was not mandatory for an IP discussion at the "first level", it was mandatory if RIM wished to review the business plan. The multinational company, referred to above, had signed a standstill agreement. It would be unfair to treat potential bidders differently. RIM, which was unhappy that it had agreed to a standstill provision in the 2007 NDA only to have the due diligence and acquisition process shut down by Certicom a few months later, indicated that it was unwilling to sign a non-disclosure agreement with a standstill provision.

27 Certicom sent RIM a non-disclosure agreement, without a standstill provision.

28 In response, Jamie Belcher of RIM advised Mr. Gupta on September 29, 2008 that RIM's legal department had advised him of the existence of the 2008 NDA and that RIM was of the view that it was "sufficient for the purposes presently being contemplated and we do not feel another NDA is required". Mr. Gupta responded, "Great. This works." Based on the 2008 NDA, he was willing to proceed with technical and IP disclosure.

29 Mr. Wormwald's evidence is that because Mr. Gupta had agreed that additional information could be provided without RIM executing a standstill provision, Mr. Wormwald "understood the information disclosed could be used for the potential acquisition of Certicom and RIM was in no way precluded from making an offer directly to Certicom's shareholders". Mr. Wormwald's further evidence was that his preference was to proceed by way of a negotiated acquisition, but that he did not want to preclude RIM from launching a hostile bid.

30 Mr. Gupta's evidence was that each time he spoke to Mr. Balsillie, which he did on March 19, 2008, October 28, 2008, November 7, 2008 and November 9, 2008, Mr. Balsillie confirmed that RIM would proceed in a "friendly" fashion, and that Certicom would not have provided RIM with confidential information had it known that RIM would use that information to make an offer directly to Certicom's shareholders. Mr. Gupta's further evidence is that no one at RIM suggested that RIM reserved the right to go directly to Certicom's shareholders until Mr. Balsillie wrote to Certicom to that effect on November 28, 2008. Mr. Gupta's evidence was not challenged on cross-examination, and Mr. Balsillie did not provide any evidence to the contrary.

The Third Tranche of Disclosure

31 Relying on the provisions of the 2008 NDA, Certicom provided RIM with the third, and final, tranche of "Confidential Information" in October of 2008. The third tranche included: slides presented at a meeting held on October 6, 2008 regarding Certicom's patents and Certicom's IP licensing and related oral disclosure; materials sent by Certicom on October 17, 2008 and October 20, 2008 co-relating claims in several patents against particular industry standards (the "Mapping Analysis") and the relevant portions of the applicable standards; disclosures made at a meeting on October 21, 2008 (which primarily entailed explanation of the Mapping Analysis); and further patent mapping information sent in an October 22, 2008 e-mail. The Mapping Analysis was specifically prepared by Certicom for provision to RIM. While RIM could have obtained the relevant industry standards and created the Mapping Analysis from materials publicly available, by providing the information in this manner, Certicom saved RIM a few days to about a week of work. The definition of "Confidential Information" in the 2008 NDA (and the 2007 NDA) includes "proprietary or confidential information". The information provided was at a minimum proprietary and it is not disputed that at the time provided, constituted Confidential Information under the 2008 NDA.

32 Mr. Wormwald acknowledged on cross-examination that the disclosure went "slightly" beyond that which might occur between businesses engaged in a licensing or supplier relationship, and that the information was being assessed from a mergers and acquisitions point of view.

Events Leading up to the Bid and the Bid

33 By November, Certicom's share price has plummeted. On November 7, 2008, Mr. Balsillie told Mr. Gupta that RIM wanted to acquire 100% of Certicom, wanted to proceed in a friendly fashion, and wanted exclusivity to complete its due diligence. Certicom indicated that it could not provide exclusivity because another party had executed a non-disclosure agreement. Certicom proposed "refreshing" the 2007 NDA, which as noted above, contains a standstill provision.

34 On November 28, 2008, Mr. Balsillie sent a non-binding expression of interest to the Certicom board, proposing a price of $1.50 per common share, and indicating that RIM reserved its right to take its offer directly to Certicom's shareholders.

35 Mr. Wormwald acknowledged that RIM had the information provided under the 2007 NDA and the October 2008 disclosures when it decided to launch its hostile bid. Mr. Wormwald's evidence is also that RIM made no attempt to use a different group of internal people to prepare its hostile offer from those who had been involved with Certicom in 2007 to the end of October 2008, and that essentially the same group of people was involved.

36 RIM announced its intention to make an offer on December 3, 2008, and circulated its offer and circular to RIM shareholders on December 10, 2008. Its offer was extended and currently expires January 27, 2009. RIM's offer is conditional, among other things, on not less than 66 and 2/3% of Certicom's shares being deposited under the bid and on the waiver or cease trade of Certicom's shareholder rights plan, or "poison pill". Counsel for RIM advised that RIM has not yet made an application to the Ontario Securities Commission (the "OSC") to cease trade the poison pill, but intends to do so. It is acknowledged that the poison pill would result in an unacceptable level of dilution, and that as a practical matter RIM will not complete its acquisition with the poison pill in place. This raises the possibility that RIM will further extend its offer.

37 The board of directors of Certicom has determined that the RIM offer is inadequate and recommended that shareholders reject RIM's offer. In response to RIM's bid, Certicom has commenced an auction process in an attempt to secure a superior bid. Confidential information is being made available to interested parties who have signed non-disclosure and standstill agreements.

APPLICABLE PRINCIPLES OF CONTRACT INTERPRETATION

38 A commercial contract is to be interpreted:

(1) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
(2) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
(3) with regard to objective evidence of the factual matrix underlying the negotiation of the contract (what *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 at para. 25 (C.A.) refers to as "the general context that gave birth to the document"), but without reference to the subjective intention of the parties; and

(4) to the extent there is any ambiguity in the contract, in a fashion that accords with good business sense, and that avoids a commercial absurdity.

Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 85 O.R. (3d) 254 (C.A.), para. 24

39 To the extent there is ambiguity after applying principles 1 through 3 above, the court is also entitled to consider the subsequent conduct of the parties as evidence of their intention at the time that the contract was executed: *Re Canadian National Railways and Canadian Pacific Ltd.*, [1979] 1 W.W.R. 358 (B.C.C.A.) at para. 48; affirmed [1979] 2 S.C.R. 668 (S.C.C.).

INTERPRETATION OF THE 2007 NDA

Relevant Provisions

40 Section 4 of the 2007 NDA provides, in part, that,

> Recipient shall use and reproduce the Confidential Information only to the extent reasonably required to fulfill the Purpose.

41 Section 3 defines "Purpose" to mean,

> (i) assessing the desirability or viability of establishing or furthering a business or contractual relationship between the Parties which may include, without limitation, some form of business combination between the Parties; and (ii) to the extent this Agreement is incorporated by reference into any other agreement between the Parties, achieving the objectives of that agreement.

42 Section 12, the standstill provision, is set out in Schedule A to these Reasons.

The Parties' Positions

43 The evidence established, and it is conceded, that the first two tranches of information provided to RIM constitute Confidential Information under the 2007 NDA.

44 Certicom argues that an offer by RIM to Certicom's shareholders to purchase their shares in Certicom, which is not endorsed by Certicom, is not a "business or contractual relationship between the Parties which may include, without limitation, some form of business combination between the Parties". An offer from RIM to Certicom's shareholders is not "between" Certicom and RIM.

45 Certicom argues that its interpretation is supported by wording in the standstill provision, in section 12 of the 2007 NDA. In that section, RIM agrees, among other things, that neither it nor any of its affiliates will effect or propose to effect, "any merger or other business combination or tender, takeover bid or exchange offer involving [Certicom] or any of its subsidiaries or shareholders". This disjunctive language, Certicom argues, makes clear that a take-over bid is not a business combination. Certicom submits that if the parties had intended to permit RIM to make a take-over bid directly to Certicom shareholders, they would have used the language "take-over bid ... involving ... shareholders" used in section 12.

46 RIM points to the following sentence in the standstill provision in section 12 of the 2007 NDA as indicating that a business combination includes an offer by RIM to Certicom's shareholders: "Nothing contained herein shall prohibit RIM from making a private proposal to the Board of Directors of

[Certicom] relating to a proposal for *an offer for the assets, securities of [Certicom] or other business combination*."[1] Based on this wording, RIM argues that an offer for the securities of Certicom is a form of business combination, and an offer by RIM to Certicom's shareholders to purchase their shares in Certicom is accordingly a business combination between RIM and Certicom within the meaning of section 3 of the 2007 NDA.

47 RIM also argues that where, as in this case, the parties specifically negotiated a standstill provision, the confidentiality obligation should be interpreted in a manner that does not, effectively, extend the duration of the negotiated standstill.

Analysis

48 I accept RIM's argument that a take-over bid can constitute a business combination for the purposes of the 2007 NDA, based on the language RIM refers to in section 12 and the factual matrix.

49 When the 2007 NDA was negotiated, the acquisition by RIM of Certicom through a "friendly" transaction was contemplated. The information was provided to facilitate the assessment of the desirability of an acquisition. Such an acquisition could have taken the form of an offer to the shareholders of Certicom, consented to in writing by the board of directors of Certicom. If a take-over bid does not constitute "some form of business combination", the 2007 NDA would not have permitted RIM to use the information for the very purpose intended.

50 That being said, a takeover bid is not necessarily a business combination *between* the parties.

51 The Shorter Oxford English Dictionary (Oxford University Press, 1973) defines "between" as "Expressing reciprocal action or relation between two agents; Used of relation to two (or more) things or parties acting conjointly or participating in action" and "Of time, quantity or degree: Intermediate to two others."

52 The word "between" is, on my count, used three other times in the 2007 NDA. In each case, it is used in manner consistent with its conventional meaning and dictionary definition and in two cases it imports the concept of a contractual relationship between Certicom and RIM. The recitals indicated that the 2007 NDA is "entered into by and between" RIM and Certicom. Section 5 indicates that the 2007 applies to Confidential Information that is disclosed "between" the Effective Date and six months thereafter. Section 14 refers to "any pre-existing non-disclosure agreements between the Parties."

53 Based on the ordinary and usual meaning and dictionary definition of the word "between" and the manner in which the word is used in the 2007 NDA, a takeover bid would in my view only amount to a business combination *between* the parties if Certicom consented to, or endorsed, the transaction and in that manner participated with RIM in RIM's bid.

54 This conclusion is buttressed by the factual matrix. As noted, when the 2007 NDA was negotiated, the parties contemplated a friendly bid for Certicom. This is the context in which the word must be interpreted.

55 In *Aurizon Mines Ltd. v. Northgate Minerals Corp.* [2006] B.C.J. No. 2070 (B.C.S.C.), affirmed [2006] B.C.J. No. 1584 (B.C.C.A.), Northgate signed a combined confidentiality and standstill agreement, but no confidential information was provided to it. It took the position that the standstill provision, which was negotiated in anticipation of disclosure of confidential information, was as a result ineffective and made an unsolicited bid for Aurizon. Northgate was held to be subject to the standstill provision, and enjoined from making a bid for Aurizon. As drafted, the standstill provision was not tied to whether or not confidential information was disclosed and the court concluded that such a term could not be implied. The non-disclosure and standstill provisions were held to be separate obligations that were not inter-linked, each with business efficacy. At paras. 52 and 55, Allan J. endorsed the view of Aurizon's financial advisor, Mr. Sauntry of BMO Nesbitt Burns Inc. who deposed that:

> The purpose of confidentiality agreements differs from the purpose of standstill agreements. A confidentiality agreement on its own facilitates, in particular, the exchange of information. Standstill agreements are entered into because companies entering into strategic dialogues do not want to find themselves then exposed to a hostile takeover bid or other unsolicited offer from the party with whom it has had such discussions. Further, where confidential information may be exchanged, standstill agreements typically also remove the need to prove whether information that has been exchanged is confidential at all, or that confidential information has been misused in connection with a bid or other conduct as such conduct itself is simply prohibited.

56 Thus, a confidentiality provision can independently prohibit the use of the information disclosed for the purpose of assessing the desirability of a hostile bid and thereby hamper the ability of the "disclosee" to make an unsolicited bid. A standstill provision is better protection, removing the need for proof, and costly litigation.

57 In this case, I have concluded that the standstill and the non-disclosure provisions are properly interpreted as separate clauses, providing different protections for different terms. The term of the absolute protection of the negotiated standstill is shorter than that provided by the non-disclosure provision. It applied whether or not RIM obtained disclosure. Indeed, section 9 of the 2007 NDA specifically provides that Certicom is not obligated to disclose any confidential information to RIM. After the standstill provision falls away, Certicom is left with longer-term protection that, among other things, entails the need for proof of disclosure *and* proof of use of confidential information. Certicom's patents and patent licences are the heart of its business. The evidence was that Certicom's patent licence agreements are generally for the life of the patent. Longer-term protection is commercially reasonable in this context. After the standstill provision had expired, it was open to RIM to mount a hostile bid, provided that it had not received, and used, any Confidential Information in assessing the bid.

58 Interpreted in this manner, the provisions are complementary, and do not amount to conflicting standstill provisions.

59 I have given a great deal of thought to RIM's argument that, because of the inclusion of the specific standstill provision, the word "between" should be interpreted in a manner inconsistent with its ordinary and usual and dictionary meanings and the manner in which it is used elsewhere in the 2007 NDA to permit the use of confidential information to mount a hostile bid. As noted above, the 2005 NDA was in effect when the parties negotiated and executed the 2007 NDA. The 2005 NDA was RIM's standard form, reciprocal non-disclosure agreement for commercial purposes. The 2008 NDA, discussed below, is the same as the 2005 NDA, except for the date of execution. In my discussion below of the 2008 NDA, I conclude that it prohibits the use of confidential information disclosed for the purpose of a hostile takeover bid for five years. Disclosure in a due diligence process with respect to an acquisition is typically more extensive, and more sensitive, than ongoing disclosure in the course of a commercial relationship. Certicom was unwilling to proceed with the due diligence process unless a new non-disclosure agreement was signed, containing a standstill provision. It does not make sense that as a result of executing an agreement with a specific standstill provision, intended to provide and seen by both parties as providing additional protection to Certicom, Certicom would in fact receive less protection for confidential information likely more sensitive than that disclosed under the 2005 NDA than it would have under the 2005 NDA. This would be the effect of RIM's position. I also think it unlikely that a disclosing party in the context of friendly acquisition discussions would specifically permit the use of the disclosed information to mount a hostile bid.

INTERPRETATION OF THE 2008 NDA

60 As noted above, the 2008 NDA differs from the 2007 NDA in two material respects. First, it does not include a standstill provision. Second, the definition of the Purpose for which the Confidential Information may be used does not include the words, "which may include, without limitation, some form of business combination between the Parties."

61 Counsel to RIM argues that its offer to the shareholders of Certicom is permitted under the second part of the definition of "Purpose", which, for convenience of reference, reads as follows. "Purpose" means: ... (ii) to the extent this Agreement is incorporated by reference into any other agreement between the Parties, achieving the objective of that agreement."

62 The "agreement" that RIM refers to, and says incorporated the 2008 NDA by reference, is *Mr. Wormwald's understanding*, referred to above, based on Mr. Gupta's agreement that additional information could be provided without RIM executing a standstill provision that, "the information disclosed could be used for the potential acquisition of Certicom and RIM was in no way precluded from making an offer directly to Certicom's shareholders." This is, in essence, Mr. Wormwald's after-the-fact interpretation of an agreement signed by the parties several months prior. It is his subjective understanding. It does not amount to an agreement that the information disclosed could be used for an unsolicited offer.

63 Moreover, like the 2007 NDA, the 2008 NDA includes a provision entitled "Entire Agreement/Modification", which provides that, "All additions or modifications to this Agreement must be made in writing and must be signed by both Parties."

64 Certicom argues, and I accept, that if Mr. Wormwald's understanding amounted to an agreement, it was a modification of the 2008 NDA, and, as it was not in writing and signed by RIM and Certicom, was not effective.

65 I note that Mr. Wormwald's evidence is that RIM's legal department had advised him of the existence of the 2008 NDA. RIM is a sophisticated party and obtained, or could have obtained, legal advice.

66 Alternatively, RIM argues that using the information for the purpose of assessing whether to make a hostile bid for Certicom constitutes "assessing the desirability ... of ... establishing ... a business relationship between the Parties" and is therefore permitted under the first part of the definition of "Purpose". The parent-subsidiary relationship resulting from a successful hostile bid would, it submits, constitute a business relationship between RIM and Certicom for the purposes of this clause. RIM argues that the parties believed that only a standstill clause would prohibit an unsolicited takeover bid and that a commercially reasonable interpretation is that the confidentiality provision protects against the use of confidential information for purposes other than an acquisition.

67 In my view, this interpretation is not supported by the language in the 2008 NDA or the factual matrix when it was negotiated and signed. It makes no business sense to conclude that in July of 2008, when the 2008 NDA was signed, the parties intended to permit RIM to use information disclosed at any time in the ensuing three years for the purpose of a hostile bid.

68 I note again the commentary in *Aurizon*, to the effect that a standstill clause provides greater protection to a disclosing party than a straight non-disclosure agreement, because issues of proof are avoided. That greater protection was not made a condition of the disclosure provided in October of 2008. A non-disclosure agreement can, however, prohibit the use of confidential information to make a hostile bid and in this case does.

69 In my view, given the clear wording of the contract and the factual matrix underlying the negotiation of the 2008 NDA, there is no ambiguity and it is therefore not necessary to consider subsequent conduct. Were it necessary to do so, the fact that Mr. Gupta was unwilling to disclose the business plan without the increased protection of a specific standstill does not affect the interpretation of the 2008 NDA. This subsequent conduct is not evidence of the parties' intention at the time RIM and Certicom entered into the 2008 NDA. Mr. Gupta was unaware of the existence of the 2008 NDA when he made this demand.

BREACH OF THE 2007 AND 2008 NDA

70 In its factum, RIM submitted that if the 2007 NDA and 2008 NDA prohibited the use of the information it obtained from Certicom in connection with its hostile bid, it had not breached those provisions. In the attendance before me, and in face of Mr. Wormwald's own evidence of use referred to in the Background section, above, RIM conceded that confidential information provided was used by Certicom in assessing the desirability of its hostile bid. It argues below that what it says was the limited value to it of much of the information provided should be considered by me in determining whether it is appropriate to grant the injunction requested.

SHOULD AN INJUNCTION BE GRANTED

Certicom's Position

71 Certicom argues that the covenants in the 2007 NDA and the 2008 NDA to use the Confidential Information only for certain purposes are tantamount to negative covenants, that is, covenants not to use the Confidential Information for other than the permitted purposes. Certicom concedes, referring me to *McDonald's Restaurant of Canada Ltd. v. West Edmonton Mall Ltd.*, [1994] A.J. No. 634 at para. 72 (Q.B.), that even in the face of the breach of a negative covenant, courts are not deprived of the right to determine what equitable remedy ought to lie.

72 It submits, however, relying on Sharpe, *Injunctions and Specific Performance*, 2nd ed. (Aurora: Canada Law Book, loose-leaf) at para. 1.80, that where a negative covenant has been clearly breached, there is a strong presumption in favour of equitable relief. The presumption follows from the importance of enforcing terms to which parties have contractually agreed: *Singh v. 3829537 Canada Inc.*, [2005] O.J. No. 2402 at para. 56 (S.C.J.). This presumption in favour of equitable relief, it argues, is further supported by the agreement of the parties, set out in the 2007 NDA and the 2008 NDA, that the disclosing party will have the right to seek injunctive relief in the event of breach. It notes that *Aurizon*, at para. 81, and *Canpages Inc. v. Quebecor Media Inc.*, [2008] O.J. No. 2169, at para. 13 (S.C.J.), found that such a provision creates an inference of irreparable harm. While Certicom submits that there is therefore, and for the reasons referred to below, irreparable harm, it argues, relying on *Canpages Inc. v. Quebecor Media Inc.*, [2008] O.J No. 2169 (S.C.J.) at para. 8; *Canpark Services Ltd. v. Imperial Parking Canada Corp.*, [2001] O.J. No. 3915 (S.C.J.) at paras. 15-19 and *Montreal Trust Co. v. Montreal Trust*, [1988] B.C.J. 410 (B.C.C.A.) at pp. 7-8, that where there is a clear breach of a negative covenant, irreparable harm and balance of convenience need not be established.

73 Certicom argues that the loss of independence, and the loss of status as a reporting issuer, that would result from becoming a subsidiary of RIM, if RIM's offer succeeded, is irreparable harm.

74 In this case, Certicom argues, damages are inadequate and an injunction is the only remedy available to it.

75 As to the effect of the injunction sought, Certicom argues that it does not seek to enjoin RIM from making a hostile bid for Certicom. RIM, it argues, was not precluded from launching a hostile bid; it could have properly done so, had it created a separate acquisition team for the hostile bid and set up a "firewall" to ensure that such team did not use the Confidential Information. Certicom says that RIM can launch another hostile bid, provided that it puts the appropriate mechanisms in place.

76 Alternatively, it is open to RIM to participate in a friendly offer.

RIM's Position

77 RIM argues that in these circumstances, an injunction, or at least the injunction sought by Certicom, is not the appropriate remedy.

78 First, RIM argues that Certicom itself has suffered no identifiable harm as a result of the breaches. Any harm suffered would be suffered by Certicom's shareholders, whose ability to obtain the best offer for their shares has been affected by what Certicom says are timing and informational advantages obtained through the improper use of the Confidential Information. RIM submits that an injunction is not necessary to address those alleged advantages. As to the timing advantage, RIM points to the fact that it extended its offer to January 27, 2009, and to Certicom's poison pill which, it submits, will exist for a period of time determined by the OSC to be reasonable. The OSC, it urges, has expertise in these matters, and timing advantages should be addressed by it, and not this court. RIM argues that the informational advantage has been addressed because Certicom has established a data room, open to interested persons who have signed non-disclosure and standstill agreements with Certicom. It points out that parties who have access to the date room have access to significant information, including Certicom's new three-year business plan, which RIM did not acquire access to.

79 Second, RIM argues that the injunction sought is contrary to public policy because it would prevent Certicom's shareholders from deciding whether or not they wish to sell their shares to RIM. Those shareholders have received Certicom's Directors' Circular, containing the directors' recommendation that the RIM offer is inadequate. The shareholders should have the chance to decide if they wish to accept RIM's offer.

80 Third, RIM argues that public trading in the securities of Certicom has undoubtedly taken place in light of RIM's offer, and that it would be unfair to persons who purchased RIM shares in the market in light of its offer to now enjoin it.

81 Fourth, RIM argues that the value to it of the Confidential Information used should be considered in determining whether an injunction is an appropriate remedy. It argues, relying on Gurry, *Breach of Confidence* (New York: Oxford University Press, 1991) at 401; *Bostitch Inc. v. McGarry & Cole Ltd.*, [1964] R.P.C. 173, at pp. 176-177 and *Seager v. Copydex Ltd.*, [1967] R.P.C. 349, that where the contribution of the confidential information to the activity sought to be enjoined is minor, an injunction is not the appropriate remedy. RIM submits that the confidential information under both the 2007 NDA and the 2008 NDA were minor factors in its decision to launch its hostile bid, and, with respect to the information disclosed under the 2008 NDA, argues that it was, and is, capable of independently generating most of the information. If this argument is framed with reference to balance of convenience, it argues that the balance of convenience therefore does not favour Certicom.

82 Fifth, it argues that Certicom does not have "clean hands", because Certicom's interim CEO broke off the due diligence and acquisition discussions after securing the execution of the 2007 NDA, and Certicom resumed discussions with RIM only after entering into discussions with a third party.

83 Sixth, it argues that if the court issues an injunction, a shorter injunction, as opposed to the permanent injunction sought by Certicom, would be adequate. In its language, there is no need for a "sledgehammer" when a "scalpel" would suffice.

Analysis

84 I note first that RIM does not argue that the clauses at issue are positive, as opposed to negative, covenants and I accept that the clauses are negative covenants. They are in substance covenants not to use Confidential Information for certain purposes, not covenants to use the Confidential Information. Sharpe, at para. 7.240, explains the different treatment of positive and negative covenants:

> Where a positive obligation is broken, the plaintiff is deprived of something the value of which can be measured. Where the defendant does something that he or she promised not to do, the impact of the wrongful act is much more difficult to measure in money terms. It is considered preferable to stop the defendant from doing what he or she promised not to do rather than trying to estimate the loss.

85 As a housekeeping matter, I note that the presumption in favour of permanent injunctive relief is expressed in *McDonald's Restaurants*, at paras. 73, 77 and 80, one arising only after a "full trial." This matter is before me as an application. The reference to a full trial is made in contrast to an interlocutory decision, where the court does not have the benefit of a full review of the facts and law, and the validity of the covenant may not be upheld at trial. The interpretation and validity of the covenants in issue has been determined on the merits in this Application. The presumption is in my view applicable.

86 I accept, based on the authorities that Certicom has referred me to, that as a result Certicom is not required to establish irreparable harm. Were it, the loss of the opportunity to select the most opportune time to sell might constitute irreparable harm. This is currently a buyer's market; Certicom's share price has plummeted since Certicom and RIM began their friendly discussions.

87 I must still, however, consider whether I should exercise my discretion to grant the injunction sought.

88 Damages are clearly an inadequate remedy. If successful on its bid, RIM would essentially be paying money to itself. The *Bostitch* and *Seager* cases that RIM refers me to stand for the proposition that where the contribution to the activity sought to be enjoined is minor, damages may be an appropriate remedy. As indicated above, in this case damages are not an adequate remedy. The *Bostitch* and *Seager* cases are manufacturing cases, and do not assist me.

89 The jurisdiction of the OSC does not extend to enjoining breach of an agreement.

90 A level playing field is not established by the fact that Certicom is making the confidential information RIM had access to available to participants in its auction process. Those participants must sign a standstill agreement, and require Certicom's consent to make an offer to its shareholders. This is significant in this buyer's market. If not enjoined, RIM will be playing by a different set of rules.

91 The public policy interest in enforcing confidentiality agreements was recognized in *Aurizon*:

> Enforcing confidentiality and standstill provisions in agreements of this sort is in the interest of the public generally, and the business community specifically, by permitting market participants to enter into meaningful discussions and consider corporate transactions, strategically and cooperatively, without incurring the risk that

> if those transactions are not pursued, the participant runs the risk of a hostile take-over bid.
>
> *Aurizon, supra*, at para. 82

92 The U.S. District Court for Northern Texas in *General Portland Inc. v. LaFarge Coppee S.A., et al.* (1981), U.S. Dist. Lexis 10158, (as cited in *Aurizon*) emphasized the same point, stating:

> These agreements [non-disclosure agreements] promote the free exchange of information between business entities who are considering the possibility of mutually agreeable business combinations. They promote maximization of the value offered to shareholders of target companies by promoting friendly combinations without unduly restricting the possibility of bidding contests. They permit the acquiring company to have a reasonable period of time in which to evaluate the target company. They also allow the target company to obtain the interest of more than one acquiring company and to select the most opportune time to sell the company. Such agreements are relied upon by the investment banking industry and the business community. If such confidentiality agreements could not be used and relied upon by the investment banking industry and the business community generally, it could substantially disrupt the present process of negotiating and consummating business acquisitions and mergers.

93 Certicom's shareholders will not necessarily be deprived of an offer for their shares. Certicom's board has launched an auction process designed to maximize shareholder value, and it is open to RIM to make a proposal to Certicom. While Certicom argues that it is open to RIM to launch another hostile bid, I find it difficult to imagine how, in the circumstances, it could do so.

94 The fact that persons have purchased Certicom shares following RIM's offer, and before this court proceeding was announced, does not weigh against injunctive relief. Persons who purchase shares after a bid has been announced are typically sophisticated purchasers with short-term agendas who appreciate the risks.

95 Certicom is a technology company. Its assets consist of patents and patent licence agreements. The information disclosed to RIM included patent licence agreements. RIM is a strategic purchaser, motivated by Certicom's technology. Some of the agreements are sufficiently sensitive that participants in the auction process are given access to the agreements only through their counsel. Which of these commercially sensitive agreements contains change of control provisions and which permit assignment or sub-licensing would be of value to a strategic purchaser. Having regard to the nature of Certicom's business, and Mr. Wormwald's evidence that the information was important for its assessment of a potential acquisition of Certicom, I am able to come to the above conclusion that such disclosure was of value, without the necessity for viva voce evidence.

96 Nor do I accept that Certicom does not have "clean hands". It broke off discussions with RIM for legitimate reasons. Certicom was not subject to an exclusivity obligation when it commenced discussions with the unidentified multinational, and it re-opened discussions with RIM.

97 In the result, a permanent injunction shall issue, enjoining RIM and RIMAC from taking any steps to advance the hostile take-over bid launched on December 10, 2008. As Certicom indicated, RIM is free to make a friendly bid, and, should it manage to craft a manner of launching a subsequent hostile bid without breaching the non-disclosure agreements, as Certicom submits it is possible to do, another hostile bid.

98 Should the parties require any clarification as to the intended effect of the relief granted, I may be spoken to.

COSTS

99 If the parties are unable to agree on costs, Certicom shall provide brief written submissions with two weeks, and RIM shall provide brief written submissions in response within ten days thereafter. I may spoken to if counsel are of the view this timetable is onerous.

A. HOY J.

* * * * *

SCHEDULE "A"

Standstill Provision in 2007 NDA

> **12. Standstill** Until the earliest of: (i) the expiration of twelve (12) months from the date hereof, (ii) such date, if any, that the Participant or any of its affiliates or Representatives enters into a legally binding agreement with any third party or a third party makes a public announcement regarding a *bona fide* unsolicited offer with respect to the potential purchase of the Participant or its outstanding equity securities, assets or operations, including without limitation the granting of an exclusive license to all or substantially all of the Participant's intellectual property, or any other potential transaction that would reasonably be expected to result in a change of control of the Participant, including without limitation any transaction described in paragraph (a) below (each, an "Acquisition Proposal"), (iii) such time as RIM shall not be permitted by the Participant to participate in any process being conducted by the Participant to consider its strategic alternatives or any subsequent "auction" or similar process on terms (including with respect to standstill obligations) at least as favourable as other participants, and (iv) such time as you receive the written consent of the Participant (collectively, the "Standstill Period"), neither RIM nor any of its affiliates nor any of its Representatives for their account or jointly and in concert with RIM shall directly or indirectly;

(a) effect or seek, offer, agree or propose (whether publicly or otherwise) to effect, or cause to participate in or in any way advise, encourage or assist (including without limitation financial assistance) any other person to effect or seek, offer agree or propose (whether publicly or otherwise) to effect or participate in (i) any acquisition of any securities or rights to acquire any securities (or any other beneficial ownership thereof), assets or properties of the Participant or any of its subsidiaries, whether such agreement or proposal is with the Participant or any of its subsidiaries or shareholders or with a third party, (ii) **any merger or other business combination or tender, takeover bid or exchange offer involving the Participant or any of its subsidiaries or shareholders**, (iii) any recapitalization, restructuring, liquidation, dissolution or other extraordinary transaction with respect to the Participant or any of its subsidiaries; or (iv) any "solicitation" of "proxies" (as such terms are used in the proxy provisions of the *Securities Act* (Ontario)) or consent to vote or otherwise with respect to any voting securities of the Participant or any of its subsidiaries;

(b) form, join or in any way participate in a group or act jointly or in concert with any person with respect to voting securities of the Participant or attempt to acquire control of the Participant or acquire any assets thereof;

(c) otherwise act, alone or in concert with others, to seek to control or influence the management, Board of Directors or policies of the Participant (other than negotiations or proposals in accordance with this Agreement);

(d) take any action which might reasonably be expected to cause or require the Participant to make a public announcement regarding any of the types of matters set forth in (a)-(c) above;

(e) disclose any intention, plan or arrangement in contravention of the foregoing; or

(f) enter into any discussion or arrangements with any third party with respect to any of the foregoing.

Nothing contained herein shall prohibit RIM from making a private proposal to the Board of Directors of the Participant relating to a proposal for **an offer for the assets, securities of the Participant or other business combination.** During the Standstill Period, Participant shall promptly notify RIM of any legally binding agreements entered into with third parties in respect of the matters described in this Section 12, including without limitation any such legally binding agreements with third parties for Acquisition Proposals, or other events that would result in the termination of the Standstill Period.

[emphasis added]

cp/e/qllqs/qlpxm/qlrxg/qlaxw/qlaxr/qlhcs/qlhcs/qlaxr

1 [emphasis added].

Indexed as:

Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.

IN THE MATTER OF the plan of compromise or arrangement of United Keno Mines Limited and UKH Minerals Limited pursuant to the Companies Creditors Arrangement Act
Between
The Toronto Stock Exchange Inc., moving party, and United Keno Hill Mines Limited and UKH Minerals Limited, applicants, responding on the motion

[2000] O.J. No. 1814

48 O.R. (3d) 746

[2000] O.T.C. 375

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

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

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

Court File No. 00-CL-3665

Ontario Superior Court of Justice
Commercial List

Lane J.

Heard: May 17, 2000.
Judgment: May 24, 2000.

(25 paras.)

Counsel:

Clifford Lax, Q.C. and Brooke A. Shulman, for the Toronto Stock Exchange Inc., moving party.
Duncan C. Boswell, Benjamin Na and Alex MacFarlane, for the applicants, responding.

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1 **LANE J.**:-- This is a motion by the Toronto Stock Exchange Inc. ("TSE") to lift the stay imposed by my Order of February 18, 2000, as since extended, whereby all proceedings against the Applicants were stayed under the Companies' Creditors Arrangement Act R.S.C. 1985 c. C-36, ("CCAA"), pending

the submission of a plan to restructure the Applicant companies. If the stay is lifted, TSE proposes to conduct hearings into the continued eligibility of the Applicant United Keno Hill Mines Limited ("United Keno") for listing on the Exchange.

2 Counsel indicated at the hearing that this was the first case of its sort that they could find. No other case had sought to define the effect of the CCAA on the ability of public regulators to discharge their statutory duties. Counsel for the TSE postulated a number of types of regulation, including those protecting health and the environment, where, he said, it would be unthinkable that the agency would have to come to court for permission to carry out its statutory duties. Counsel for the Applicants aptly termed these in terrorem' examples. I do not regard them as useful, because I do not regard my task as the setting out of a rule of general application. Rather, my task is to determine, on these particular facts and dealing with the specific legislation involved, whether to exercise my discretion to lift the CCAA stay.

3 Mr. Lax conceded that the language of the Order of February 18th is broad enough to cover proceedings before regulatory bodies:

> 3.(a) any and all proceedings, including without limitation, actions, applications, motions, suits, any extra-judicial proceedings or remedies, taken or that may be taken by any creditor, ... or other entity exercising ... regulatory or administrative functions of or pertaining to government in Canada or elsewhere, ... or by any other corporation or entity .... are hereby stayed and suspended ... ; and
>
> (f) no suit, action, other proceeding or extra-judicial remedy or enforcement process shall be proceeded with or commenced against the Applicants ....

4 The TSE is also a supplier to United Keno of the services of the Exchange, and in this capacity is restrained from modifying the arrangement, or pursuing any remedies in connection with it:

> 4. ..... all persons having arrangements or agreements with an Applicant, ... for the supply ... of services ... to an Applicant .... are hereby restrained from ... terminating, suspending modifying or cancelling such arrangements .... or pursuing any rights and remedies ... in respect thereof .... without the leave of this Court ... .

5 By subsequent Orders, the stay has been extended to June 23, 2000 and the Applicants have been directed to file their Plan in draft by June 9, 2000 and in final form by June 16, 2000.

6 The TSE is a not-for-profit corporation created by the Toronto Stock Exchange Act R.S.O. 1990 c. T.15 ("TSE Act") for the purpose of operating the Exchange under the overall authority of the Securities Act R.S.O. 1990 c. S.5. It operates as a self-regulatory organization, enacting Rules through which it regulates the operation of the market and the conduct of market participants. These Rules determine, inter alia, the criteria for the listing of securities on the Exchange and the halting of trading in, and suspension or delisting of, securities. There is also a standard form of agreement which must be executed by a company in order to have its shares listed.

7 United Keno is a publicly held mining company whose shares are listed on the TSE. The evidence indicates that in early 2000 the TSE had some concerns about United Keno and on February 17, 2000, it forwarded a letter outlining those concerns to the company. They focused on United Keno's financial condition and operating results and whether the company continued to meet the financial criteria for listing; on the fact that the company's securities were trading at a price so low that continued trading may not be justified; on the company's failure to pay certain fees; and on the continuance of the company's business and its ability to meet the conditions for original listing. The TSE proposed to hold a meeting on March 2, 2000, to consider whether or not to suspend trading in the company's securities. As a result of the CCAA Initial Order of March 18, 2000, the hearing was not held and the TSE brought this motion instead. Although originally returnable on March 28, 2000, the motion was not heard until May 17, 2000.

8 If leave is granted, the TSE intends to hold a hearing under its Expedited Review Process following delivery of a new notice of hearing. The evidence is that at that hearing United Keno will be permitted to present submissions to seek to satisfy TSE that suspension of trading is not warranted, failing which trading will at once be suspended.

9 The TSE's primary evidence is in an affidavit by Mr. John Carson, its Senior Vice-President, Listings and Market Regulation. After setting out the legal structure of the TSE, he testifies that the public expects that listed companies will meet the TSE's requirements or cease to be listed; that the TSE has given United Keno notice that it was reviewing the continuing listing eligibility of the company under certain sections of the manual of criteria referred to in the TSE's letter of February 17, 2000; and expresses his belief that the hearing should be allowed to proceed.

10 As the first reason for this belief, Mr. Carson questions the jurisdiction of the Court under the CCAA to "prohibit public interest regulators from carrying out their mandated functions during the period of restructuring." He notes that the TSE Manual expressly contemplates the insolvency of a listed issuer, or the institution of reorganization proceedings in respect of such a company as providing a basis for the TSE, at its discretion, halting trading in the securities. This theme was taken up by counsel in his submissions.

11 The CCAA has consistently been read as authorizing a stay of proceedings beyond the narrowly judicial. The word "proceeding" includes "... judicial or extra-judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.": Quintette Coal Ltd. v. Nippon Steel Corp. (1990) 51 B.C.L.R. (2d) 105 at 113. See also, to the same effect, Campeau v. Olympia and York Dev. Ltd. (1992) 14 C.B.R. (3d) 303 at 309 (Ont. Ct. GD) per Blair J.; Re Lehndorff General Partner Ltd. (1993) 17 C.B.R. (3d) 24 (Ont. Ct. GD) per Farley J. and Meridian Developments Inc. v. Toronto Dominion Bank (1984) 52 C.B.R. (NS) 109 (Alta. QB) per Wachowich J. That the statutory language covers a regulatory hearing was decided by Farley J. in Re Anvil Range Mining Corp. (1998) 3 C.B.R. (4th) 93 (Ont. Ct. GD), albeit in a brief endorsement.

12 Unlike the United States Code, which specifically exempts governmental regulatory enforcement proceedings from the stay (11 USC para. 362(b)(4)), the CCAA does not so limit the powers of the Court. Similarly, the CCAA amendments in 1997 adding sec. 11.1 limited the power of the Court to order a stay in certain other respects, but did not refer to regulatory action.

13 I conclude that the hearing proposed by the TSE is a "proceeding" within the meaning of the CCAA and is properly stayed by the Orders herein.

14 As the second basis for the position that the hearing should proceed, Mr. Carson deposes that it is crucial to the public interest role of the TSE that it be able to proceed with its mandated functions, including considering whether to suspend trading in the shares of United Keno, to protect the interest of the public investor and confidence in the securities markets. What is conspicuously absent from this affidavit, and from the TSE's case, are any specifics as to how the company's disclosure to the public and to the Exchange fails to convey material information or how the public is harmed when the insolvency, or near insolvency, of United Keno is made manifest by the publicly known existence of the CCAA proceedings and the fall of its share price to something in the order of 9 cents a share at the time of the hearing of this motion. Mr. Carson notes that the share price is now so low that it is questionable if trading should continue, but fails to note how the public could be misled by the price which is manifestly public, and is surely a clear warning to possible investors to look closely. The publicly known Order of this Court is surely an adequate explanation, if one is needed, of the fact that the stock continues to be listed during the stay period despite its price having fallen below the usual trading range of TSE listed stocks.

15 United Keno's evidence is that it has kept the public informed by press releases on February 21, March 13 and April 3, 2000, of the CCAA proceeding and the state of its restructuring efforts and that it has kept the TSE fully informed as well, including by a detailed information package presented on March 2, 2000. In that presentation, the company observed that it believed that financing to pull the company through its problems was available, provided nothing fundamental changed; and that delisting would be a fundamental change. That delisting or suspension would cause irreparable harm to United Keno's restructuring efforts is attested to by several witnesses, none of whom were cross-examined. These witnesses included Mr. Hugh Turnbull, chairman of the Committee of Convertible Debenture Holders, the largest creditor of United Keno, who deposed that the Committee opposes this motion on the basis that suspension of United Keno's listing would seriously prejudice its ability to restructure and would prejudice the interests of all stakeholders.

16 The TSE evidence on this point from Mr. Gerald Ruth suggests that suspension of the listing would not "necessarily preclude" the obtaining of financing, nor "inevitably prevent" the reaching of a compromise. There has been no cross-examination admittedly, but I find the choice of adverbs and verbs instructive. The test is not so absolute.

17 On the evidence, I am persuaded that holding the proposed hearing would itself be seriously problematic for United Keno's efforts to restructure, and any suspension of trading would devastate its chances of success. On the other hand, the TSE has failed to present concrete evidence of harm, actual or potential, to the public from the continuance until June 23rd of the trading of the company's shares.

18 In its Factum, the TSE presented the CCAA as simply an Act designed to facilitate compromise between a debtor and its creditors and therefore the issue before me was one between the private parties United Keno and its creditors on the one hand; and the TSE representing the public on the other. In his oral argument, responding to a question, counsel did acknowledge that the CCAA was remedial legislation intended to forward a public interest, but contended that the discretion to be exercised was really related to the creditors' position versus the regulators. I think counsel has cast the net too narrowly. The CCAA is as much an instrument of a public policy as are the TSE and the Securities Act. The public policy behind the CCAA seems to me to be the recognition that permitting commercial enterprises a breathing space to restructure is good not only for the enterprise and its creditors, but also for the public which includes among its members the employees, suppliers, shareholders, landlords and customers of the enterprise. It is also beneficial to the public as a whole to enable enterprises to regain the opportunity to contribute to the country's economic strength. A similar list of affected constituencies is found in the decision of Austin J. in Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992) 10 C.B.R. (3d) 23 (Ont. Ct. G.D.). That the public interest is relevant and is generally served by permitting an attempt at reorganization, was recognized by Gibbs J.A. in Chef Ready Foods Limited v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, BCCA October 29, 1990, (cited in Elan Corp. v. Comiskey (1990) 1 O.R. (3d) 289 (CA) per Doherty JA, dissenting, 306) where Gibbs JA noted that:

> Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day [1933] sought through the CCAA to create a regime whereby the principals of the company and the creditors could be

brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business ...

19 Later, Gibbs JA referred to the Act as serving a "broad constituency of investors, creditors and employees ..". In Ultracare Management Inc. v. Zevenberger (Trustee of) (1990) 3 C.B.R. (3d) 151 (Ont.Ct. GD), Hoilett J. referred to ".. the remedial nature of the legislation and the purpose it is intended to serve, as well as the liberal interpretation mandated ...". In Elan, Doherty JA referred to the CCAA as "remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided ...".

20 These cases show that the CCAA is recognized, in its own right, as an instrument of national economic and social policy deserving of a wide and liberal interpretation to enable it to serve these purposes.

21 Viewing the matter, then, as involving two streams of public policy, I turn to the discretion I must exercise. The interests of the affected parties must all be weighed. On the one hand, as noted, the evidence indicates that the TSE's proposed action would be very harmful to the company, its shareholders, creditors, employees, suppliers and customers because it would likely destroy the opportunity to reorganize and continue in business. On the other hand, the TSE urges its public duty. At paragraph 19 of its Factum, the TSE describes its purpose, derived from the securities regulation regime, as: "to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets." There is no evidence that United Keno has been involved in any unfair, improper or fraudulent practice, or that the market is less fair or less efficient because its shares are traded. It is asserted that the maintenance of investor confidence in the TSE is a reason to proceed, without any details of why the continued listing of a CCAA company during a brief and public restructuring period would have an adverse effect, particularly when it is admitted that other companies in the same or similar situations have continued to be traded.

22 In paragraph 21 of its Factum, the TSE lists its reasons for wishing to review the company's listing. They are the very reasons which drive companies into the CCAA regime. If the TSE were allowed to prevail for those reasons, simpliciter, without any showing of a factual foundation for believing that the public interest is genuinely at risk, the remedial purposes of the CCAA would be undermined.

23 The TSE also submitted that the priority of public interest regulators over the private interests of the CCAA parties had been recognized by Farley J. in Re Anvil Range Mining Corp. cited above. It is important to note that what was permitted there was a hearing before the Yukon utilities regulator to set the general level of rates for power users, of which the company was the single largest customer. It was not a hearing like the one proposed here, aimed directly at the protected company and with the objective of depriving it of an important asset. Further, the decision was that the hearing should not proceed until the company had sufficient time to prepare without unduly interfering with its restructuring efforts. This decision does not by any means establish a general priority for regulators over the CCAA; if anything, it reinforces the absence of any such general priority, and the need to proceed on the particular facts of each case.

24 In my view, on the evidence before me, the serious risk to United Keno and those involved in its survival, and to the public interest considerations derived from the CCAA, outweigh the largely speculative and unproven allegations of prejudice to the TSE in the execution of its public interest mandate.

25 For these reasons, I decline to lift the stay for the purpose requested. The motion is dismissed. Costs may be addressed by appointment or through correspondence if the parties agree.

LANE J.

cp/d/qlala/qlalm

Indexed as:
Versatech Group Inc. (Re)

IN THE MATTER OF The Versatech Group Inc. and the Other Corporations Listed on Schedule "A" Hereto AND IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2000] O.J. No. 3785

Court File No. 00-CL-3738

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: September 21, 2000.
Judgment: September 22, 2000.

(5 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' Creditors Arrangement legislation -- Securities regulation -- Regulatory commissions -- Powers or jurisdiction -- Cease trading orders.

Motion by the Toronto Stock Exchange for an order lifting a stay granted under the Companies' Creditors Arrangement Act in order to permit the Exchange to commence proceedings to consider whether to suspend trading in the listed shares of Versatech. In a late affidavit, Versatech indicated that its restructuring efforts would be harmed by the holding of a suspension hearing. That affidavit was not the subject of a cross-examination. The Exchange had brought a previous motion in another case seeking to lift a similar stay. That motion was denied.

HELD: Motion dismissed. On the evidence as it stood, this case was substantially similar to the previous one and there was no reason to deviate from the decision that the motion should be denied.

Statutes, Regulations and Rules Cited:

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

Counsel:

Sean F. Dunphy and Bradley M. Davis, for the Toronto Stock Exchange.
Steven L. Graff, for the Versatech Group Inc.

1 **FARLEY J.** (endorsement):-- Subsequent to raising some concerns on May 5, 2000 about the suitability of Versatech's shares continuing to trade on the TSE, the TSE eventually moved on August 9, 2000 for an order lifting the Companies' Creditors Arrangement Act ("CCAA") stay granted May 5, 2000 in order to permit the TSE to commence proceedings to consider whether to suspend trading in the listed shares of Versatech on the TSE (this would not affect trading on the "unlisted" market). This is the second attempt by the TSE to deal with a stay granted pursuant to the CCAA: See Toronto Stock Exchange Inc. v. United Keno Mines Ltd. (2000), 48 O.R. (3d) 746 (S.C.), a decision of Lane J. In that hearing Lane J. dismissed the TSE's motion to lift the stay to allow the hearing as to the suspension of trading of the United Keno shares and their delisting.

2 TSE counsel in the Versatech hearing stressed that the lift stay motion before me only dealt with the question of a hearing as to the suspension of trading - and not delisting. This was contrasted with the United Keno case where relief was sought to deal with the suspension of trading and delisting. However, given the unchallenged affidavit of John Kyle for Versatech this would appear to be a distinction without a difference.

3 John Kyle the controller and vice-president of Versatech swore an affidavit on September 14, 2000 indicating that Versatech would be harmed in its restructuring efforts by the holding of a suspension hearing. While he was not cross-examined on this affidavit I would also observe that I find it inappropriate to have such a late-blooming affidavit surface rather immediately before the return of this motion originally anticipated by the parties to be heard in mid-August but adjourned on consent. Please note that the Practice Direction for the Commercial List directs that sufficient time be allowed by the parties to complete all interim steps before a hearing and that such be accomplished pursuant to meaningful communication. In any event, no cross-examination took place in the previous week and I was not advised as to any difficulty in doing so. In the end result I was left, as was Lane J. in United Keno, with uncross-examined affidavits by affiants for both the TSE and Versatech, the protected corporation. One would have thought, given Lane J.'s views on this, that there would be cross-examinations - possibly even viva voce before the court. Mr. Kyle was present in court at the request of the TSE but no request or arrangements for cross-examination were made by the TSE. Both counsel had originally booked this hearing for thirty minutes in total; when asked at the start of the hearing how long they would be, they advised that in total they would be thirty to forty-five minutes.

4 Given the state of the record before me, I see no reason to deviate from the views of Justice Lane in United Keno. I am of the opinion that the case before me - as presented - is not materially different from United Keno. The case law concerning stare decisis indicates that deference should be shown to the decision "on principle" of a judge of coordinate jurisdiction unless there is good reason to deviate therefrom.

5 If any such matter is brought back before the court I would think it helpful to have a testing of the evidence as aforesaid. Further given the question of continuous and timely disclosure being a cornerstone of securities legislation, one may think that it would be helpful to have the views of the Ontario Securities Commission as to whether anything further is warranted to protect the public. It would also be helpful for the TSE to flush out public protection elements of their policy rules/guidelines. While regard should be had to my views in Sairex GmbH v. Prudential Steel Ltd. (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.), I am also of the view that a CCAA protected company would be unwise to merely formalistically state that such a hearing would be injurious to its restructuring efforts. Further it would be unwise for a hard-pressed corporation to allow itself to become self-diluted as to the importance of continued trading of its shares on the TSE so that it becomes self-diverted from focus on the important elements of its restructuring. Such corporations should not needlessly waste scarce resources. Not only should substance be given to this assertion but the corporation should review this in light of its progress

or lack thereof under the stay regime. It would also be remiss of me not to note that the TSE will have some say in any restructuring which involves a further issue of shares to be listed on the TSE or anything of a similar nature; further it would be appropriate to note that Versatech has been dealing with rather sophisticated third parties as to obtaining any financial or other support for its restructuring efforts and one would not usually anticipate that such sophisticates would be unnecessarily concerned about such a hearing and its implications if they were serious (as opposed to being uninformed "tire-kickers"). I also pause to note that CCAA matters as to their resolution might be characterized for that purposes falling into one of two main categories and that determination is usually made within a relatively short timeframe - either the corporation is a beautiful phoenix rising from the ashes or it is the picked over carcass of a Thanksgiving turkey found in a crater.

FARLEY J.

cp/d/qlrme

Case Name:
Hawkair Aviation Services Ltd. (Re)

**IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Business Corporations Act, S.B.C. 2002 c. 57
AND IN THE MATTER OF Hawkair Aviation Services Ltd., petitioner**

[2006] B.C.J. No. 938

2006 BCSC 669

18 B.L.R. (4th) 294

22 C.B.R. (5th) 11

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

Vancouver Registry No. L052400

British Columbia Supreme Court
Vancouver, British Columbia

**Burnyeat J.
(In Chambers)**

Heard: April 18, 2006.
Judgment: April 26, 2006.

(38 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Motion by Hawkair Aviation for a declaration that CAW-Canada Union breached two 2005 orders by filing for certification against Hawkair allowed -- Motion by CAW-Canada for an order vacating the paragraph in a 2006 order to permit the union's application for certification and varying the 2005 orders dismissed -- The 2005 orders prohibited the filing of the certification application -- The broad scope of the Companies' Creditors Arrangement Act to postpone the exercise of the rights of employees and unions under Labour Code should prevail -- Lifting of the stay in the 2005 orders was not appropriate as Hawkair presently had insufficient resources to carry through with negotiations if a collective agreement was to be reached -- Companies' Creditors Arrangement Act, s. 11.

Motion by Hawkair Aviation for a declaration that CAW-Canada Union breached two 2005 orders by filing for certification against Hawkair and a motion by CAW-Canada for an order vacating the paragraph in a 2006 order to permit the union's application for certification and varying the 2005 orders

-- The 2005 orders prohibited the bringing of any proceedings or applications pursuant to the Labour Code against Hawkair which was under the protection of the Companies' Creditors Arrangement Act -- Union applied for certification in 2006 describing the proposed bargaining unit as pilots and flight attendants -- Pilots and flight attendants might not be creditors of Hawkair -- Hawkair required time to assess the impact of a potential union certification application and to carefully consider the best way to make Hawkair as competitive as possible -- HELD: Motion by Hawkair allowed -- Motion by CAW-Canada dismissed -- The 2005 orders prohibited the filing of the certification application -- The broad scope of the Companies' Creditors Arrangement Act to postpone the exercise of the rights of employees and unions under Labour Code should prevail -- An order under s. 11 of the Act was effective against third parties who were not creditors where the actions of the third parties could potentially prejudice the ability of the company to continue in business or to bring forward a Plan having any likelihood of success -- A liberal and expansive interpretation of the powers under s. 11 of the Act would include the stay of proceedings being in effect against the pilots and flight attendants and the Union -- Maintenance of the status quo of Hawkair at the time of filing required an order that the court would maintain the relationship that Hawkair had with its employees -- Lifting of stay was not appropriate as Hawkair had insufficient resources to carry through with negotiations if a collective agreement was to be reached -- Once reorganization had taken place, Hawkair would be better able to deal with a certification application -- There would be no injustice to the union or the flight attendants and pilots if the stay of proceedings stayed in effect.

Statutes, Regulations and Rules Cited:

Business Corporations Act, S.B.C. 2002 c. 57, R

Canada Labour Code,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11(3)(a), s. 11(3)(b), s. 11(3)(c), s. 11(4)(a), s. 11(4)(b), s. 11(4)(c), s. 11(6)(a), s. 11(6)(b)

Counsel:

Counsel for Hawkair Aviation Services Ltd.: A.H. Brown

Counsel for I.M.P. Group Ltd.: A. Frydenlund

Counsel for Field Aviation Company Inc.: M.I.A. Buttery

Counsel for the Attorney General of Canada representing Transport Canada: R.D. Leong

Counsel for Campbell Saunders Ltd., the Monitor: B. Lewis-Hand

Counsel for National Automobile, Aerospace, Transportation and General Workers Union of Canada: S.A. Rush, Q.C.

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1 **BURNYEAT J.**:-- There are two motions in these proceedings pursuant to the ***Companies Creditors Arrangement Act***, R.S.C. 1985, C. -36 ("***Act***"). First, a Motion by Hawkair Aviation Services Ltd. ("Company") for:

(a) a declaration that by filing with the Canada Industrial Relations Board on February

17, 2006 an Application for Certification against the Petitioner, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) is in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006;

(b) an Order that the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) shall, on or before March 30, 2006, comply with the Orders by providing notice in writing to the Canada Industrial Relations Board that they formally withdraw their Application for Certification dated and filed with the Canada Industrial Relations Board on February 17, 2006.

(c) In the alternative, an Order that the Application for certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be declared null and void and of no force or effect whatsoever, as having been filed in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006.

(d) In the further alternative, an Order that the Application for Certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be stayed pending further Order of this Honourable Court, as having been filed in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006.

2 Second, a Motion by the National Automobile Aerospace, Transportation, General Workers Union of Canada (CAW-Canada)("Union"):

(a) vacating paragraph 3 of the Order of Mr. Justice Tysoe dated March 9, 2006 staying the application for certification of the Union;

(b) that the Initial Order, dated October 7, 2005 be varied by adding the following words to paragraph 1(c) in the fourth line after the word Petitioner "but not including an application for certification brought by the Union on behalf of employees of the Petitioner pursuant to the Canada Labour Code";

(c) in the alternative, for leave to permit the Union to commence and to continue an application for certification by the Union on behalf of the employees of the Petitioner pursuant to the Canada Labour Code;

(d) in the further alternative that the certification proceedings before the Canada Industrial Relations Board commenced by the Union on behalf of the employees of the Petitioner are not proceedings which are stayed by the Initial Order;

(e) in the further alternative, for leave to permit the Union to carry on certification proceedings on behalf of employees of the Petitioner pursuant to the Canada Labour Code.

3 The Orders that have been made to date in these proceedings include the following:

(a) The October 7, 2005 Order of Madam Justice Brown made on an *ex parte* basis which provided the following provisions relevant to these applications:

(i) Paragraph 1(c) which provided the following stay of proceedings:

no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature, including without restriction, any application or proceeding pursuant to the British Columbia Labour Code or other legislation of like or similar import, shall be proceeded with or commenced against the Petitioner;

(ii) Paragraph 5(b)(i) allowing the Company to remain in possession of the assets and undertaking of the Company but having the following power:

it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing or restructuring of its business and operations ("Downsizing or Restructuring"), including:

(i) terminating the employment of or renegotiating agreements with such of its employees or temporarily laying off such of its employees, as it deems appropriate; ...

all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing or Restructuring steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioners to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.

(iii) the appointment of a Monitor to maintain the business and financial affairs of the Company;

(b) The next Order was made on November 4, 2005 by Mr. Justice Rice confirming the October 7, 2005 Order. However, this Order amended paragraph 1(c) of the earlier Order so that this paragraph then read that the following was prohibited:

no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature.

4 The Union applied for certification with the Canada Industrial Relations Board ("CIRB") on February 17, 2006 describing the proposed bargaining unit as "pilots and flight attendants". In his Affidavit, John Bowman who is a National Representative of CAW sets out the background leading up to the application for certification:

> On or about the first of February, 2006, I was contacted over the phone by an employee from Hawkair Aviation Services Ltd. ("Hawkair") who was interested in finding out how the employees of Hawkair could go about joining the Union.

> The employee advised that the employees were concerned that their wages had been reduced and that there were arbitrary layoffs by the company. Nothing was said during this conversation about the company operating under CCAA protection.
>
> Arrangements were made to have membership cards and information about the Union given to this individual for distribution to the employees. The information was provided on February 7, 2006.
>
> After distributing the information to co-workers and obtaining the membership support from a majority of the workers in the bargaining unit applied for, the signed membership cards were returned to the Union on or about February 16, 2006. In further discussions with this individual during the week of February 13, there was no mention of the company operating under CCAA protection.

5 Given the publicity surrounding the filing by the Company and the information available to employees, it is inconceivable that whoever contacted the Union would not have known about the filing and the Order which was in effect. However, I cannot find that any official with the Union had knowledge of the filing by the Company.

6 A Motion was then brought by the Company for a declaration that the Certification Application was in breach of the provisions in the Order establishing the Stay of Proceedings. That Motion was heard by Mr. Justice Tysoe on March 9, 2006 who ordered that the Stay of Proceedings be further extended to June 9, 2006 and that the following stay be in effect regarding the Certification Application:

> The Application for Certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be and the same is hereby stayed pending further Order of this Honourable Court.

7 I am satisfied that the Orders made to date have not dealt with the issues which are before me so that it will be necessary to deal with the following questions:

> (1) Did the October 7, 2005 and November 4, 2005 Orders prohibit the filing of the Certification Application?
>
> (2) Did the November 4, 2005 Order have the effect of removing any prohibition regarding labour proceedings as set out in the October 7, 2005 Order so that the Certification Application could be filed?
>
> (3) If the Certification Application was prohibited, should there be a declaration that it is void and of no effect or should approval of the filing of the Application be given *nunc pro tunc* but a Stay of Proceedings then imposed?

STATUS OF THE PREPARATION OF A PLAN OF REORGANIZATION

8 In his Affidavit, the General Manager of the Company states that an agreement has been arranged with one of its aircraft financiers, that this agreement with Field Aviation Ltd. was approved by the Court on January 18, 2006, that negotiations are ongoing with its other financier, I.M.P. Group Ltd. ("I.M.P."), and that the Certification Application would create the following difficulties for the Company:

> I have no previous experience as an employer with unions and did not know how to deal with this development. I was completely unfamiliar with the certification

process.

I contacted a number of individuals who have substantial experience in the airline industry and who had previously indicated a willingness to join Hawkair's board of directors. Discussions with those individuals and other restructuring experts led me to appreciate that, when taking into account: a) the change in Transport Canada regulations rendering our aircraft less than optimum for our needs; b) our inability to negotiate an acceptable compromise with IMP; and c) the fact that the company is now at risk of having a unionized work force, Hawkair is truly in a fight for its existence. To maximize Hawkair's ability to survive in both the short and longer term, it is imperative that the company take a more aggressive approach to its restructuring than had previously been done.

Attached ... is a true copy of the letter Hawkair received from the Canada Industrial Relations Board. The presentation of this application has rendered it necessary for Hawkair to incur the additional cost of engaging legal counsel to deal with the application. It has also required that I and Hawkair's insolvency counsel spend a good deal of time learning the implications of certifications and developing a strategy to respond. This has imposed a significant detriment upon Hawkair's ability to successfully conclude its restructuring.

I understand that section 24(4) of the Canada Labour Code specifies that where an application for certification has been made, the employer is prohibited from altering any term or condition of employment or any right or privilege, of any of Hawkair's pilots or flight attendants. If that section applies to Hawkair's restructuring it would likely impede Hawkair's ability to carry out the Downsizing or Restructuring contemplated in paragraph 5(b) of the Initial Order. For that reason, I believe it is inadequate for this Honourable Court to merely order that the certification application be stayed. In my view it is imperative that it be either declared null and void or be dismissed.

I do not yet have any well developed sense of the financial and other implications to Hawkair if a Union Certification Application is successful. Hawkair needs to investigate this and determine what effects, if any it has on our presently envisioned restructuring plan and upon the viability of Hawkair in both the short and long term.

I have been told that if the union certification application proceeds, it would typically take 60 to 90 days to run its course.

In my opinion, Hawkair is at a critical crossroad. It is imperative that management be given sufficient time to:

(a) assess the financial and other impact of a potential union certification application;
(b) locate replacement aircraft; and
(c) carefully consider the best way to make Hawkair as competitive as possible in its current situation.

9 The February 20, 2006 letter from the CIRB referred to, advised the Company that "except under certain circumstances", the terms and conditions of employees could not be changed, that information regarding all employees was to be compiled and forwarded, that any objections regarding the proposed Bargaining Union had to be forwarded with 10 days, that any response to the application had to be forwarded within 10 days, and that an oral hearing before the Board could be requested. Counsel for the CAW advised that the entire process leading to a contract if there was a Certification might take anywhere from six to nine months depending on how active a role was played by the Company and how long it would take to negotiate a contract.

PURPOSE OF THE *ACT* AND THE STAY OF PROCEEDINGS

10 Section 11(3) of the ***Act*** provides the Court with the power to make an order on an "Initial Application" to be effective for no more than 30 days. That Initial Order can have the effect of:

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1) [being the ***Bankruptcy and Insolvency Act*** or the ***Winding-up and Restructuring Act***];
> (b) restraining until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

11 After the "Initial Order" has been made, a further order can be made pursuant to s. 11(4) of the ***Act*** which states:

> A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose;
>
> > (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

12 Pursuant to s. 11(6) of the ***Act***, an order shall not be made under s. 11(3) or s. 11(4) unless:

> (a) The applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) In the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

13 The purpose of the ***Act*** was described by our Court of Appeal in ***Hongkong Bank of Canada v. Chef Ready Foods Ltd.*** (1990), 4 C.B.R. (3d) 311 as follows:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business .... When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the

> status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8, which negates any contracting out provisions in a security instrument. (at paras. 10 and 11)

14 The purpose of maintaining the status quo existing at the time of the filing is so that the proceedings under the ***Act*** can produce a plan of reorganization which will benefit the company, its creditors, and, potentially, the community in which the Company operates. In this case, the Company has 98 employees in Terrace, Vancouver, Prince Rupert, Fort St. John, and Dawson Creek.

15 The intension was also set out in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (n.s.) 141 (B.C.S.C.) at p. 117. and where Trainor J. cited with approval the following statement made by Duff C.J.C. on behalf of the Court in ***A.G. Canada v. A.G. Quebec***, [1934] 16 C.B.R. 1 (S.C.C.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. (at p. 2)

16 In ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 (Ont. G.D.) Farley J. stated:

> 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 and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. (at para. 5)
>
> 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. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* ... [(1990), 1 C.B.R. (3d) 101 (Ont. C.A.)] at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, ... [(1990), 1 C.B.R. (3d) 248 (B.C.S.C.)] at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* ... [(1990), 1 O.R. (3d) 321 (Ont. G.D.)] at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres

> could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* ... [1984] 5 W.W.R. 215 (Alta. Q.B.) p. 220]. The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd., supra* at pp. 251-252. (at para. 6)

17 The purpose of the stay of proceedings is to forestall the possibility that anyone will obtain an advantage to the detriment of others while those others remain bound by the general stay of proceedings commonly ordered in the First Order. In this regard, Tysoe J. in Re ***Woodward's Ltd.*** (1993) 17 C.B.R. (3d) 236 stated:

> The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process. (at p. 241)

18 In ***Campeau v. Olympia and York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont. J.D.), R.A. Blair J. stated:

> By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors. (at p. 309)

19 In deciding whether a stay of proceedings should be ordered on the hearing of the first application or continued in subsequent orders, the stay of proceedings set out in s. 11 of the ***Act*** will be invoked if not restraining a judicial or extra judicial conduct will seriously impair the ability of a company either to continue in business or to bring a Plan forward. In this regard, Gibbs J.A. in ***Quintette Coal Ltd. v. Nippon Steel Corp.*** (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A.) stated on behalf of the Court:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.
>
> (at p. 113)

20 While adopting that statement, R.A. Blair J. in ***Campeau**, supra,* added:

> I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

DID THE STAY OF PROCEEDINGS APPLY TO THE CERTIFICATION APPLICATION?

21 A certification application comes within the definition of a "proceeding against the company" as that phrase is used in s. 11(3) of the *Act* or a "extra-judicial proceeding or proceeding of any other nature" as set out in the Orders made in these proceedings: ***International Woodworkers of America Local 1-324 v. Wescana Inn Ltd.*** (1977), 82 D.L.R. (3d) 368 (Man. C.A.); and ***Re: Air Canada***, [2003] C.I.R.B. No. 225 (C.I.R.B.). While the Canada Labour Code sets out the procedure to be followed when an application for certification is made and provides rights to employees and unions and imposes obligations of entities sought to be unionized, I am satisfied that the broad scope of the *Act* to postpone the exercise of those rights should prevail.

22 A number of decisions have dealt with a potential conflict between the *Act* and other federal legislation. For instance, the Court in ***Chef Ready***, *supra*, stated:

> Having regard to the broad public policy objectives of the C.C.A.A., there is good reason why s. 178 security [under the ***Bank Act*** R.S.C. 1985, c. B-1] should not be excluded from its provisions (at para. 22).
>
> If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern (at para. 24).

23 On behalf of the Court Gibbs J.A. then concluded:

> The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails (at para. 26).

24 There is no indication that the broad scope of the *Act* should not prevail over the procedures and the rights given to employees and unions as set out in the Canada Labour Code. It would have been easy for the Canada Labour Code or the *Act* to have excluded the possibility that the *Act* would not apply. The next question is whether pilots and flight attendants and the Union would ordinarily be bound by the Stay of Proceedings.

25 I am advised by counsel for the Company that the pilots and flight attendants who would be in the proposed bargaining unit may not be creditors of the Company. Clearly, the Union is not a creditor of the Company. However, an order under s. 11 of the *Act* is effective against third parties who are not creditors where the actions of the third parties could potentially prejudice the ability of the company to continue in business or to bring forward a Plan having any likelihood of success: ***Re Lehndorff***, *supra*, at paras. 14-16 and 21 where a stay of proceedings was granted against assets of the limited partnership in which the applicants held interests; ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) at p. 12 where a stay of proceedings was granted against a non-creditor joint operator of an oil and gas property prohibiting the substitution of a new operator in place of the company where it was noted that the effect of the removal of the company as operator would likely be "fatal to attempt to restructure the company" (at p. 13); ***Re T. Eaton Co.*** (1997) 46 C.B.R. (3d) 293 (Ont. G.D.) at para. 6 where a non-creditor, landlord was subjected to the stay of proceedings; in ***Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*** (2000) 48 O.R. (3d) 746 (Ont. S.C.J.) where a proposed meeting to consider whether or not to suspend trading in the securities of the company was subjected to the stay of proceedings; and ***Re Versatech Group Inc.*** [2000] O.J. No. 3785 (Ont. S.C.J.) where a stay of proceedings was not set aside where the Toronto Stock Exchange wish to commence proceedings to consider whether to suspend trading in the listing shares of Versatech.

26 In this regard, it should be noted that ss. 11(3) and (4) does not make reference to proceedings taken or that might be taken by creditors. Rather, it is merely proceedings taken or that might be taken "in respect of the company". As well, it is clear that the inherent power of the Court to grant stays of proceedings can be used to supplement s. 11 ***Act*** when it is just and reasonable to do so: ***Re Lehndorff***, *supra*, at para. 16.

27 I am satisfied that the October 7, 2005 and November 4, 2005 Orders prohibited the filing of the Certification Application. Even if it is ultimately determined that the pilots and flight attendants are not found to be creditors of the Company, I am satisfied that the Certification Application is a "proceeding" and that a liberal and expansive interpretation of the powers under s. 11 of the ***Act*** would include the Stay of Proceedings being in effect against the pilots and flight attendants and the Union.

28 At the time of the filing, the "status quo" was that none of the employees of the Company were unionized and there was no application for certification. At the time of the Initial Order and the subsequent November 4, 2005 Order, the maintenance of the status quo required an order that the Court would maintain the relationship that the Company had with its employees. The next question raised is whether the November 4, 2005 Order had the effect of removing the prohibition set out in the October 7, 2005 Order so that the Certification Application could have been filed because it was not prohibited by the Stay of Proceedings.

29 The Union submits that the November 4, 2005 amendment to paragraph 1(c) of the October 7, 2005 Order had the effect of removing the effect of the Stay of Proceedings regarding any application pursuant to the Canada Labour Code. It was submitted that the removal of the specific reference should be interpreted as meaning that the general reference remaining does not apply to the Application for Certification. I cannot accede to that submission.

30 First, the remaining reference to "extra-judicial proceeding or a proceeding of any other nature" applies to Certification Applications. Second, paragraph 5(b)(i) confirms that the Company has the ability to downsize or restructure its business operations including the ability to terminate the employment of or to renegotiate agreements with its employees or to temporary lay off its employees. This power is "all without interference of any kind from third parties". These powers remaining available to the Company contemplate something that would not necessarily be available to the Company if an Application for Certification was filed with the CIRB. If paragraph 5(b)(i) of the Initial Order is to have any meaning, the amendment to paragraph 1(c) of the Initial Order could not have had the effect submitted by the Union. Accordingly, I am satisfied that the amendment to paragraph 1(c) would not contemplate the ability of some or all of the employees to apply for Certification. The Stay of Proceedings ordered remained in effect after November 4, 2005 so that the Certification Application should not have been filed.

31 The appropriate procedure that the Union should have followed would be to have applied to have the stay lifted: ***Re Air Canada***, *supra*, at para. 15. Such an application parallels what is available under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3: ***GMAC Commercial Credit Corp - Canada v. TCT Logistics Inc.*** (2004), 48 C.B.R. (4th) 256 (Ont. C.A.). The question which then arises is whether the Stay of Proceedings should now be lifted in order to allow the filing of Application for Certification.

32 The granting of the stay under the s. 11 of the ***Act*** is discretionary and the burden of proof to obtain a stay of proceedings or an extension of the stay is on the Company. In this regard, the Company had to satisfy the onus of showing that circumstances exist that make the request for a stay extension appropriate and that it has acted and is acting in good faith and with due diligence. However, there is no statutory test under the ***Act*** to guide the Court in deciding whether it is appropriate to lift a stay of proceeding. While I am satisfied that the burden of proof to lift a stay of proceedings should lie with the party making such an application, I will proceed on the assumption that the Company must satisfy the onus of showing that the Stay of Proceedings should not be lifted.

33 In deciding the question of whether the Stay of Proceedings should be lifted in order that the Application for Certification can be continued or a new Application for Certification filed, I am guided by the statements of Paperny J. in ***Re Canadian Airlines Corp.*** (2000) 19 C.B.R. (4th) 1:

> In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):
>
>> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.
>
> (at para. 15)
>
> Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holdings Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):
>
> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze or relative pre-stay positions.
> (6) The court has a broad discretion to apply these principles to the facts of the particular case.

At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

(at paras. 19-20)

34 I am satisfied that the filing of the Certification Application has and will seriously impair the ability of the Company to focus and concentrate on its efforts to bring forward a plan of reorganization. While I am not satisfied that the Certification Application will seriously impair the ability of the Company to carry on business, it is clear that the management of the Company does not have the financial or personnel resources to deal with the Certification Application on its own. In a small company such as this, I am satisfied that there are insufficient resources to carry through with the submissions and negotiations which will be required if a collective agreement is to be reached on the assumption that Certification will be granted. I am satisfied that the Company will be better able to handle such an application once the reorganization has taken place as the Company will then know with certainty the economic status of the Company. I am also satisfied that one of the purposes of the stay of proceedings provided under s. 11 of the ***Act*** is to allow time and energy to be directed towards the preparation and presentation of a plan of reorganization in a timely manner. There have already been a number of delays and extensions of deadlines to present a Plan. If the Company is required to follow through with the Application for Certification and, if there is certification, the negotiations for a contract, the purpose of providing a Plan of Reorganization on a timely basis will be thwarted. The Plan is now scheduled to be before all parties by June 9, 2006. If the Union is in a position to proceed with the Certification Application, no certainty will be available regarding the status of the employees until late in the year at the earliest. That can hardly be described as a Plan which is presented to all parties on a timely basis.

35 I am satisfied that the Company has satisfied the onus of showing that there would be no injustice to the Union or the flight attendants and pilots if the Stay of Proceedings stays in effect. In order to move the process along to the point where a Plan is available or it is evident that the attempt to find an acceptable Plan is doomed to failure, the status quo must be maintained. At this point, I cannot be satisfied that the Plan is likely to fail. I am also satisfied that it has been shown that the Union and the employees will not suffer hardship or will be prejudiced. It has not shown that anyone will be severely prejudiced by the refusal to lift the stay or that any right or advantage would be lost by the passage of time which, in this case, is only until June 9, 2006. It has not been shown that any rights will be lost by the passage of time if the Stay of Proceedings is not lifted to allow the Certification Application to continue. I am also satisfied that the Company has acted and continues to act in good faith and with due diligence.

36 I make a declaration that the Application for Certification of the Union is in breach of the October 7, 2005 Order as extended by the Orders pronounced November 4, 2005, December 19, 2005 and February 10, 2006 and is null and void and of no force or effect. Those declarations are made in accordance with the application by Hawkair Aviation Services Ltd. and as supported by Field Aviation, a secured creditor who agreed to become an unsecured creditor, I.M.P. Group Ltd., an owner of two aircraft leased to the Company, and the Monitor appointed under the Order. I dismiss the application of the Union that the October 7, 2005 Order be varied and I do not grant leave to the Union to commence and to continue an application for certification on behalf of any employees of Hawkair Aviation Services Ltd..

37 All creditors plus the pilots and flight attendants and the Union will not have to wait long to see what Plan is proposed by the Company and I am satisfied that it is appropriate that the Stay of Proceedings be continued against the Union and the employees of the Company in the interim.

38 I will remain seized of all future applications relating to these proceedings. Those parties represented at the April 18, 2006 applications will be at liberty to speak to the question of costs.

BURNYEAT J.

cp/i/qw/qlemo

Case Name:
Nortel Networks Corp. (Re)

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF 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 (the "Applicants") Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 614

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: February 10, 2009.
Judgment: February 10, 2009.

(20 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Applications -- Proceedings -- Practice and procedure -- Stays -- Application by a group of companies, subject to protection under the Act, for a variety of orders to allow them to continue to do business, allowed -- Stay period was extended -- Patent Reward Program was to be continued -- Group Supplier Protocol Agreement was to be extended -- Annual meeting of shareholders was postponed.

Application by Nortel Networks Corporation and its affiliated companies for a variety of orders under the Companies' Creditors Arrangement Act. The applicants received protection under the Act on January 14, 2009. They applied to extend the stay period to May 1, 2009. Two of the applicants asked to be relieved of the obligation to call and hold annual meetings and that they be directed to call such meetings within six months after the termination of the stay period. The applicants wanted to continue its Patent Reward Program so as to ensure that product development by employees continued. They also wanted to extend a Group Supplier Protocol Agreement that was necessary for the applicants' business in the United Kingdom.

HELD: Application allowed. The stay was extended as requested. Nortel worked with due diligence and in good faith so as to justify the extension. The request about the meetings was not opposed and was granted. Nortel focused on the restructuring to date and was to continue to direct its resources in that direction. The Program was to be continued. It was appropriate, given the nature of Nortel's business. The Protocol Agreement was extended as requested.

Statutes, Regulations and Rules Cited:

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

Counsel:

Derrick Tay, Mario Forte and Jennifer Stam for Nortel Networks Corporation, et al.

L. Barnes for Directors of Nortel Networks Limited & Nortel Networks Corporation.

A. MacFarlane for Official Committee of Unsecured Creditors - Chapter 11 Proceedings.

L. Wittlin and A. Rousseau for ABN AMRO Bank N.V.

M. Barrack & R. Moncur for Flextronics Telecom Systems Ltd.

K. Zych for The Informal Nortel Noteholder Group.

J. Carfagnini for Ernst & Young Inc., the Monitor.

M. Marrie for Steering Committee of Recently Severed Canadian Employees.

F. Lamire for Weston Group CSC.

D. Ullmann for Verizon Communications Inc.

B. Harrison for Citibank.

H. Clarke for Royal Bank of Canada.

D. Yiokaris & S. Philpott for Former Employees of Nortel.

I. Aversa for Perot Systems Corp & Tellabs Inc.

A. Kauffman & E. Lamek for Export Development Canada.

H. Chaiton for IBM Canada Ltd.

K. Rosenberg for Pension Benefits Guarantee Fund.

J. Davis-Sydor for Brookfield Lepage & Johnson Controls.

S. Mitra for Tata Consultancy Services and Enbridge Gas.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- Nortel Networks Corporation ("NNC"), Nortel Networks Limited

("NNL") and related applicants (collectively "Nortel") applied for and received CCAA protection on January 14, 2009.

2 Nortel seeks to extend the Stay Period to May 1, 2009. Nortel also moves for a variety of other authorizations as set out in the Notice of Motion.

3 The Motion to extend the stay has the support of a number of creditors present in court. As well, a number of creditors take no position. No party registered opposition to the request to extend the stay.

4 Nortel filed the affidavit of Mr. Doolittle sworn February 5, 2009 in support of the motion and the Monitor filed its First Report as Monitor which provided additional information on the activities of Nortel since the commencement of CCAA proceedings and its plans going forward.

5 Counsel to Nortel outlined that the priority of Nortel since the date of filing has been to restore order to its affairs and to project to its stakeholders that it is "business as usual". This has involved a great deal of communication to the Nortel community.

6 The record outlines the steps that have been taken to date. It also points out that its comprehensive restructuring plan is still at a preliminary stage.

7 I am satisfied, having reviewed the record and having heard submissions that Nortel has been working with due diligence and in good faith such that an extension of the Stay is warranted to the requested date of May 1, 2009.

8 NNC and NNL have also requested that they be relieved of any obligation to call and hold annual meetings and that NNC and NNL be directed to call such meetings within six months following the termination of the Stay Period. Counsel submits that this relief is appropriate. He adds that Nortel has been focussing on the restructuring to date and should continue to direct its resources in that direction. This request was not opposed. I am satisfied that the request is appropriate and the requested relief is granted.

9 Mr. Tay also addressed the issue of employees and submitted that it was essential that product development be continued. Nortel sought authorization to continue the Patent Reward Program. Again, this relief was not opposed. In my view, considering the business of Nortel, the continuation of the Program is appropriate and this requested relief is granted.

10 Mr. Tay also outlined the situation in the U.K. and the necessity to extend the Group Supplier Protocol Agreement. The interplay with the U.K. is significant and I am satisfied that it is appropriate to extent the GSPA as requested and this relief is granted.

11 As outlined in the Monitor's Report, Nortel is fundamentally a technology company that designs, develops and deploys communication products, systems and solutions to its carrier and enterprise customers around the globe. Its principal assets include its people, the intellectual property derived and maintained from its R&D activities, its customers and other significant contracts and agreements.

12 In view of the size and complexity of Nortel, it is not surprising that a number of parties have taken the opportunity to raise issues today. These parties may not be in a position to address various issues today but they did register their presence and reserved their rights to raise their respective issues at a future hearing, if necessary.

13 Mr. Rosenberg, on behalf of the Pension Benefits Guarantee Fund, referenced paragraph 6(a) of the Initial Order and reserved his client's rights to seek an amendment to this provision if current circumstances changed. Nortel takes no issue with this reservation which the Court acknowledges in this endorsement.

14 Mr. Yiokaris, on behalf of non union pensioners takes no position on the extension, but did indicate that his clients may be seeking a form of representation order. This has been noted.

15 Mr. MacFarlane, on behalf of the Official Committee of Unsecured Creditors raised a number of issues relating to Nortel Networks Inc. In particular, he made reference to the inter-company lending facility as approved in the Initial Order. This facility which includes collateral on the Carling St. property has also been approved in the Chapter 11 proceedings. It is noted that the facility is limited to $75 million in the Chapter 11 proceedings with a pending motion to increase the cap scheduled for February 19, 2009 in the U.S. Court.

16 Mr. MacFarlane raised certain issues about the adequacy of the charge, but he also indicated that UCC is in a dialogue with Nortel about ongoing issues. The concerns of the UCC have been noted.

17 Mr. Forte submitted that a number of amendments were required to the Initial Order to clarify the rights of providers of various financial assurances both related to the EDC Support Facility (an amended agreement dated February 10, 2009 has been filed) as well as to certain cash collateral facilities utilized by the Applicants in the ordinary course of business. I am in agreement with his submissions that the requested amendments are reasonable and appropriate as they will enable Nortel to continue with its existing arrangements. The requested amendments were supported by the institutions involved including EDC, Royal Bank of Canada, ABN AMRO and Citibank. No party opposed those amendments.

18 It should also be noted that the Monitor's Report provided information and analysis with respect to the financial position of Nortel, including the required cash flow forecast. The Monitor recommended that the Court grant the requested relief.

19 Two orders shall be issued. The first covers the extension of the stay, the Patent Reward Program, the Group Supplier Protocol Agreement and the postponement of the Annual Meeting of Shareholders, and the second order is an Amendment and Restated Order which incorporates amendments to paragraphs 7, 33, 44, 46 and the addition of paragraphs 7A, 10A and 10B.

20 These orders shall be issued in the form presented, as amended.

G.B. MORAWETZ J.

cp/e/qlrpv/qlmxb/qlaxw

Case Name:
Laidlaw Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF the Business Corporations Act (Ontario), R.S.O. 1990, c. B-16, as amended
Laidlaw Inc. and Laidlaw Investments Ltd.

[2002] O.J. No. 947

34 C.B.R. (4th) 72

112 A.C.W.S. (3d) 203

Court File No. 01-CL-4178

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: February 28, 2002.
Judgment: February 28, 2002.

(9 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, participation, provable claims.

Motion by purported shareholders of Laidlaw for relief. The shareholders sought the establishment of a Shareholders Oversight Committee to represent the interests of shareholders with respect Laidlaw's business activities, including participating in the Plan of Reorganization under the Companies' Creditors Arrangement Act. The shareholders also sought an order appointing the Committee as inspectors to investigate the activities of the board, officers, management, auditors and legal counsel of Laidlaw. They sought an order requiring an annual meeting and that the Laidlaw companies fund the costs of the Committee, including the retainer of legal counsel and a forensic accountant. The shareholders maintained that pending litigation for $6.5 billion gave the shareholders hope that, if successful, Laidlaw could have a positive shareholder equity. It was conceded that if Laidlaw was truly insolvent, the relief sought by the shareholders would not be appropriate.

HELD: Motion dismissed. Even if successful in the pending litigation, Laidlaw would likely have only a paper judgment and there was no realistic possibility that it could remain solvent. The shareholders therefore had no economic interest to protect. If the situation changed, the Monitor was charged with looking out for the interests of all stakeholders and there would be court reinvolvement. This, however, was unlikely and it was inappropriate to saddle the creditors with the expense of the requests of the shareholders at a time when their recovery was expected to be at a significant discount. Given that Laidlaw was insolvent and well into the restructuring process, there was no benefit to be gained from requiring an annual meeting.

Statutes, Regulations and Rules Cited:

Canadian Business Corporations Act, s. 229(2).

Companies' Creditors Arrangement Act.

Ontario Business Corporations Act.

Counsel:

David Burnham and Patrick Alpaugh, in person, moving parties.
B. Zarnett, J. Carfagnini, B. Empey, for Laidlaw Inc. and Laidlaw Investment Ltd.
D. Tay, for Ernst & Young Inc., monitor.
R. Orzy and K. Zych, for the Laidlaw Bondholders Subcommittee.
D. Byers, for the Laidlaw Banks Subcommittee.
R. Jaipargas, for Chubb and Federated Insurance.

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1 FARLEY J.:-- It may be questionable whether the moving parties are technically shareholders of Laidlaw Inc. However it was determined to be appropriate to deal with this motion as if they were shareholders. Mr. Burnham, a non-lawyer, spoke for both Mr. Alpaugh and himself. They wished various relief:

a) the establishment of a Shareholders Oversight Committee ("SOC") to represent the rights and interests of shareholders with the regard to all business activities of Laidlaw Inc. and Laidlaw Investments Ltd. from 1997 to the present, including through the SOC directly participating in the CCAA Plan of Reorganization, direct participation in the mediation process between Laidlaw and Safety-Kleen ("SK") relating to the pending litigation and review and approval of the proposed litigation settlement between Laidlaw and the bondholders;
b) orders pursuant to the OBCA and the CBCA appointing the SOC as inspectors to investigate the activities of the board, officers, management, auditors and legal counsel of Laidlaw;
c) an order requiring an annual meeting to be called by Laidlaw Inc. upon completion of the inspector's (SOC's) report in (b) above; and
d) an order requiring the Laidlaw companies to fund the costs of the SOC, including the retainer of legal counsel and a forensic accountant.

2 Mr. Burnham quite fairly noted that, if in fact Laidlaw Inc. was so insolvent that the shareholders were so far under water that they had no reasonable expectation that they would come close to having a positive economic interest in the corporation, then the relief which he was seeking would not be appropriate. However, he pointed out that Laidlaw had a $6.5 billion claim against SK and that this was a flicker of hope that, if realized, could result in Laidlaw Inc. having a positive shareholder equity. It is of course important for the objective appreciation of this situation to realize that the $6.5 billion is not a sure thing - in fact far from it. The Monitor Ernst & Young Inc. is a court-appointed officer which must objectively look out for and be concerned for the interests of all stakeholders - including the shareholders in that capacity. However, both the Monitor and the investment-banking firm with extensive experience providing valuation services, Dresdner Kleinwort Wasserstein Inc., have concluded that on any reasonable scenario the shareholders are very significantly underwater. Further, it is realistic to note that creditors (Bondholders and Banks) will take a very severe "haircut" so that they will not come close to being paid out in full. Thus, under all foreseeable circumstances, it appears that the shareholders have no economic interest to protect.

3 What of the $6.5 billion claim against SK? Aside from the fact that SK has a $4.3 billion claim against Laidlaw, Laidlaw's claim against SK is unsecured and therefore junior to SK's secured debt. At the present SK's 2008 Notes, which are junior to the secured bank debt, are trading at less than five cents on the dollar. Thus, even if Laidlaw were entirely successful against SK, it appears that the "market" is confirming that it would in all probability be a "paper judgment" in the sense that there would be no assets available to collect against. However, if there were a radical change in major parts of this equation, then - if, as and when that unexpected good fortune smiles upon Laidlaw - it is possibly conceivable that the shareholders would have a bona fide economic interest in Laidlaw Inc. - with the result that the Plan of Reorganization would have to be changed to reflect that. That would have to come back before the courts. In the interim the Monitor is of course charged with the continuing task of looking out for the reasonable interests of all stakeholders - but looked at in a realistic way. That is, there must be an air of reality to the analysis.

4 It would be inappropriate to saddle the creditors (who would bear the burden of the costs of the SOC) with the expense of the SOC, at a time when their expected recovery is at a significant discount. See the view of the legal hierarchy of interests (creditors standing before or on top of shareholders) I discussed in Re T. Eaton Co. (1999), 15 C.B.R. (4th) 311 (Ont. Sup. Ct.). See also Paperny J.'s views in Re Canadian Airlines Corp. (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) at p. 22 concerning not involving shareholders where they do not have a true economic interest. See also Re Loewen Group Inc., [2001] O.J. No. 5640, released December 13, 2001.

5 I also note that the creditors in the subject case have a great and abiding interest in maximizing the value of the enterprise as in achieving the greatest out of the SK claim. As discussed above, I do not see any reasonable prospect for the shareholders to be on the cusp of economic value, but if they were, then they have the safeguards above discussed.

6 As for an investigation, I would note that the moving parties have not met the test of s. 229(2) of the CBCA. See Re Ferguson and IMAX Systems Corp (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.) and Brown v. Maxim Restoration Ltd. (1998), 42 B.L.R. (2d) 243 (Ont. Ct. Gen. Div.). I understand that there is a class proceeding of shareholders in the works; it would not be appropriate to ask the creditors of Laidlaw to fund a shareholder investigation in any event.

7 With respect to an annual meeting, given that Laidlaw Inc. is heavily insolvent and well into the restructuring process, I do not see on the record before me that there is any material benefit to be gained from requiring an annual meeting under the corporate legislation, given the sad financial state of Laidlaw Inc. with the shareholders having no economic interest given their very significant underwater location on the depth gauge.

8 I would also note that it would be inappropriate to interject the SOC into negotiations (either re the Plan of Reorganization or the SK claim mediation or otherwise) as this could have a very disruptive effect on those processes.

9 Motion dismissed.

FARLEY J.

cp/d/qlala/qlltl

Case Name:
Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of Air Canada and those subsidiaries listed on Schedule "A"
AN APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2003] O.J. No. 1558

Court File No. 03-CL-4932

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: April 25, 2003.
Judgment: April 25, 2003.

(12 paras.)

Creditors and debtors -- Debtors relief legislation -- Companies' creditors arrangement legislation -- Practice -- Interim proceedings -- Company law -- Meeting, procedure -- Extension of time for holding annual meeting.

Application by Air Canada for certain procedural orders. Air Canada sought protection under the Companies' Creditors Arrangement Act. It sought leave to extend the time for holding its annual meeting of shareholders. The court was informed that Air Canada and its creditors intended to continue negotiations in order to reach a consensual practical overall resolution.

HELD: Application allowed. Air Canada was granted an extension order. The parties were encouraged to reach a settlement. This would be more effective than litigation. If the parties could not settle certain issues they were expected to deal with them on an expedited functional basis. Counsel were required to provide the court with a realistic schedule as to motions that would occur in the foreseeable future.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.1.

Counsel:

Sean Dunphy, Ashley John Taylor and Shane Coblin, for the Air Canada applicants.
Murray Gold, for CUPE.
Lyndon Barnes and Steve Golick, for GE Capital.
Richard B. Jones, for Air Canada Pilots Association.
Robert Thornton and Greg Azeff, for GE Capital Aviation Services Inc. (GECAS).
Peter Griffin and Peter Osborne, for the Monitor.
Heath P.L. Whiteley, for City and County of San Francisco.
A. O'Brien, for Goodrich and Goodrich-Messiere.
Stephanie Fraser, for IBM Canada Limited.
Jay Swartz, for ECA Lenders.
James P. Dube, for Diners Club/Citibank Canada.
Gary Smith, for Andrews, Brownsmith et al.
Robert Frank, for Arkia Israeli Airlines Ltd.
Jeff Carhart, for Airport Authorities.
Dan MacDonald, for Bank of Nova Scotia.
Paul Macdonald and Jeff Gollop, for Royal Bank of Canada.
Alex MacFarlane, for The Bank of Nova Scotia as agent for the Lenders Syndicate.
Massimo Starnino, for Bell Canada.
Clifton Prophet, for NAV Canada.
Elizabeth Shilton, for IAMAW.
Jacqueline Dais-Visca and Ian Dick, for Department of Justice, Attorney General Canada.
D. Wray, for CALDA.
John Porter, for Potential Equity Investor.
Christopher W. Besant and Joseph J. Bellissimo, for Orix, et al.
David E. Baird, Q.C., for Board of Directors of Air Canada.
Pamela Huff, for CIT Leasing/CIT Financial.
Kevin O'Hara, for Minister of Finance, Ontario.
Ronald Davis, for CUPE.
Lisa Corne, for Cara Operations Ltd.
M.J. Dermer, for CIBC Mellon.
Kevin McElcheran, for CIBC.
Paul Steep, for Sun Life.
Sandra Forbes, for Norddeutsche LG.
Donald Hanna, for GTAA.
John MacDonald, for Onex.
Kenneth D. Kraft, for Rolls-Royce p/l.
R. Shayne Kukulowicz, for ILFC, Ansett, BMO, Triton Aviation, Nissho Iwai Corp., Marubeni Corp., Diamond Lease Co.

FARLEY J. (endorsement):--

The Bank of Nova Scotia in its capacity as agent for the R/T Syndicate

1 R/T Syndicate objects to the specifying of "as of 12:01 a.m. on April 1, 2003" as it may affect their rights of set off preserved for them by s. 18.1 of CCAA. With respect, any valid right of set off which R/T Syndicate (or any other interested person) has is specifically recognized by para. 9 of the original order and now with the addition of para. 9A it is recognized that there is no overriding of any provision of the CCAA which would, of course, include s. 18.1 thereof. I see no change since the original order as of the effective time of the DIP lender charge. While the original wording was "effective time of this order" (see para. 35), this is not changed in my view in substance or effect by now referring to "as of 12:01 a.m. on April 1, 2003". Court orders, unless otherwise specified, are effective on the day of the order - and that includes the whole day. In any event, para. 16 which is unchanged refers to the effective time of the order as being "from 12:01 a.m. (Toronto time) on the date of this order". I do not see that the R/T Syndicate has not had an opportunity to previously discuss and negotiate on this point. In my view the DIP Commitment was in existence April 1, 2003 and is properly a valid charge as of that date assuming that the DIP loan closes; that does not involve any issue of true retroactivity. Thus in my view if the DIP loan with GE closes, then its charge is effective as of April 1, 2003 and GE will only have to deal, if necessary, with any valid set off rights which are preserved by s. 18.1.

Air Canada (Applicants) Motion Record

2 Leave granted to Air Canada to extend time for holding annual meeting of shareholders until further order of the court. Order to issue as per my fiat.

3 Counsel and parties have made progress. I am attaching my fiat to an order of today which also authorizes in Schedule B thereto an "Amended and Restated Initial Order". Order to issue as per my fiat.

4 At the request of counsel I have advised that the aspect of being "in limbo" should be treated by the parties as that anything, which was announced but not yet implemented/executed, should not be carried out except pursuant to negotiation - which negotiations are to be conducted bona fides on an expedited basis.

5 With respect to para. 4 of the Initial (and now Amended and Restated) Order, I further understand that those interested will continue with bona fide discussions and negotiations with a view to coming to a consensual practical overall resolution. In the meantime if there are material difficulties which come up, then I expect that those affected will deal with this on an expedited functional basis on the model of the CUPE concern re SARS on April 4, 2003. If that does not resolve matters, then the parties are of course free to come to court.

6 Generally I make the observation that time should be productively employed by attempting to come to rational and functional solutions through communication and bona fide negotiations, which may often be more effective in the long run than argument in court.

7 I further note that the authorization of an establishment of a fixed charge (DIP loan) by the court does not preempt para. 3 of today's order. Specifically if the pension situation is concluded on the basis of there being a valid deemed trust, then para. 3 of today's order would come into play.

8 I have asked counsel to provide me with a realistic and achievable schedule as to future motions for the foreseeable future. Again I would emphasize that I would appreciate, indeed it is functionally necessary, having all material provided to the Commercial List Office at least a day in advance (and in an orderly and identifiable basis, including marking of both covers and an understandable (to staff) request letter) so that I might have the material overnight to review.

NAV Canada

9 To be booked with the Airport motions (2 motions) for 3 motions in total (estimated 2 hours maximum) for May 14, 2003 which counsel advise they have pre-cleared with the Commercial List Office. If parties reach satisfactory solution in the interim they are to advise forthwith Commercial List Office and myself that this booked (to be booked) time is abandoned.

10 This endorsement also applies to Airports of Dallas and San Francisco.

Greater Toronto Airports Authority

11 See NAV Canada motion record endorsement.

Other Airport Authorities

12 See NAV Canada motion record endorsement.

FARLEY J.

qp/e/nc/qw/qlgkw

Court File No. 10-8699-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

Applicants

Unofficial Reasons Transcription

May 26, 2010

Re: Reasons – May 20, 2010

Mr. Francisco, who controls 67% of the shares of the Applicants objects to the request of the Applicants to adjourn and postpone the AGM of Planet Organic Health.

Mr. Francisco was President and CEO of Planet Organic Health ("POH") until May 22, 2009. He remained a director until January 27, 2010. He is of the view that POH seeks to postpone the AGM so as to deny its shareholders their right to appoint a board of directors. Mr. Francisco believes there is potential value for all stakeholders if POH is given the opportunity to take a long term view to restructure its affairs. To this end, he states that shareholders can and should designate who they believe should represent the company through the difficult process – to what he hopes will result in a successful restructuring.

This raises the issue of the role of shareholders. The Applicants are insolvent. Consequently, it appears that the shareholders have no economic stake in the enterprise. Where there is no economic stake for shareholders, they have no right of veto in a company's reorganization which may include a sale of all or part of the debtor's assets. Such sales are commonly approved by courts, without shareholder approval.

Section 11 of the CCAA provides the court with a general power to make any order that it considers appropriate in the circumstances of the CCAA proceedings. The purpose of s11 is to maintain the status quo for a period of time so that the proceedings can be taken under the CCAA for the welfare and well-being of the debtor company and of the creditors.

To introduce the prospect of a change in the composition of the board to reflect the interest of a party who has no economic stake, or arguably, no economic stake in the enterprise – would be distracting and quite possibly, destabilizing. In my view, this development would not be in the best interests of the debtor company and its creditors. The priority of creditors over the interests of shareholders must be recognized.

The issues and concerns raised by Mr. Francisco should be brought to the attention of the Monitor, who can report back to court, if it thinks necessary or appropriate to do so.

At this state of the proceeding, I am of the view that it is appropriate to order a postponement of the AGM of POH. The Monitor can assess whether there are alternatives to the Catalyst proposal and can also assess whether there is a realistic prospect of a restructuring that could provide value for all stakeholders.

In the interim the AGM of POH is to be postponed for a period of 60 days or such other time as this court orders.

[Dictated but not read]

"G. Morawetz J."

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Case Name:
Cansugar Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the application of Cansugar Inc., a body corporate
Between
Cansugar Inc., applicant, and
Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Business New Brunswick, respondent

[2005] N.B.J. No. 227

2005 NBQB 199

288 N.B.R. (2d) 374

6 B.L.R. (4th) 133

140 A.C.W.S. (3d) 391

2005 CarswellNB 308

No. S/M/96/03

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Saint John

P.S. Glennie J.

Heard: April 4 and 7, 2005.
Oral judgment: April 11, 2005.

(48 paras.)

Insolvency law -- Practice -- Proceedings in bankruptcy -- Jurisdiction of courts -- The court had the authority to extend the time for the bankrupt to exercise it option to purchase provincial lands.

Application by Cansugar Inc. for an order extending the time period within which it could exercise an option to purchase certain provincial lands -- The option to purchase had been granted to Cansugar by the province -- Cansugar had encroached on the provincial lands with one of its buildings -- When Cansugar had attempted to sell its assets to a third party while in bankruptcy protection, this issue resurfaced -- The Minister and Cansugar had entered into negotiation to provide a mechanism to resolve the encroachment problem which resulted in the option to purchase agreement -- Cansugar failed to exercise its option to purchase within the requisite time -- The province argued that the Court could not revive an expired contract and had no statutory authority to delve into private contractual matters dealing with public lands -- HELD: Application allowed -- The Court had an inherent jurisdiction coupled with express power to extend the option time period -- If an extension of the time period was not granted, the success of Cansugar's Plan of Arrangement would be prejudiced -- The province specifically gave the Court the authority to extend the time period by virtue of a provision in the option agreement that mentioned the time period could be extended by court order -- The province specifically linked the option agreement to the plan of arrangement -- Prejudice to Cansugar and its affected creditors was greater than any prejudice to the province.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended s. 11, s. 11(1), s. 11(4), s. 11 (6)

Constitution Act, 1867, s. 92(5), s. 92(13)

Counsel:

R. Gary Faloon, Q.C. on behalf of Cansugar Inc.

Richard A. Williams and Nathalie H. LeBlanc on behalf of the Minister of Business New Brunswick

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DECISION

1 **P.S. GLENNIE J.** (orally):-- On April 7, 2005, I allowed the Application of Cansugar Inc. ("Cansugar") for an Order extending the time period within which it may exercise an option contained in an option to purchase granted to it by the Province of New Brunswick as represented by the Minister of Business New Brunswick (the "Minister") on July 9, 2004. The option related to certain land in the McAllister Industrial Park, Saint John. These are the reasons for my ruling.

Background

2 On December 8, 2003, Cansugar was granted protection by an order of this Court (the "Initial Order") pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA").

3 In December, 2004, a Plan of Arrangement which provided for the sale of the Cansugar facility in the McAllister Industrial Park, Saint John, was approved by the creditors to whom the Plan of Arrangement applied and was submitted to this Court for approval by way of a Sanction Order. Hearings in this regard have been held from time to time but a Sanction Order has not, as yet, been issued by this Court.

4 Cansugar has entered into an Asset Purchase Agreement with First Excelsior Holdings Limited ("First Excelsior") for the sale of its assets in the McAllister Industrial Park. The transaction is scheduled to close on April 22, 2005. The purchaser of Cansugar's assets has until April 11, 2005 to complete its due diligence pursuant to the Asset Purchase Agreement.

5 In the fall of 2003, Cansugar commenced a major expansion to its refinery and in the process

encroached upon adjacent vacant land in the McAllister Industrial Park owned by the Minister. According to the Minister, the encroachment took place without his permission, knowledge or consent. The Cansugar facility is located on land identified as PID #55150932. The Minister's land is identified as PID #55163703.

6 It should be noted that there had been negotiations between Cansugar and an employee of Saint John Industrial Parks Ltd., agent for the Minister, with respect to the McAllister Industrial Park, to purchase the Minister's land between April and October of 2003, however those negotiations failed, apparently because Cansugar was not prepared at that time to accept the asking price for the Minister's land.

7 According to the Minister, the encroachments on the Province's land by Cansugar include the encroachment of a building 10 meters on one end and 17 meters on the other including the obstruction of a joint utility easement; encroachment of a fence by its full length of 26.84 meters and an encroachment of a railway spur.

8 When it became apparent to this Court that the encroachment problem might impair the ability of Cansugar to successfully complete the sale of its assets to a third party, the Minister through his legal counsel was asked by this Court and the Court Monitor to enter into negotiations with Cansugar to resolve the encroachment problem. It should be noted that the Minister, through his legal counsel, has been involved in all of the hearings held with respect to Cansugar's request for a Sanction Order for its Plan of Arrangement because the Minister is the guarantor of certain of Cansugar's indebtedness to a Canadian Chartered Bank.

9 The Minister and Cansugar then entered into negotiations to provide a mechanism to resolve the encroachment problem in conjunction with the resolution of the debt restructuring objectives of Cansugar and as a result the Minister and Cansugar entered into an Option to Purchase Agreement dated as of July 9, 2004 (the "Option Agreement").

10 The Option Agreement gave Cansugar an irrevocable option to purchase two parcels of land from the Province identified as PID #55163703 and PID #55163711 for the purchase price of $106,000 plus HST.

11 The Option Agreement contains the following provisions:

> 2(a) The creation of any interest or estate in the Property and the exercise of this option by the company is contingent upon compliance to the satisfaction of the Vendor with the following conditions precedent by and at the expense of the Purchaser within 180 days of the signing of this agreement unless agreed otherwise by the parties in accordance with section 8 or unless ordered by the Court pursuant to the Court's authority under the Companies Creditors Arrangement Act, otherwise this agreement is null and void:
>
> (i) Acceptance by the creditors of Purchaser of a Plan of Arrangement for the restructuring of the finances of the Purchaser under the Companies Creditors Arrangement Act;
> (ii) Elimination of all safety hazards and pollution hazards which may create hazards to persons or the environment or which may impact on other lands owned by the Vendor or expose the Province of New Brunswick to third party liability and approval by all Governmental authorities and agencies of all remedial actions to eliminate the pollution and hazards;

(iii) Relocation to a new reasonable location of the utility easement which has been obstructed by the construction of the building on the Property by the Purchaser;

(iv) Reasonable compliance with the restrictive covenants contained in a conveyance from the Vendor to the Purchaser dated the 2nd day of December 2002 and registered in the Saint John Registry Office on the 6th day of December, 2002 as Number 15522445.

(b) The parties specifically agree that no interest or estate, legal or equitable, in the Property is created or conferred on the Purchaser until there is compliance with these conditions precedent and acceptance by the Vendor of that compliance in accordance with section 2(c) herein.

(c) Upon compliance with the conditions precedent the Vendor shall provide the Purchaser with a written confirmation of the satisfactory compliance with the conditions precedent ("Certificate of Compliance") after which time an interest in land in the Purchaser may in the normal course be created and the Purchaser shall be free to exercise this option. The parties further agree that the delivery of the Certificate of Compliance to the Purchaser is also a condition precedent to the creation of any interest in the land and the exercise of the easement.

3(a) If prior to the exercise of this option there is any outstanding work or deficiency which arises from any action from the Purchaser which is related to the compliance with the conditions precedent to the creation of the interest in land and the exercise of the option then the Vendor may at its sole discretion undertake to repair or correct any deficiency and add the cost of the repair or rectification to the amount due on the exercise of the option and if the Purchaser fails to pay the cost of any of these remedial actions then the Vendor may terminate this option in which case the Purchaser shall forfeit all deposits.

(b) The Parties agree to keep each other fully informed of the progress of all actions taken in respect to compliance with the conditions precedent and to cooperate one with the other in the spirit of good faith negotiations, to achieve compliance with the conditions precedent.

12 The Option Agreement also contains the following recital:

> "WHERAS the parties are desirous of resolving the outstanding issues between them in respect to the real property matters identified herein."

13 It is acknowledged by Counsel for the Minister that the Option Agreement was drafted primarily by legal counsel for the Minister.

14 Cansugar did not exercise it's option to purchase within the requisite time period and now seeks an order extending the date that it may exercise the option for a further period of one year.

15 The Minister argues that this Court lacks the statutory jurisdiction to make an order extending the time period to exercise the Option Agreement based on the fact that Section 2(a) of the Option Agreement has expired. In other words, the Court can not revive an expired contract.

16 The Minister also asserts that the Court has no specific statutory authority to delve into private contractual matters dealing with the Management and Sale of Public Lands belonging to the Province, as defined by Section 92(5) of the Constitution Act, 1867, or the field of Property and Civil Rights in the

Province, as defined by Section 92(13) of the Constitution Act, 1867.

17 The Minister argues that using the Court's general jurisdiction provided under Section 11 of the CCAA to revive an expired contract dealing specifically with Public Land, without clear statutory authority in this regard, would be unconstitutional.

Analysis

18 Pursuant to the CCAA, Courts are vested with a statutory authority and an inherent residual jurisdiction resulting from the equitable nature of Superior Courts. See: Skeena Cellulose Inc., Re: 13 B.C.L.R. (4th) 236.

19 The CCAA deals with the Court's jurisdiction to make an order other than on an initial application at Section 11(4) which, along with Section 11(1), provides as follows:

> 11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> ...
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

20 Section 11(6) of the CCAA provides as follows:

> 11(6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

21 The purpose of Section 11 of the CCAA is to provide the Court with a discretionary power to restrain conduct or actions against a debtor company in order for the debtor company to continue with the operation of its business during the restructuring period. See: Richtree Inc., Re: 2005 CarswellOnt 255.

22 Courts have exercised their discretion under Section 11 of the CCAA against third parties in certain limited circumstances.

23 In Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, the Court prohibited a third party from exercising its power under a contractual agreement which would effectively terminate the agreement.

24 In Re: Gauntlett Energy Corp., [2003] A.J. No. 1062, (2003), 2003 CarswellAlta 12009, Justice Kent based his reasoning on the reasons given by Justice Forsyth at paragraph 376 of the Norcen case, supra, who stated the following:

> ... I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties would be effective only for a relatively short period of time.

25 Courts have also interfered with parties' contractual rights to arbitrate their disputes, allowed debtor companies to unilaterally repudiate contracts and forced third parties to agree to the assignment of existing contracts. See: Smoky River Coal Ltd., Re [1999] A.J. No. 676 (Alta. C.A.); T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]); Playdium Entertainment Corp., Re (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), additional reasons (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

26 In Playdium Entertainment, supra, the Applicants sought an order to force a third party to consent to the assignment of an agreement. Justice Spence discusses the provisions of Section 11(4) of the CCAA as follows at para. 26:

> 26 Section 11(4) of the CCAA, in subsections (a), (b) and (c), provides only for orders of a negative injunctive effect until otherwise ordered by the court, in respect of proceedings against the company, i.e. in this case, Playdium. However, the order sought is in effect to require Famous Players to be bound by an assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4)(a), (b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

27 Justice Spence approved an assignment by concluding as follows at para. 42:

> 42 Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

28 In the case at bar, I am inclined to rely on the Court's inherent jurisdiction coupled with the express power granted to this Court to extend the option time period as provided for in Section 2(a) of the Option Agreement.

29 In Canadian Red Cross Society/Société Canadienne de la Croix-Rouge (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Justice Blair stated at page 315:

> 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.

30 Recently, in Stelco Inc. (Bankruptcy) Re, [2005] O.J. No. 1171, 2005 CanLII 8671 (Ont. C.A.), the Ontario Court of Appeal concluded that Section 11 of the CCAA did not provide the authority for a court to interfere with the composition of the board of directors of a company by removing members of a corporate board.

31 R.A. Blair, J.A. writes at para. 41, 42 and 44:

> [41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:
>
>> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002) at page 262.
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

32 And at para. 51:

> [51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation.

These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

33 With respect to inherent jurisdiction, Justice Blair writes in Stelco at paras. 32 to 38:

> [32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786 (Sup. Ct.) at para. 11. See also, Re Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.), at p. 320; Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act; see Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.) [Commercial List]), Royal Oak Mines Inc. (Re) (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and Westar Mining Ltd. (Re) (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).
>
> [33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.
>
> Inherent Jurisdiction
>
> [34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:
>
>> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.
>
> [35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament of the Legislature has acted. As Farley J. noted in Royal

Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475 (S.C.C.) at 480; Richtree Inc. (Re), [2005] O.J. No. 251 (Sup. Ct.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run; along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital jurisdical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however - difficult as it may be to draw - between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose". Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding.

34 With respect to Section 11 discretion, Justice Blair opined that:

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course

> of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, although the s. 11 discretion in spite of its considerable breadth and flexibility - does not permit the exercise of such a power in and of itself, there may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA.

35 In my view, to the extent that the jurisdiction to extend an option period is not specifically expressed in Section 11 of the CCAA, the granting of such an extension may be said to be an exercise by this Court of its inherent jurisdiction and in particular by virtue of the authority granted to this Court by Section 2(c) of the Option Agreement. In order to accomplish the goal of facilitating the restructuring of a debtor company, the Court must have a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected persons, but also to do what practicality demands: Re: Royal Oak Mines Inc. (1999), 7 C.B.R. (4th) 293 (Ont.Gen. Div.).

36 In Re Woodwards Ltd. (1993), 17 C.B.R. (3d) 236 at pp. 247-248, Justice Tysoe writes:

> In deciding whether to exercise its inherent jurisdiction the Court should weight the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

37 Counsel for the Minister states that there is little doubt that the Courts inherent jurisdiction extends in CCAA proceedings as to permit the Court, in appropriate circumstances, to make orders against third parties where their actions would potentially prejudice the success of a plan.

38 Counsel for the Minister argues however that use of inherent jurisdiction to create standing for a party who is clearly not mentioned on a contract or to enable the Court to breath life into an expired contract are not appropriate uses of the Court's inherent jurisdiction.

39 In my opinion, if an extension of the time period to exercise its option pursuant to the Option Agreement is not granted, the success of Cansugar's Plan of Arrangement would be prejudiced.

40 With respect to the expired contract argument advanced by Counsel for the Minister, there is no provision in the Option Agreement which provides that a Court Application for an extension of time must be made within the initial 80 day time period.

41 With respect to the Minister's assertion that this Court has no specific statutory authority to delve into private contractual matters dealing with the management and sale of public land belonging to the Province and that to revive an expired contract dealing specifically with public land and without clear statutory authority in this regard would be unconstitutional, I am of the respectful view that the Minister specifically gave this Court the authority to extend the time period within which the option could be exercised by Cansugar by virtue of Section 2(a) of the Option Agreement.

42 In the case at bar, the Option to Purchase, which was drafted primarily by legal Counsel acting on behalf of the Minister, is linked to Cansugar's court proceedings under the CCAA. There is a specific provision in Section 2(a) of the Option Agreement that the time period within which it can be exercised by Cansugar could be extended by order of the Court pursuant to the Courts authority under the CCAA. As well, one of the conditions precedent is the acceptance by Cansugar's creditors of a Plan of Arrangement under the CCAA. In this regard, since it was the intention of the Minister and Cansugar to link the Option Agreement to the CCAA and Cansugar's Plan of Arrangement bearing in mind that the Option was granted to Cansugar to resolve the encroachment problem at the request of the Court acting pursuant to the CCAA, the extension of time granted to Cansugar to exercise the option is contingent upon a Sanction Order being issued by the Court with respect to Cansugar's Plan of Arrangement. In other words, in the event a Sanction Order is not issued by this Court for Cansugar's Plan of Arrangement, the extension of time to March 31, 2006 is rescinded and is no longer available to Cansugar or a Receiver or a Trustee in Bankruptcy of Cansugar.

43 On weighing the interest of Cansugar and its creditors directly affected by Cansugar's Plan of Arrangement against any prejudice to the Minister in granting an extension, I am of the view that the prejudice to Cansugar and its affected creditors is greater than any prejudice to the Minister. Because of the encroachment problem, the Minister would appear to not be able to sell the land to another party. The Option Agreement was entered into by the Minister and Cansugar to resolve the "outstanding issues between them" in respect to the real property matters identified in the Option Agreement.

44 If the Minister had intended that any application to this Court for an extension of time would have to be made before the expiration of the initial 180 day option period, the Option Agreement would have said so.

45 With respect to the one year time period that I have allowed for the option to be exercised by Cansugar, I have taken into consideration the fact that some of the conditions precedent will take time to complete. I have also taken into consideration the Court Monitor's recommendation in this regard. He recommended a minimum one year extension. I have also taken into consideration the fact that the draftsperson of the Option Agreement has more than adequately protected the Minister with respect to the conditions precedent contained in Section 2(a)(ii)(iii) and (iv). These conditions precedent must be complied with "to the satisfaction" of the Minister before Cansugar can exercise its option to purchase. As well, there are the Minister's rights in Section 3(a) of the Option Agreement.

46 In its brief, Cansugar states that it was the expectation of Cansugar and the Minister that the option would be exercised upon the conclusion of the CCAA proceeding. I have granted a one year extension on the basis of Cansugar's representation that it will take time to complete the conditions precedent contained in Section 2 of the Option Agreement and in the Minister's recommendation in this regard. It is understood that Cansugar will continue to diligently satisfy the conditions precedent in a timely manner. The Province is at liberty to ask this Court to review the extension of time in the event Cansugar is not diligently proceeding in a timely manner to fulfill the conditions precedent.

Conclusion and Disposition

47 In the result, the Application of Cansugar Inc. for an order extending the time period written which it may exercise the option to purchase contained in the Option Agreement granted to it by the Province of New Brunswick is allowed.

48 An order will issue extending the time period within which Cansugar Inc. may exercise the option to purchase to March 31, 2006 subject to a sanction order with respect to Cansugar's Plan of Arrangement being issued by this Court and contingent upon Cansugar proceeding diligently in a timely manner to fulfill the conditions precedent. A ruling on the assignment issue is deferred.

P.S. GLENNIE J.

cp/e/qlgxc/qlhcs

** Preliminary Version **

Case Name:

Century Services Inc. v. Canada (Attorney General)

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

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

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

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

2010 CarswellBC 3419

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

EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

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

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

File No.: 33239.

Supreme Court of Canada

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

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

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the CCAA proceedings, a chambers judge approved a payment not exceeding $5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's proposal to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the

ETA to allow payment to the Crown. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge's order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferrable from his order. Further, no deemed trust was created.

Statutes, Regulations and Rules Cited:

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 69, s. 128, s. 131

Bank Act, S.C. 1991, c. 46,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-, s. 67, s. 86

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

Cities and Towns Act, R.S.Q., c. C-19,

Civil Code of QuÚbec, S.Q. 1991, c. 64, art. 2930

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.4, s. 18.3, s. 18.4, s. 20, s. 21

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36,

Employment Insurance Act, S.C. 1996, c. 23, s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), s. 227(4.1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 2, s. 44(f)

Personal Property Security Act, S.A. 1988, c. P-4.05, Winding-up and Restructuring Act, R.S.C. 1985, c. W-11,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

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

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

Court Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J., Binnie, LeBel, **Deschamps**, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp.(Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222 (3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

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

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

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

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

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

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18(3) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

Cases Cited

By Deschamps J.

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

By Fish J.

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

By Abella J. (dissenting)

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

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bank Act, S.C. 1991, c. 46.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 86 [am. 2005, c. 47, s. 69].

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

Cities and Towns Act, R.S.Q., c. C-19.

Civil Code of Québec, S.Q. 1991, c. 64.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.4, 18.3, 18.4, 20 [am. 2005, c. 47, ss. 128, 131], 21 [am. 1997, c. 12, s. 126].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

Employment Insurance Act, S.C. 1996, c. 23, ss. 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Income Tax Act, R.S.C. 1985, c. 1 (5 Supp.), ss. 227(4), (4.1).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2, 44(*f*).

Personal Property Security Act, S.A. 1988, c. P-4.05.

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

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, p. 15:15.

Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

Canada. Senate. *Debates of the Senate*, vol. 142, 1 Sess., 38 Parl., November 23, 2005, p. 2147.

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation*. Ottawa: Information Canada, 1970.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3 ed. Scarborough, Ont.: Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

Driedger, Elmer A. *Construction of Statutes*, 2 ed. Toronto: Butterworths, 1983.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report.* (2002).

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55.* (2005).

Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007.* Toronto: Thomson Carswell, 2008, 41.

Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005.* Toronto: Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency.* Toronto: Thomson Reuters, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations.* Toronto: University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act.* Toronto: Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3 ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law.* Toronto: Irwin Law, 2009.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

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

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

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and

Cromwell JJ. was delivered by

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

1. Facts and Decisions of the Courts Below

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

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

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

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

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

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

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

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

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

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

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

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

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

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

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

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

3.2 *GST Deemed Trust Under the CCAA*

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

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

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

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

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

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

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

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

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

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

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

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

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

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

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

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

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

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

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

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

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

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

42 The Ontario Court of Appeal in *Ottawa Senator* s rested its conclusion on two considerations.

First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

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

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

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

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

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

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

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

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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

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

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11 (3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J.:--

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act <u>is deemed</u>, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, <u>to hold the amount separate and apart</u> from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, <u>in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act</u>. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
>
> ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the

CPP and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

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

be held in trust, is deemed

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

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp.* (*Re*) (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222 (3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
>> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C.

1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3 (1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed with costs, ABELLA J. *dissenting.*

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

> (*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,
(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to

in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224 (1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*, and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224 (1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

> (*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than
>
> (i) the expiry of the order,
> (ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224 (1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

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

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224 (1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

cp/e/qlecl/qlcal/qlced/qljyw/qlhcs/qljyw/qlhcs/qlana/qlcas/qlcas

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

Case Name:
Clothing for Modern Times Ltd. (Re)

RE: IN THE MATTER OF THE Notice of Intention to make a Proposal of Clothing for Modern Times Ltd.

[2011] O.J. No. 5803

2011 ONSC 7522

Court File No. 31-1513595

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: December 16, 2011.
Judgment: December 16, 2011.

(26 paras.)

Counsel:

M. Poliak and H. Chaiton, for the Applicant.

M. Forte, for A. Farber & Partners Inc., the Proposal Trustee and Proposed Monitor.

I. Aversa, for Roynat Asset Finance.

D. Bish, for Cadillac Fairview.

L. Galessiere, for Ivanhoe Cambridge Inc., Oxford Properties Group Inc., Primaris Retail Estate Investment Trust, Morguard Investment Limited and 20 VIC Management Inc.

M. Weinczuk, for 7951388 Canada Inc.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Motion to continue *BIA* Part III proposal proceedings under the *CCAA*

1 Clothing for Modern Times Ltd. ("CMT"), a retailer of fashion apparel, filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on June 27, 2011. A. Farber & Partners Inc. was appointed CMT's proposal trustee. At the time of the filing of the NOI CMT operated 116 retail stores from leased locations across Canada. CMT sold fashion apparel under the trade names Urban Behavior, Costa Blanca and Costa Blanca X.

2 CMT has obtained from this Court several extensions of time to file a proposal. That time will expire on December 22, 2011. Under section 50.4(9) of the *BIA*, no further extensions are possible.

3 Accordingly, CMT moves under section 11.6(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 for an order, effective December 22, 2011, continuing CMT's restructuring proceeding under the *CCAA* and granting an Initial Order, as well as approving a sale process as a going concern for part of CMT's business.

II. Key background events

4 Following the filing of the NOI, pursuant to orders of this Court, CMT conducted a self-liquidation of underperforming stores across Canada and, as well, a going-concern sale of its Urban Behavior business. The latter transaction is scheduled to close on January 16, 2012.

5 At the time of the filing of the NOI there were three major secured creditors of CMT: Roynat Asset Finance, CIC Asset Management Inc., and CMT Sourcing. The company's indebtedness to those creditors totaled approximately $28.3 million. CMT anticipates that the proceeds from the Urban Behavior transaction and the liquidation of under-performing stores will prove sufficient to repay its loan obligations to Roynat in full before the expiration of a forbearance period on January 16, 2012.

6 When CMT was last in court on November 7, 2011 it stated it intended to make a proposal to its unsecured creditors, an intention supported by the two remaining secured creditors, CIC and CMT Sourcing. Subsequently CMT met with representatives of certain landlords and commenced discussions about its proposed restructuring plan. As a result of those discussions CMT lacks the confidence that its proposal would be approved by the requisite majority of its unsecured creditors, and it does not believe that it can make a viable proposal to its creditors. Instead, CMT thinks that a going-concern sale of its Costa Blanca business would be in the best interests of stakeholders and would preserve employment for about 500 remaining employees, both full-time and hourly retail staff.

7 In its Sixth Report dated December 14, 2011 Farber agrees that a going concern sale of the Costa Blanca business would be in the best interests of CMT's stakeholders, maximize recoveries to the two secured creditors, CIC and CMT Sourcing, and preserve employment for CMT's remaining employees. Farber supports CMT's request to continue its restructuring under the *CCAA*. Farber consents to act as the Monitor under *CCAA* proceedings and to administer the proposed sale process.

III. Continuation under the *CCAA*

A. Principles governing motions to continue *BIA* Part III proposal proceedings under the *CCAA*

8 Continuations of *BIA* Part III proposal proceedings under the *CCAA* are governed by section 11.6(a) of that Act which provides:

> 11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> (*a*) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part.

9 It strikes me that on a motion to continue under the *CCAA* an applicant company should place before the court evidence dealing with three issues:

- (i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;
- (ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,
- (iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

Let me deal with each in turn.

B. The applicant has not filed a proposal under the *BIA*

10 The evidence shows that CMT has satisfied this statutory condition.

C. The continuation would be consistent with the purposes of the *CCAA*

11 In *Century Services Inc. v. Canada (Attorney General)*,[1] the Supreme Court of Canada articulated the purpose of the *CCAA* in several ways:

- (i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;[2]
- (ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;[3]
- (iii) To avoid the social and economic losses resulting from liquidation of an insolvent company;[4]
- (iv) To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.[5]

As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved "through a rules-based mechanism that offers less flexibility."[6]

In the present case CMT bumped up against one of those less flexible rules - the inability of a court to extend the time to file a proposal beyond six months after the filing of the NOI.

12 The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Re Stelco Inc.* Farley J. observed that if a restructuring of a company is not feasible, "then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part".[7] It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors.[8] In *Re Nortel Networks Inc.* Morawetz J. set out the rationale for this judicial approach:

> The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.[9]

13 The evidence filed by CMT and Farber supports a finding that a continuation under the *CCAA* to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the *CCAA*. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.

D. Evidence which serves as a reasonable surrogate for *CCAA* s. 10(2) information

14 As the Supreme Court of Canada observed in *Century Services*, "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority."[10] On an initial application under the *CCAA* a court will have before it the information specified in section 10(2) which assists it in considering the appropriateness, good faith and due diligence of the application. Section 10(2) of the *CCAA* provides:

> 10. (2) An initial application must be accompanied by
>
> (*a*) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
>
> (*b*) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
>
> (*c*) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

15 Section 11.6 of the *CCAA* does not stipulate the information which must be filed in support of a

continuation motion, but a court should have before it sufficient financial and operating information to assess the viability of a continuation under the *CCAA*. In the present case CMT has filed, on a confidential basis,[11] cash flows for the period ending January 31, 2012, which show a net positive cash flow for the period and that CMT has sufficient resources to continue operating in the *CCAA* proceeding, as well as to conduct a sale process without the need for additional financing.

16 In addition, the Proposal Trustee filed on this motion its Sixth Report in which it reported on its review of the cash flow statements. Although its opinion was expressed in the language of a double negative, I take from its report that it regards the cash flow statements as reasonable.

17 Finally, the previous extension orders made by this Court under section 50.4(9) of the *BIA* indicate that CMT satisfied the Court that it has been acting in good faith and with due diligence.

E. Conclusion

18 No interested person opposes CMT's motion to continue under the *CCAA*. Its two remaining secured creditors, CIC and CMT Sourcing, support the motion. From the evidence filed I am satisfied that CMT has satisfied the statutory condition contained in section 16(a) of the *CCAA* and that a continuation of its re-structuring under the *CCAA* would be consistent with the purposes of that Act.

IV. Sale Process

19 In *Re Nortel Networks Corp.* Morawetz J. identified the factors which a court should consider when reviewing a proposed sale process under the *CCAA* in the absence of a plan:

(a) is a sale transaction warranted at this time?
(b) will the sale benefit the whole "economic community"?
(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
(d) is there a better viable alternative?[12]

20 No objection has been taken to CMT's proposed sale of its Costa Blanca business or the proposed sale process under the direction of Farber as Monitor. Chris Johnson, CMT's CFO, deposed that CMT is not in a position to make a viable proposal to its creditors and has concluded that a going-concern sale of the Costa Blanca business would be the most appropriate course of action. The Proposal Trustee concurs with that assessment. In light of those opinions, an immediate sale of the Costa Blanca business would be warranted in order to attract the best bids for that business on a going-concern basis. Such a sale, according to the evidence, stands the best chance of maximizing recovery by the remaining secured creditors and preserving the employment of a large number of people. No better viable alternative has been put forward.

21 Accordingly, I approve the proposed sale process as described in paragraph 37 of the affidavit of Chris Johnson.

V. Administration Charges

22 CMT seeks approval under section 11.52 of the *CCAA* of an Administration Charge over the assets of CMT to secure the professional fees and disbursements of Farber as Monitor and its counsel, as well as the fees of Ernst & Young Orenda Corporate Finance Inc. ("E&Y"), who has been acting as CMT's financial advisor, together with its counsel. The order sought reflects, in large part, the priorities of various charges approved during the *BIA* Part III proposal process. CMT proposes that the Professionals Charge approved under the *BIA* orders and the CCAA Administration Charge rank *pari passu*, and that whereas the *BIA* orders treated as ranking fourth "the balance of any indebtedness under the Professionals Charge", the *CCAA* order would place a cap of $250,000 on such portions of the Professionals and CCAA Administration Charges.

23 No interested person opposes the charges sought.

24 I am satisfied that the charge requested is appropriate given the importance of the professional advice to the completion of the Urban Behavior transaction and the sale process for the Costa Blanca business.

VI. Order granted

25 I have reviewed the draft Initial Order submitted by CMT and am satisfied that an order should issue in that form.

26 CMT also seeks a variation of paragraph 3 of the Approval and Vesting Order of Morawetz J. made November 7, 2011 in respect of the Urban Behavior transaction to include, in the released claims, the Professionals Charge and the CCAA Administration Charge. None of the secured creditors objects to the variation sought and it is consistent with the intent of the existing language of that order. I therefore grant the variation sought and I have signed the order.

D.M. BROWN J.

cp/e/qllqs/qlvxw

1 2010 SCC 60.

2 *Century Services*, para. 15.

3 *Ibid.*, para. 59.

4 *Ibid.*, para. 70.

5 *Ibid.*, para. 77.

6 *Ibid.*, para. 15.

7 (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.), para. 1. In *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482 the Court of Appeal held that a sale of a business as a going concern during a *CCAA* proceeding is consistent with the purposes of that Act.

8 See the cases collected by Morawetz J. in *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), paras. 35 to 39. See also section 36 of the *CCAA*.

9 *Ibid.*, para. 40.

10 *Century Services*, para. 70.

11 CMT has filed evidence explaining that disclosure of the cash flows prior to the closing of the Urban Behavior transaction would make public the proceeds expected from that transaction. I agree that such information should not be made public until the deal has closed. CMT has satisfied the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 and a sealing order should issue.

12 *Nortel Networks, supra.*, para. 49. See also *Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13.

Case Name:
Richtree Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of Richtree Inc. and Richtree Markets Inc.

[2005] O.J. No. 251

74 O.R. (3d) 174

[2005] O.T.C. 63

10 B.L.R. (4th) 334

7 C.B.R. (5th) 294

13 C.B.R. (5th) 111

136 A.C.W.S. (3d) 768

2005 CarswellOnt 255

2005 CarswellOnt 4045

2005 CanLII 55905

Court File No. 04-CL-5584

Ontario Superior Court of Justice
Commercial List

J.L. Lax J.

Heard: December 8, 2004.
Judgment: January 26, 2005.

(19 paras.)

Constitutional law -- Division of powers -- Determination of jurisdiction -- Paramountcy doctrine -- Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Practice -- Proceedings in bankruptcy -- Securities regulation -- Legislation -- Administration and enforcement.

Motion by the reporting issuer, Richtree Inc, for an exempting order by way of extension from the requirement to file its audited financial statements and other continuous disclosure documents with the

Ontario Securities Commission. At the time of its motion, Richtree had received creditor protection under the Companies' Creditors Arrangement Act, and proceedings were ongoing. When the Commission refused its request, Richtree sought similar relief from Superior Court. The question arose, therefore, whether the statutory discretion granted to a court under the Companies' Creditors Arrangement Act could be exercised in the fact of s. 80 of the Securities Act, which provided that it was the Commission that could grant or refuse the exemptions sought.

HELD: Motion dismissed. There was no provision of the Companies' Creditors Arrangement Act that either addressed or contemplated an application to the court for exemption from the filing requirements of the Securities Act. As there was no inconsistency between the federal Companies' Creditors Arrangement Act and the provincial Securities Act, the doctrine of paramountcy did not apply. Furthermore, where the Securities Act gave exclusive jurisdiction to determine a matter, the court's discretionary power under the Companies' Creditors Arrangement Act could not be used to override it. The purpose of s. 11 of the federal act was to provide the court with a discretionary power to restrain conduct against a debtor company so as to permit it to continue in business during the arrangement period. The power was discretionary and to be exercised judiciously. Neither were companies under the protection of bankruptcy legislation immunized from complying with regulatory regimes.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 11.

Securities Act, R.S.O. 1990, c. S-5, s. 80.

Counsel:

Edmond F.B. Lamek, for the Applicant, Richtree Inc.

Michael Weinczok, for Catalyst Fund General Partner Inc.

Kelley McKinnon, Alexandra S. Clark, J.H. Grout for the Respondent, The Ontario Securities Commission.

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1 J.L. LAX J.:-- Richtree Inc. is a reporting issuer in Ontario and in several other Canadian jurisdictions. It brings this motion requesting an exemption by way of extension from the requirement to file its audited financial statements and other continuous disclosure documents with the Ontario Securities Commission (the "OSC") and the equivalent regulatory authorities in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador and Nova Scotia. Following submissions, I dismissed the motion with reasons to follow. These are the reasons.

Background

2 At the time of the motion, Richtree had filed an Application with the Superior Court of Justice, Commercial List, and received creditor protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). This proceeding is ongoing.

3 On November 24, 2004, it made an Application under the Mutual Reliance Review System for Exemptive Relief Applications (the "MRRS System") for an exemption from the obligation to meet its filing requirements with the OSC. The MRRS System permits reporting issuers to request exemptions from multiple Canadian securities regulators with a single application. As Richtree had appointed the OSC as the principal regulator, its staff had primary carriage of the Application for Exemption. The exemptions sought were exemptions from the filing with the OSC the 2005 Q1 Interim Financial Statements and the 2005 Q1 Management's Discussion and Analysis by December 8, 2004; and, the 2004 Annual Financial Statements, the 2004 Management's Discussion and Analysis and the 2004 Annual Information Form by December 10, 2004.

4 Shortly before the formal filing of the Application for Exemption, OSC staff informed Richtree that they would not recommend that the OSC grant the exemption. On December 1, 2004, OSC staff confirmed its recommendation and also informed Richtree that staff of the other regulators would also recommend that their securities commissions refuse the request for exemption. The OSC staff offered to convene a joint hearing before a panel of the OSC, with the other jurisdictions participating by conference, or a hearing before the OSC if the other jurisdictions agreed to abide by the decision of the OSC. Richtree refused the hearing and brought this motion on December 7, 2004, which was the day before its first filings were due.

Analysis

5 Richtree concedes that the OSC has statutory jurisdiction to grant an exemption to a reporting issuer: Securities Act, R.S.O. 1990, c. S-5, s. 80. However, it submits that the court has inherent jurisdiction to grant this relief consistent with its discretionary powers under section 11 of the CCAA to accomplish the goal of facilitating the restructuring of a debtor company. It points to examples of stays in the nature of "tolling provisions". These are frequently granted in Initial CCAA Orders and constrain creditors or third parties from exercising rights so as to provide the necessary stability for the debtor company to restructure its affairs. It submits that the court has a variety of discretionary powers arising from its inherent jurisdiction to make orders to do justice between the parties and also to do what practicality demands. For this proposition, it relies on dicta of Farley J. in Re Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.[Commercial List]) where he said at p. 296:

> ... In light of the very general framework of the CCAA, judges must rely upon inherent jurisdiction to deal with CCAA proceedings. However, inherent jurisdiction is not limitless if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play. The same limitations are applicable to a Court's use of a discretion granted by statute. I appreciate that there may have been some blurring of distinction among discretion, inherent jurisdiction and general jurisdiction (including the common law facility). This combination is implicitly recognized in Baxter Student Housing Ltd. v. College Housing Cooperative Ltd. (1975) 57 D.L.R. (3d) 1 S.C.C.) in Dickson J's analysis of inherent jurisdiction at pp. 4-5 ...

6 In Baxter, Dickson J. emphasized that inherent jurisdiction does not empower a judge to negate an unambiguous expression of the legislature. Neither may it be exercised to conflict with a statute or rule. It is a special and extraordinary power to be exercised only sparingly and in a clear case and usually to maintain the authority and integrity of the court process.

7 The concept of "inherent jurisdiction" within CCAA proceedings is discussed in the recent decision of the British Columbia Court of Appeal in Re Skeena Cellulose Inc. (2003) 43 C.B.R. (4th) 187 at 211-212 (B.C.C.A.). The court concludes that when one analyzes cases such as Re Royal Oak Mines, as well as others referred to by Farley J. such as Re Westar Mining Ltd., [1992] 6 W.W.R. 331 (B.C.S.C.), the court's use of the term "inherent jurisdiction", is a misnomer. In these cases, the courts are exercising a statutory discretion given by the CCAA rather than their inherent jurisdiction. This is an important distinction, which Farley J. recognizes in Re Royal Oak Mines in the passage quoted and in his reference to the decision of the Supreme Court of Canada in Baxter.

8 I agree with the analysis in Skeena Cellulose that when a court grants a stay of proceedings under section 11 or approves a plan of arrangement under section 6, the court is not exercising a power that arises from its nature as a Superior Court, but rather is exercising the discretion granted to it under the broad statutory regime of the CCAA. The relief that Richtree requests whether under the CCAA or the Securities Act is discretionary. The question that arises then is whether the statutory discretion granted to a court under the CCAA can be exercised in the face of section 80 of the Securities Act, which provides that it is the Commission that may grant or refuse the exemptions sought.

9 The answer is no. There is no provision of the CCAA that either addresses or contemplates an application to the court for exemption from the filing requirements of the Securities Act. The doctrine of paramountcy has been acknowledged to apply where the exercise of a court's discretion under the CCAA conflicts with the mandatory provisions of provincial legislation, see for example, Re Smoky River Coal Ltd. (1999) 12 C.B.R. (4th) 94 at 115 (Alta. C.A.); Re Loewen Group Inc. (2001) 32 C.B.R. (4th) 54 at 58 (Ont. S.C.J.) However, it is worth noting that in neither case was it necessary to invoke the paramountcy doctrine. Here, as in the cases referred to, there is no inconsistency between federal and provincial law. The doctrine of paramountcy does not apply.

10 Further, where a provincial statute is given exclusive jurisdiction to determine a matter, the court's discretionary power under the CCAA cannot be used to override it. Hence, a broad receivership power under federal bankruptcy legislation confers no authority on a bankruptcy court to determine whether a receiver that carries on the business of a debtor is a successor employer. This is within the exclusive jurisdiction of the Ontario Labour Relations Board: GMAC Commercial Credit Corp. v. TCT Logistics Inc., (2004) 238 D.L.R. (4th) 677 (Ont. C.A.). On this point, the court was unanimous.

11 Richtree relies on Orders made in CCAA proceedings in Slater Steel and Air Canada where the court granted extensions of time for calling an annual general meeting of shareholders. This is commonly done in CCAA proceedings. It is quite a different thing to relieve a reporting issuer from providing timely and accurate financial information to members of the public where, as here, the company's shares continue to trade. At the time of its application for exemption from filing requirements, Slater's shares had been delisted from the Toronto Stock Exchange and were no longer trading. Further, the OSC, as lead regulator, had granted Slater a filing exemption, which is recited in the Order of May 5, 2004.

12 Richtree submits that the court should defer to the opinion of the directors of the company who are attempting to achieve the best results they can for the company and all of its stakeholders. I agree that the task of the directors is to focus their attention on assisting Richtree with its restructuring. However, the proper forum for debating the effect of the filing requirements on Richtree is not on this motion, but at the OSC. The legislature has decided that it is the proper forum for balancing the interests of the company and its stakeholders on the one hand and the interests of members of the public on the other. I conclude that the court has no jurisdiction under the CCAA to grant the exemptions sought.

13 Having said this, I wish to make some comments about the reasons that the Richtree directors have come to court. The company does not plan to comply with its filing requirements and the directors have two concerns. The only evidence before the court is a solicitor's affidavit, which deposes in paragraph 2:

> ... I understand that Richtree's directors are concerned that they could be required under applicable securities laws to notify the boards of any other public companies on which they serve or may in the future serve, of such filing requirement defaults. Moreover, I understand that Richtree's directors are concerned that they might be

viewed as having acquiesced in a deliberate breach by Richtree of securities law and corporate legislation and thereafter suffer damage to their respective reputations.

14 As to the first concern, the Richtree directors are already required to disclose that they have been directors of a company that has made a plan of arrangement under the CCAA. Specifically, the rules of the Toronto Stock Exchange require directors to disclose this on a Personal Information Form for all companies seeking to list, or that currently list their shares for trading on the TSX.

15 The sole consequence of Richtree's failure to meet the filing requirements is that the company will be placed on the OSC's Default List. There is no requirement under Ontario securities law to disclose that an individual has been a director of a company that has been placed on the Default List. Although the OSC does place companies that are under CCAA protection on the Default List, there is no evidence that this has caused any harm to Richtree or indeed to other companies currently on the list, or to their directors.

16 As to the second concern, I was informed that the Richtree directors, or at least some of them, are on several boards, and that this raises concerns for them about their reputations as directors of these boards or other boards they may be invited to join. I find this to be a disquieting submission. As directors of Richtree and as directors of any other boards on which they may now or in the future serve, they have fiduciary duties that require them to act honestly and in good faith with a view to the best interests of the corporation. These duties are paramount. Reputational concerns of a personal nature play no role in assessing the alleged harm that may flow to a director from being a member of a board whose company is a defaulting issuer.

17 The purpose of section 11 of the CCAA is to provide the court with a discretionary power to restrain conduct against a debtor company so as to permit it to continue in business during the arrangement period: see Quintette Coal Ltd. v. Nippon Steel Corp. (1990) 2 C.B.R. (3d) 303 at 312 (B.C.C.A.). As observed there, the power is discretionary and therefore is to be exercised judicially.

18 Companies under CCAA protection are not immunized from complying with regulatory regimes. During a CCAA proceeding, directors are not immunized from carrying out their responsibilities or relieved of their obligations to serve the company and its stakeholders diligently. The order that is sought has nothing to do with Richtree's restructuring process. It is intended to grant the directors personal protection to their reputations. This is neither contemplated by section 11, nor are the directors entitled to this protection. Even if the court had the jurisdiction to grant the relief sought, I would not do so as this is an improper and injudicious exercise of the court's discretion under the CCAA.

19 For these reasons, the motion was dismissed. The OSC does not seek costs.

J.L. LAX J.

cp/e/qlgxc/qlisl

Case Name:
Collins & Aikman Automotive Canada Inc. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Collins & Aikman Automotive Canada Inc.
APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2007] O.J. No. 4186

37 C.B.R. (5th) 282

63 C.C.P.B. 125

161 A.C.W.S. (3d) 675

2007 CanLII 45908

2007 CarswellOnt 7014

Court File No. 07-CL-7105

Ontario Superior Court of Justice

J.M. Spence J.

Heard: September 20 and 26, 2007.
Judgment: October 31, 2007.

(141 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from lender subject to certain terms, which terms were approved in Initial Order -- Court declined to order changes to paragraphs in Initial Order, as moving parties provided insufficient basis for their objections -- Court could not compel Collins to make "special payments" ordinarily required under statutory pension law when terms of financing did not contemplate such payments.

Insolvency law -- Receivers, managers and monitors -- Liability -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Court declined to alter paragraphs of Initial Order and Order approving *engagement of Chief Restructuring Officer that provided limitation of liability for monitor and CRO because moving parties failed to show that Court lacked jurisdiction to make such provision -- Established practice indicated that Court did have authority to grant such protection.*

Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from a lender subject to certain terms, which terms were approved in Initial Order of July 19, 2007 -- Moving parties objected to wording of certain paragraphs of Initial Order, and also sought to compel Collins to make "special payments" contemplated under statutory pension law -- HELD: Motion dismissed -- Paragraph 4 of Initial Order allowing Collins to hire further individuals was not altered, since USW provided no basis for its concern that paragraph authorized unilateral contracting out of union positions -- Paragraph 6 of Initial Order stating that Collins was "not required" to make various employee compensation payments was not altered because terms of financing that Collins obtained specifically set out what disbursements were contemplated in cash flow, and "special payments" at issue were not included -- Collins was precluded by terms of financing agreement from making any material disbursements not contemplated in cash flow approved by lender -- Even if the "not required" provision resulted in abrogation of statutory pension plan law by permitting Collins to refrain from making "special payments" ordinarily required by Pension Benefits Act, Court had jurisdiction to approve an order under CCAA which conflicted with, and overrode provincial legislation -- Further, it was a proper exercise of Court's discretion to approve provision because moving parties had opportunity to object to Court's approval of financing terms, but did not do so -- Ordering Collins to make "special payments" would constitute a collateral attack on Initial Order that approved financing because Collins had no alternative funds available and such an order would require it to use funds for a purpose which was not permitted pursuant to Initial Order -- Paragraph 11 of Initial Order allowing Collins to terminate employment arrangements as it deemed appropriate was not altered, since USW did not establish that paragraph would allow Collins to repudiate its collective agreements -- Paragraph 26 of Initial Order providing that monitor was not to be deemed to have become an employer was not altered because if monitor started to act as de facto employer, motion could be brought at that time to consider matter in context of actual fact situation, rather than in current abstract circumstances -- Paragraph 29 of Initial Order providing for limitation of monitor's liability to gross negligence or willful misconduct was not altered because Court did not agree with USW's argument that such provision was beyond Court's jurisdiction to make under CCAA -- Similar limitation of liability that was provided for Chief Restructuring Officer in paragraph 4 of Order approving engagement of CRO was not altered for the same reason, and since established practice showed that Court did have authority to grant such protection to CRO.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 11.3, s. 11.8 (1)

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 69(1), s. 69(2), s. 69(12), s. 116

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 55(2)

Pension Benefits Act, General Regulation, R.R.O. 1990, Reg.909, s. 4, s. 5

Counsel:

M.E. Bailey, for the Superintendent of Financial Services (Ontario).

K.T. Rosenberg and M.C. Starnino, for the United Steelworkers.

C.E. Sinclair, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada).

R.J. Chadwick, for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor and K.L. Mah, for Collins & Aikman Automotive Canada Inc.

J.E. Dacks, for JP Morgan Chase Bank NA.

C.J. Hill, for Chrysler LLC.

REASONS FOR DECISION

1 **J.M. SPENCE J.**:-- Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW - Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
> (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements ...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:
>
> ...
>
> b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan"); ...
>
> d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> "and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws ...."

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto-Dominion Bank v. Usarco Ltd.*, (1991), 42 E.T.R. 235 at paragraph 25 (Ont. Gen. Div.), in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2

million.

Paragraph 26

18 Paragraph 26 provides as follows:

> THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof - or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

> THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

> THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the

USW objects to it for the same reason. That paragraph provides as follows:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

> THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The *Companies Creditors Arrangement Act*

25 Section 11(1) of the CCAA provides as follows:

> Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> Other than initial application court orders -
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

27 Section 11(6) of the CCAA provides as follows:

Burden of Proof on Application -

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
(b) requiring the further advance of money or credit.

The *Pension Benefits Act*

29 Section 55(2) of the PBA provides as follows:

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan ... shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
(b) all contributions required to pay the normal cost;
(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

...

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4(2)(c) shall be not less than the sum of,

...

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

...

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

...

Power of Board to determine whether sale

> (12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

> Board's orders not subject to review
>
> 116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the *Companies' Creditors Arrangement Act*

33 In *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306 (Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24, at p. 31 (Ont. Gen. Div.):

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> [emphasis added]

34 In *Sulphur Corp. of Canada Ltd. (Re)*, [2002] 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

> The Paramountcy Argument and the Jurisdiction of the Courts
>
> para. 23 Sections 11(3) and 11(4) of the CCAA read as follows:
>
> > 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
> >
> > 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> para. 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?
>
> para. 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.*[3] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002) 94 Alta. L.R.(3d) 389.

> para. 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:
>
> > The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors ...
>
> At para 18:
>
> > I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: "... the

> CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

...

para. 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

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para. 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

para. 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

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para. 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475.

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para. 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act*[7], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act*[8], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80.

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para. 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion - a discretion she found to have been broad and one provided for in the statute.

para. 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

para. 34 In *Re United Used Auto & Truck Parts Ltd.*[9], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

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para. 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

para. 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

para. 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

para. 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*[10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

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36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

> Jurisdiction
>
> [31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.
>
> [32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R.(3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R.(3d) 24 (Gen. Div.). [page17] Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).
>
> [33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.
>
> ...
>
> [35] ... [I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter*

Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc.* (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above[2] at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19] process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose"[3] at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

> [43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student *Housing Ltd. v. College Housing Cooperative Ltd., supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re), supra*; and *Richtree Inc. (Re), supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Re Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc. (Re)* (2005), 74 O.R.(3d) 174 dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Re Sulphur Corp. of Canada Ltd., supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia,* Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows:
>
> > The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with

the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

(a) Automotive had no other realistic source of DIP funding to continue operations;
(b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and
(c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings.

It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Re Richtree Inc., supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP Approval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

(a) there shall only be one collective agreement in force between a trade union and an employer;

(b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
(c) the collective agreement is binding upon the employer and the employees;
(d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
(e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
(f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
(g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained - a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc. (Re)* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Syndicat national de l'amiante d'Asbestos inc. et al. v. Jeffrey Mine Inc.*, [2003] Q.J. No. 264, there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Jeffrey Mine* paragraphs 60 to 62.

86 It was submitted that the text of the *Jeffrey Mine* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Jeffrey Mine* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc. (Re)* (2005), 47 C.C.P.B. 62 at paragraph 4 (Ont. S.C.J. [Commercial List]) (affirmed (2006) 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines, Inc., supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer . This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Jeffrey Mine* decision at paragraph [76].

118 The discussion in *Re Jeffrey Mine* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> ...
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
>> ... explicit statutory language is required to divest persons of rights they otherwise enjoy at law ... [S]o long as the doctrine of paramountcy is not

> triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *T.C.T. Logistics* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *T.C.T. Logistics* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *T.C.T. Logistics* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and

Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision, [2007] S.J. No. 313.

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

J.M. SPENCE J.

cp/e/qlaxs/qlmxt/qlhcs/qlisl

Indexed as:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada
And between
Imperial Tobacco Ltd., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada

[1994] 1 S.C.R. 311

[1994] S.C.J. No. 17

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.

Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following Tobacco Products Control Regulations, amendment, SOR/93-389.) In Canada Gazette, Part II, Vol. 127, No. 16, p. 3284.
Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.
Simon V. Potter, for the applicant Imperial Tobacco Inc.
Claude Joyal and Yves Leboeuf, for the respondent.
W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.
Solicitors for the respondent: Côté & Ouellet, Montreal.
Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

> 27. Any party against whom judgment has been given, or an order made, by the

> Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2 (b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was intra vires s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

> 97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:

    (i) There is a serious constitutional issue to be determined.
    (ii) Compliance with the new regulations will cause irreparable harm.
    (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as

> between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; Nelles v. Ontario, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private

> litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p.

795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island Telephone Co. Re, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373

(H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in R. v. Oakes, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in Metropolitan Stores. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in Metropolitan Stores:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Case Name:
Canwest Global Communications Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Global Communications Corp. and the other applicants listed on Schedule "A"**

**[Editor's note:
Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]**

[2009] O.J. No. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the *relevant merits favoured the position of the CMI Entities on the lift stay motion.*

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders.

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with

policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
(a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau.* If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) <u>Application</u>

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an

> enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

cp/e/qlrds/qljxr/qlced/qlaxw/qlcas

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

CITATION: Unique Broadband Systems (Re), 2011 ONSC 224
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-01-25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED and IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Wilton-Siegel J.

COUNSEL: *Peter Roy* and *Sean Grayson*, for the Applicant, 2064818 Ontario Inc.

E. Patrick Shea, for the Applicant, Unique Broadband Systems, Inc.

Peter C. Wardle, for the UBS Directors, Grant McCutcheon, Henry Eaton and Robert Ulicki

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

Raj Sahni, for Jolian Investments Inc., in its capacity as a creditor

HEARD: December 20, 2011

ENDORSEMENT

[1] 2064818 Ontario Inc. ("206") seeks an order pursuant to ss. 11.5(1) and (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") removing Grant McCutcheon ("McCutcheon") and Henry Eaton ("Eaton") as directors of Unique Broadband Systems, Inc. ("UBS"). UBS seeks an amendment to the initial order under the CCAA dated July 5, 2011 (the "Initial Order") granting protection to UBS that would extend the stay thereunder to include a stay of an oppression action against the UBS directors commenced by 206 on December 22, 2010 (the "Oppression Action"). I will deal with each matter in turn after briefly setting out the background.

Background

The Parties

[2] UBS is a public corporation incorporated in Ontario under the *Business Corporations Act*, R.S.O. 1990, c. B16 (the "OBCA").

[3] LOOK Communications Inc. ("Look") is a public corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA").

[4] UBS owns shares in Look carrying 39.2% of the equity and 37.6% of the votes. UBS also provides management services to Look pursuant to a management services agreement described below.

[5] 206 is a corporation controlled by Alex Dolgonos ("Dolgonos"). 206 is a substantial shareholder of UBS holding slightly less than 20% of the outstanding shares of UBS. Dolgonos also owns all of the outstanding shares of DOL Technologies Inc. ("DOL"), a private corporation incorporated under the OBCA.

The Election of the UBS Directors

[6] Each of the current UBS directors, being McCutcheon, Eaton and Robert Ulicki ("Ulicki") (collectively, the "UBS Directors"), was elected to the UBS board of directors at a special meeting of the shareholders held on July 5, 2010 to replace the former directors, being McGocy, Douglas Reesan and Louis Mitrovich, pursuant to s. 122 of the OBCA. The election of these directors was the subject of a proxy contest between the existing management and the shareholders who supported the UBS Directors.

[7] On July 6, 2010, UBS advised Look that it had the support of shareholders of Look possessing sufficient votes to effect a change of control of the board of directors of Look. UBS requested that the then-current board of Look resign and appoint a replacement slate of directors proposed by UBS, which included the UBS Directors, Laurence Silber ("Silber") and David Rattee ("Rattee"), without calling a special meeting of shareholders.

[8] On July 20, 2010, all five Look directors resigned and McCutcheon, Eaton and Ulicki were appointed directors of Look. On July 21, 2010, McCutcheon was also appointed the chief executive officer of Look, replacing McGocy who had previously served in that position pursuant to the provisions of a management services agreement between UBS and Look, described below. Silber and Rattee were subsequently elected directors of Look on July 27, 2010. [illegible] that there are currently four directors of Look.

[9] The UBS Directors were re-elected at the annual general meeting of UBS shareholders on February 25, 2011. 206 opposed the current slate of directors and proposed its own slate, which included the two directors it seeks on this motion to have installed as directors in place of McCutcheon and Eaton.

The Current Litigation

[10] UBS had previously retained DOL pursuant to an agreement dated July 12, 2008 (the "DOL Technology Agreement") to provide the services of Dolgonos as a "chief technology officer" to UBS. The DOL Technology Agreement was terminated by DOL after the election of the UBS Directors based on "change of control" provisions in the Agreement. DOL then commenced an action against UBS claiming amounts totalling approximately $8.6 million. This action is being defended by UBS, which asserts that the largest component of the DOL claim is

not payable pursuant to the terms of the DOL Technology Agreement. UBS has also counterclaimed to set aside the DOL Technology Agreement.

[11] UBS had also previously retained Jolian Investments Inc., a corporation controlled by Gerald McGoey ("McGoey"), to provide his services as chief executive officer of UBS pursuant to an agreement dated January 1, 2006 (the "Jolian Agreement"). The Jolian Agreement was also terminated by Jolian after the election of the UBS Directors based both on the failure to elect McGoey to the UBS board and on "change of control" provisions in the Agreement. Jolian then commenced an action against UBS claiming amounts totalling approximately $7.5 million. This action is also being defended by UBS, which asserts that the largest component of the Jolian claim is also not payable pursuant to the terms of the Jolian Agreement. UBS has also counterclaimed to set aside the Jolian Agreement. On July 5, 2010, McCutcheon was appointed the chief executive officer of Look to replace McGoey.

[12] In the DOL action and the Jolian action, DOL, Dolgonos, Jolian and McGoey brought motions seeking confirmation of their right to an advancement of funds in respect of the legal costs of pursuing their respective claims and defending the UBS counterclaims against them. UBS resisted such relief and sought an order requiring the parties to return certain retainers previously advanced by UBS to counsel for such parties. By order dated April 11, 2011, Marrocco J. held that these parties were entitled to an advancement of funds as more particularly specified therein. UBS has appealed this order to the Court of Appeal and, pending the hearing of such appeal, has refused to advance or pay any of the amounts addressed in the order of Marrocco J.

[13] In addition, on July 6, 2010, Look also commenced an action against Dolgonos, DOL, McGoey and Jolian, among others, seeking damages based on allegations of breach of fiduciary duty and negligence. The action relates to certain restructuring awards paid by Look in 2009, for which Look seeks recovery.

The Oppression Action

[14] On December 22, 2010, DOL commenced the Oppression Action against both UBS and the UBS Directors. At the hearing of this motion, 206 advised that it is not pursuing the claims against UBS. The statement of claim in the Oppression Action seeks nine separate heads of relief against the UBS Directors in addition to interest and costs.

[15] The Oppression Action centres on two principal allegations. First, it is alleged the UBS Directors acted oppressively in approving a settlement between UBS and Look that was made pursuant to an agreement dated December 3, 2010 (the "Amending Agreement"), that amended a management services agreement dated May 19, 2004 between UBS and Look (collectively, with the Amending Agreement, the "Look MSA"). Second, it is alleged that, by failing to re-elect McGoey to the UBS board of directors on July 5, 2011, the UBS Directors intentionally triggered certain provisions of the Jolian Agreement, giving rise to a right in favour of Jolian to terminate the Agreement. It is alleged that these actions of the UBS Directors exposed UBS to the consequences of the default. 206 also alleges that the UBS Directors acted improperly in

defending the DOL claim described above. More generally, 206 alleges that the UBS Directors have depleted the funds of UBS by these actions contrary to their announced intention at the time of the proxy fight in July 2010 to minimize UBS' expenses and conserve its funds.

[16] 206 seeks damages for oppressive behavior against the UBS Directors in the amount of any loss suffered as a result of execution of the Amending Agreement and in the amount of any payment required to be made to Jolian under the Jolian Agreement. It also seeks declarations that the UBS Directors had a conflict of interest in respect of the execution of the Amending Agreement and have preferred the Look shareholders over the UBS shareholders. On these grounds, 206 further seeks an order removing the UBS Directors from the UBS board.

The CCAA Proceedings

[17] UBS is insolvent. It obtained protection under the CCAA pursuant to the Initial Order. Duff & Phelps Canada Restructuring Inc. (the "Monitor") has been appointed the monitor in the CCAA proceedings. Under the Initial Order, the Oppression Claim is currently stayed against UBS but not against the UBS Directors.

[18] Pursuant to an order dated August 4, 2011, the court approved a claims process in respect of claims against UBS. In accordance with this order, 206 filed a proof of claim in an amount "to be determined" that specifically referred to, and attached, the statement of claim in the Oppression Action.

[19] The largest claims filed in the claims process are: the DOL and Jolian claims described above; a contingent claim by Look for the remainder of the monies due to it under the Amending Agreement, which will expire in June 2012 provided UBS continues to provide services to Look in accordance with the terms of the Look MSA; and the 206 claim in respect of the Oppression Action. Each of the UBS Directors also filed contingent claims respecting indemnification of legal fees that may be incurred in defending the Oppression Action, based on indemnities dated July 5, 2010 granted to them by UBS.

[20] 206 took the position that McCutcheon and Eaton should not review any of the claims filed against UBS in the claims process by virtue of the alleged conflict of interest addressed below. While UBS disputes the existence of such a conflict of interest, these directors did not participate in the UBS review of the claims filed with it, which were therefore reviewed by Ulicki alone together with legal counsel. The UBS position regarding each of these claims was provided to the Monitor by letter dated December 9, 2011.

The Oppression Claim

[21] UBS seeks to have the court exercise its authority under s. 11.03(1) of the CCAA to extend the stay of proceedings in the Initial Order to include the Oppression Action in respect of the UBS Directors. It seeks to have the Oppression Action determined in its entirety in the CCAA proceedings.

[22] UBS makes several arguments in support of this relief. Among others, it submits that the requested relief will further the purposes of the CCAA by allowing the directors to focus on the restructuring rather than diverting their time and effort to other litigation. 206 says that this argument is of no force if the court finds that McCutcheon and Eaton are conflicted and grants its motion to replace them. Given the determination below on 206's motion, I accept this argument of UBS.

[23] In addition to the forgoing reason for extending the stay, there are three other considerations that also support such an order.

[24] First, unless and until a court determines that the UBS Directors are not entitled to indemnification by UBS in respect of the claims made against them in the Oppression Action, the UBS Directors have claims against UBS in the CCAA proceedings arising out of the Oppression Action that must be addressed in the restructuring. As a result, the restructuring cannot proceed until the Oppression Action and related indemnification claims are determined.

[25] Second, the Jolian claim against UBS is already proceeding in the CCAA proceedings. Given the similarity in the factual matrix between the claims in the Jolian action and the Oppression Action, any determination in the Jolian action will also likely apply to the claims and defences in the Oppression Action. Accordingly, the Oppression Action must proceed within the CCAA proceedings to avoid the possibility of both a multiplicity of actions and potentially conflicting decisions.

[26] Lastly, I note that there is no suggestion of any material prejudice to 206 if the determination of the Oppression Action also proceeds within the CCAA proceedings.

[27] Based on the foregoing considerations, the UBS motion to extend the stay in the Initial Order is granted.

<u>Removal Motion</u>

[28] I propose to first address the applicable law in respect of this motion before considering the specific issue in this proceeding.

Applicable Law

[29] Section 11.5 of the CCAA provides as follows:

> (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

(2) The court may, by order, fill any vacancy created under subsection (1).

[30] Accordingly, to succeed on this motion, 206 must demonstrate that the actions of McCutcheon and Eaton, or their positions as directors of both UBS and Look, are such that either (1) they are unreasonably impairing or are likely to impair the possibility of a viable restructuring; or (2) they are acting or are likely to act improperly as directors. Further, it should be noted that any such order, while it requires such a finding, remains subject to the discretion of the court.

[31] 206 does not propose a particular standard applicable to a determination under s. 11.5, apart from stating that the CCAA is remedial legislation and should therefore be construed liberally in accordance with the modern purposive approach to statutory interpretation. I understand this to mean that 206 would interpret s. 11.5(1) to establish a low threshold for entitlement to relief thereunder. UBS submits that there must be a "clear demonstration" of facts supporting a determination under s. 11.5, which appears directed more toward the standard of proof required than the nature of the threshold established under s. 11.5(1).

[32] There is nothing in the wording of s. 11.5 that displaces the ordinary standard of proof on a balance of probabilities. However, the language of s. 11.5(1) does establish a significant threshold for the entitlement to relief thereunder.

[33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. A similar examination of the actions of the directors is required for a determination that a director has acted inappropriately in the circumstances of a particular restructuring. I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director's removal. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the "business judgment rule".

[34] Further, the language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring or are "inappropriate", or are likely to be "inappropriate", in the circumstances.

[35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.

[36] First, removing and replacing directors of a corporation, even a debtor corporation subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.

[37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would ordinarily take into consideration the presence or absence of any recommendation from the Monitor.

Analysis and Conclusions

Positions of the Parties

[38] 206 asserts that McCutcheon and Eaton have a conflict of interest as directors of both UBS and Look which prevents them from fulfilling their responsibilities as directors in the restructuring and justifies an order under s. 11.5 of the CCAA.

[39] 206 has advised the court that it does not allege a monetary conflict based on a larger personal economic interest in Look than in UBS. Instead, 206 alleges that McCutcheon and Eaton are conflicted by virtue of their concurrent positions as directors of both UBS and Look. 206 says that, as a result, these directors can have no role in the UBS CCAA proceedings and should be removed.

[40] UBS takes the position that these directors are not conflicted and are not prevented from participating in any aspect of the CCAA proceedings except for (1) the determination of the Look contingent claim; and (2) the determination of their individual contingent claims for indemnification. It says that, as a result of the position taken by 206 regarding the review of the claims filed under the CCAA proceedings, McCutcheon and Eaton voluntarily did not participate in the UBS review of these claims. However, they intend to be involved on a going-forward basis after determination of this motion, subject to the exceptions described above.

Analysis and Conclusions

[41] For the purposes of this motion, I accept the premise of 206's argument – that the presence of a conflict of interest may prevent directors from fulfilling their responsibilities in a CCAA proceeding to the extent that their continued involvement unreasonably impairs, or is likely to unreasonably impair, the possibility of a viable compromise or arrangement being made in respect of the insolvent company. I also accept that McCutcheon and Eaton have a conflict of interest as directors of both Look and UBS that prevents them from acting in respect of any matter within the CCAA proceedings that pertains to the relationship between the two corporations.

[42] However, such a conflict of interest is not, by itself, sufficient to satisfy the requirements of s. 11.5. Courts have long recognized that interlocking directorships are acceptable, often inevitable or necessary, in the corporate context. Further, the Court of Appeal expressly recognized that "a reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders" is insufficient for removal of directors: see *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.), at para. 76. Instead, courts recognize that conflicts of interest may exist that are to be dealt with in accordance with applicable fiduciary law principles. There is nothing in s. 11.5 that evidences an intention to alter the

general rule, stated by Blair J.A. in *Stelco*, at paras. 74-76, that apprehension of bias is insufficient, on its own, to remove a director.

[43] More generally, as Blair J.A. made clear in *Stelco*, at paras. 74-76, directors will only be removed if their conduct, rather than the mere existence of a conflict of interest, justifies such a sanction:

> In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.
>
> Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.
>
> If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair* v. *Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

[44] Accordingly, on this motion, 206 must demonstrate either (1) that McCutcheon and Eaton have breached their duties as directors in respect of the conflict that exists in a manner that constitutes acting inappropriately in the circumstances; or (2) that the existence of such conflict of interest prevents them from acting as directors of UBS in a meaningful manner in the restructuring such that they are unreasonably impairing the possibility of a viable restructuring.

[45] I am not persuaded that the fact that McCutcheon and Eaton are directors of both UBS and Look justifies an order replacing them as directors of UBS under s. 11.5 of the CCAA on either ground. I reach this conclusion for the following reasons.

[46] First, the evidence does not disclose that this conflict of interest has prevented the USB board from functioning. Prior to the CCAA proceeding, the Amending Agreement was negotiated between Rattee, on behalf of Look, and Ulicki on behalf of UBS with the benefit of legal counsel. 206 may object to the result on the basis that the agreement was not in the best interests of UBS. However, that is a matter to be addressed in the Oppression Action. It cannot be said that the fact that the other two directors were unable to participate in the decision prevented the negotiations between UBS and Look from proceeding to a conclusion or would have resulted in a different agreement.

[47] Moreover, it should be noted that the Amending Agreement was negotiated and signed before the CCAA proceedings began. In the current proceeding, the only issue that is relevant to the progress of a restructuring of UBS in which the two directors have a conflict of interest is the Look contingent claim. Apart from their individual indemnification claims, there is nothing that prevents these directors from acting in respect of all other aspects of the CCAA proceedings. The fact that they have not done so to date is attributable not to any legal impediment but to the position taken by 206, which cannot survive the order giving effect to these Reasons.

[48] Second, I am not persuaded that the record demonstrates a preference by those directors for the shareholders of Look over the shareholders of UBS. I will first address three specific matters raised by 206 as evidence of this alleged preferment. I will then address the issue more generally.

[49] The first allegation pertains to the terms of the Amending Agreement, which involved a release of a payment obligation of Look to UBS of $900,000. This has been addressed above — the determination of this allegation is a matter for the Oppression Action. The court cannot reach any conclusion on this issue at this time based on the record before the court.

[50] The second allegation is that the UBS Directors are spending the remaining cash of UBS rather than causing Look to pay a dividend to the Look shareholders, including UBS. This allegation is part of a larger allegation that the UBS Directors are taking an inordinate amount of time to deal with the claims filed in the CCAA proceeding and refuse to consider financing alternatives, with the result, if not the intention, that the Look shares owned by UBS will be ultimately sold at a discount to Look or its other principal shareholder, a brother of Silber.

[51] The evidence does not support this allegation for a number of reasons. Whether or not McCutcheon and Eaton are on the Look board, the non-UBS directors of Look will determine

whether to pay a dividend based on their view of the best interests of Look. UBS cannot cause such a dividend to be paid. On this basis, I do not see how the failure of the Look board to consider such a dividend is a relevant consideration. Further, for the moment at least, the evidence does not support 206's position that there is an imminent likelihood that UBS will run out of cash to fund its operations. Moreover, there can be no restructuring plan until the principal claims in the claims process are resolved. While the time spent responding to the claims filed may have been longer than desirable, the evidence does not, at the present time, support the conclusion that the three-month period was inordinate and without reasonable explanation. Lastly, and in any event, 206 has failed to put a specific, alternative funding proposal to the directors for their consideration.

[52] The third allegation is that the Look shareholders have benefitted from the UBS proxy fight by which the UBS Directors were nominated. UBS bore the $600,000 cost of the proxy fight. Referring to a letter of Ulicki to Rattee and Silber dated November 17, 2010, 206 says that, absent the UBS proxy fight, UBS would have controlled Look and the cost of any Look action against Dolgonos, DOL, McGoey and Julian would have been borne by individual 206 shareholders.

[53] While this may be factually correct, there is no evidence before the court that would justify a conclusion that, in taking such action, the UBS Directors preferred the Look shareholders to the UBS shareholders. Their position is that there is a common interest in initiating claims against the defendants in the Look action. On the current evidence, this position is at least as probable as 206's position. The court cannot determine this issue on this motion.

[54] More generally, the fact that UBS and Look have adopted a common position in regard to Dolgonos and McGoey, and their respective companies, since the election of the UBS Directors is not, *per se*, evidence that McCutcheon and Eaton are preferring the interests of the Look shareholders over the interests of the UBS shareholders. The actions that the UBS Directors, including McCutcheon and Eaton, have taken may not be supported by Dolgonos and 206, but that is not evidence of the alleged preferment absent proof as to the absence of any reasonable basis for the actions of the UBS Directors. At this stage in the proceedings, such proof is not before the court.

[55] In reaching the foregoing conclusions, I should add that the court has also had regard to the Monitor's advice that it has not observed any conduct of these directors that will compromise the CCAA proceeding or UBS's attempt to restructure, and that it has also not observed any conduct that the Monitor would consider inappropriate or would cause the Monitor concern that they would act inappropriately in the future. Further, the Monitor has advised that, in its view, there would be no benefit and substantial harm to the CCAA proceedings if these directors were removed from their position. This advice would argue against the exercise of the court's discretion in the present circumstances even if 206 had otherwise established activity on the part of these directors that satisfied the requirements of s. 11.5.

[56] Lastly, the backdrop to this motion is a dispute between two opposing groups of UBS shareholders. A particular objective of 206 is to have a new board of directors review the

decision of the UBS Directors to defend the DOL action brought against UBS. However, s. 11.5 cannot be used to replace a board of directors to the extent that the purpose of such relief is to have a new board of directors revisit decisions taken by the existing board. At this stage, the court cannot decide the merits of the issues of the appropriateness of the past payments to Dolgonos and McGoey, the actions of the UBS Directors in respect of the Amending Agreement, or their competing visions for the future of Look/UBS. These issues involve all three of the UBS Directors. These issues are the subject of the litigation between the parties, including the Oppression Action, to be addressed in the claims process with the CCAA proceedings. Equally important, as mentioned above, the "business judgment rule" continues to govern judicial intervention in the affairs of a debtor corporation under the CCAA. To succeed on this motion, 206 must provide evidence that establishes the elements of the test in section 11.5. It cannot do so on the facts before the court on this motion.

[57] Based on the foregoing, the 206 motion to replace McCutcheon and Eaton as directors of UBS is dismissed.

Costs

[58] The parties will have thirty days from the date of this Endorsement to make written submissions as to costs not to exceed five pages in length.

W. Wilton-Siegel J.

Wilton-Siegel J.

Date: January 25, 2012

OSC Proceedings

IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED
and
IN THE MATTER OF
IVANHOE III INC. and CAMBRIDGE SHOPPING CENTRES LIMITED

Hearing: January 19, 1999

Panel:

John A. Geller, Q.C. - Vice-Chair
Helen M. Meyer - Commissioner
Derek Brown - Commissioner

Counsel:

Paul Steep - For Ivanhoe III Inc.
David Armstrong
Daniel Benay
Rene Sorell

John Lorne McDougall, Q.C. - For Cambridge Shopping Centres Limited
Robert Dickson
Richard Scott
Christine Dube

William Orr - For the Special Committee ofthe Board of Directors ofCambridge Shopping CentresLimited

<><>Janet Holmes
Jay Naster - For the Staff of the Ontario Securities Commission
Stan Magidson

Richard Proulx - For the Staff of the Commission des valeurs mobilières du Québec
Benoit Dionne
Alfred Buggé

REASONS FOR DECISION

Background

Ivanhoe III Inc. ("Ivanhoe") is a Quebec corporation owned by six Canadian pension funds.Its largest shareholder is Caisse de dépôt et placement du Quebéc.

Cambridge Shopping Centres Limited ("Cambridge") is an Ontario corporation and areporting issuer or equivalent under the

Securities Act and in the other provinces ofCanada. As at December 11, 1998, Cambridge had 62,531,992 common shares ("Shares") and 4,422,727 second preferred shares issued and outstanding. The Sharesare listed on The Toronto Stock Exchange and the Montreal Exchange.

Ivanhoe and its affiliates have been shareholders of Cambridge since 1989. Since thattime, Ivanhoe has gradually increased its holdings of Shares through normal course stockexchange purchases. At the time of the hearing, Ivanhoe, its affiliates and associatesowned 27,324,861 Shares, representing approximately 43% of the outstanding Shares onan undiluted basis and approximately 35% on a partially diluted basis. Ivanhoe also held$60,000,000 aggregate principle amount of convertible debentures of Cambridge dueMarch 11, 2004, $15,200,000 aggregate principal amount of convertible debentures ofCambridge due March 11, 2004 and $2,600,000 aggregate principal amount of convertibledebentures of Cambridge due June 30, 2007.

The next largest shareholder of Cambridge is the Canadian National Railways PensionTrust Fund (the "CN Fund"), holding approximately 17% of the outstanding Shares on anundiluted basis, and approximately 19% on a partially diluted basis.

On October 30, 1998, Ivanhoe informed Cambridge of its intention to make a take-over bidfor up to 15,000,000 Shares at the price of $12.50 per Share, the offer not beingconditional on any minimum number of shares being tendered. Ivanhoe asked Cambridgeto have its board promptly establish a committee of independent directors to mandate aqualified and independent valuator to prepare a formal valuation of the Shares inaccordance with the requirements of Policy 9.1 of the Commission and Policy Q-27 of theCommission des valeurs mobilières du Québec (the "Quebec Commission").

Ivanhoe publicly announced its intention to make the takeover bid on the same date.

On November 3, 1998, Cambridge announced that it had formed a special committee ofits board of directors (the "Special Committee") and would appoint a valuator to conducta formal valuation of the Shares. The members of the Special Committee were T. IainRonald ("Ronald"), as Chairman, David S. R. Leighton, J. Blair MacAulay and TullioCedraschi ("Cedraschi"). Cedraschi is a nominee of the CN Fund on the Cambridge board.

On November 12, 1998, the Special Committee appointed Morgan Stanley & Co.Incorporated ("Morgan Stanley") to prepare a formal valuation. On December 17, 1998,

Morgan Stanley delivered its formal valuation report to the Special Committee.

On December 14, 1998, Ronald met with René Tremblay, president and chief executiveofficer of Ivanhoe, ("Tremblay") to advise Tremblay of the preliminary valuation range thatMorgan Stanley had arrived at. Ronald expressed two concerns with the proposedIvanhoe offer. Firstly, Ronald advised that the Special Committee felt that the offeringprice should be toward the higher end of the $14.50 to $17 valuation range in thepreliminary valuation. Secondly, the Special Committee felt that the offer should be for allShares not held by Ivanhoe and its affiliates, and not merely for control. Ronald said that,unless Ivanhoe was prepared to meet these conditions, it should not proceed with its offer.Tremblay expressed concern with both of these conditions. Tremblay and Ronaldarranged for Ivanhoe's financial advisers, RBC Dominion Securities Inc. ("DS"), to meetwith Morgan Stanley to review and discuss the latter's approach and calculations. Thismeeting took place on December 15, 1998 and, as a result, Morgan Stanley's finalvaluation range was changed to $14 to $16. DS then asked to be permitted to meet withthe Cambridge board to express DS's views on the valuation. This request was refused,but DS was permitted to meet with the Special Committee on December 17, 1998.

On December 17, 1998, Tremblay advised Ronald that Ivanhoe proposed to go ahead withits offer on the originally contemplated basis.

Also on December 17, 1998, the Special Committee approved Morgan Stanley's valuationreport and decided to (a) recommend it to the Cambridge board, (b) recommend to theboard a shareholders rights plan, and (c) appoint ScotiaMcLeod Inc. ("Scotia McLeod") toprovide financial advice to the Special Committee. At a meeting held on the same date,the Cambridge board accepted the Special Committee's recommendations.

On December 18, 1998, the Cambridge board announced that it had approved theadoption of a shareholders rights plan (the

"Plan"), to become effective upon receipt of allnecessary regulatory approvals. The press release announcing the Plan stated that theprime objective was to ensure that the Cambridge board would have sufficient time toproperly consider any proposed take-over bid for that company and to allow time forcompeting bids to emerge.

Ivanhoe's take-over bid (the "Bid") was mailed to holders of Shares on December 23, 1998.The Bid was open for acceptance until 6:00 p.m. (Vancouver time) on January 21, 1999.Ivanhoe's take-over bid circular stated that "The purpose of the Offer is to increase theholdings of the Offeror in Cambridge. The Offeror currently has no other plans forCambridge."

On January 4, 1999, the Cambridge board issued its directors' circular with respect to theBid, recommending against acceptance of the Bid.

The Plan, although adopted by the Cambridge board, has not been presented to theshareholders of Cambridge for approval. By its terms, the Plan expires 60 days after itseffective date, that is on February 15, 1999. In the Plan, the Cambridge board reservedto itself the right to amend the Plan without the approval of any holders of rights issuableunder the Plan or of Shares.

Ivanhoe Application

On December 24, 1998, Ivanhoe applied to the Commission for:

a) a cease trade order pursuant to clause 127(1)2 of the Act with respect to therights proposed to be issued pursuant to the Plan; and

b) an order under clause 127(1)3 of the Act removing the prospectusexemptions in sections 72 of the Act in respect of the distribution of rightsunder the Plan and in respect of the exercise of those rights.

A similar application was made to the Quebec Commission.

Hearing

A joint hearing in respect of Ivanhoe's application was held by the Commission and theQuebec Commission on January 19, 1999.

Mr. Steep, on behalf of Ivanhoe, called two witnesses, Tremblay and Peter Buzzi ("Buzzi")a vice-president and director of DS.

Tremblay described the discussions which had taken place between Ivanhoe andCambridge, the background of the Bid, and other matters. As regards Ivanhoe'swillingness to extend the time for acceptance of the Bid, he said the following.

"We have no intention as of this date to extend this offer and our offer will endJanuary 21st, and the reason is, as I stated before, it is that we have otheropportunities and we have to remove this uncertainty, or an incertitude on thisinvestment, and we have to decide what we will do. I think for the shareholders,too, but for us, too, because we have, as I said, other opportunities, and I don't wantto penalize our relationships with other potential partners that we could have inEurope, for instance."

Buzzi, amongst other things, expressed DS's view that Morgan Stanley's value range wastoo high, and that it was not reasonable to expect other offers to come forward for anumber of reasons, including Ivanhoe's substantial ownership of Shares.

Mr. McDougall, on behalf of Cambridge, also called two witnesses, Ronald and DanielSullivan ("Sullivan"), a deputy chairman and member of the executive committee of ScotiaMcLeod.

Ronald also described the discussions which had taken place between Ivanhoe andCambridge, as well as the reasons for Cambridge's actions, and other matters.

Sullivan described, among other things, the number of confidentiality agreements in placewith other potential bidders, the progress in attempting to achieve other offers for theShares, and the likelihood of such other offers coming forward. Sullivan stated that:

- "we are pleased with the progress that we are making and we think that thereis a reasonable prospect of coming up with other offers"

- "we think that, given the uniqueness of the opportunity there is a reasonablelikelihood that there is going to be another offer or offers" and

- "In my opinion, I think there is a good chance that another offer or offers aregoing to emerge."

Analysis of Issues

The two principal issues which had to be considered by the Commission were:

1. in view of the facts that the Plan had been adopted in the face of the Bid andhad not received shareholder approval, should it be permitted to stand; and

2. if the Plan was permitted to stand, had the time come for it to be terminatedby the Commission.

The general position with respect to a rights plan put into place in the face of a bid andwithout a vote of shareholders was enunciated by the Commission in *In the Matter of CWShareholdings Inc. and WIC Western International Communications Ltd.* (1998), 21OSCB2899 at p. 2908, where the Commission said the following:

We conclude that the Bid is in no way coercive. Holders of Class B Shares are freeto respond to the Bid if they consider that it is in their best interest to do so, and arealso free to retain their Class B Shares if they would prefer to take their chances onthe future of WIC. There is no change of control as a result of the Bid which wouldalter their position.

The Rights Plan was put into place in the face of the Bid and without a vote ofshareholders. In such circumstances, it is, at the very least, necessary for the targetcompany to demonstrate that it was necessary to do so because of the coercivenature of the Bid or some other very substantial unfairness or impropriety. This wasnot done by WIC in this case.

The Bid would have given Ivanhoe control of Cambridge, but leaving outstanding a verylarge minority position. The Bid was made at a price below the value range for the Sharesestablished by Morgan Stanley in its valuation report.

In its directors' circular, the Cambridge board made the following statement.

"The Offer is "partial bid". A partial bid structure is inherently coercive because itforces shareholders to make a decision as to whether to accept an offer (and inrespect of how many shares), reject such offer, sell into the market or maintain theirposition without knowing whether and to what extent other shareholders will acceptsuch offer and without knowing the price at which the shares will settle after suchoffer. A shareholder may feel compelled to deposit to a take-over bid which theshareholder considers inadequate, out of a concern that in failing to do so, theshareholder may be left with illiquid or minority discounted shares. Informationabout tender and post-bid trading price is obviously material to a shareholder'sinvestment decision since the extent to which any one shareholder can have itsshares purchased at the Offer price, as opposed to sold in the market at the post-bid settled price, depends on the extent to which other shareholders tender theirCommon Shares to the Offer."

In general, we agree with this statement.

In our view, the Bid was coercive since it put pressure on minority shareholders to disposeof whatever shares they could before being locked into a minority position. There was noassurance whatsoever that Ivanhoe would ever bid for the remaining minority shares.

The evidence was that, because of the already large institutional shareholdings inCambridge, the market for Shares was a relatively illiquid one. In our view, if the Bid issuccessful, the market for the shares will likely become an even less liquid one.

Accordingly, what the Commission described in *Regal* (see below) as the "fear factor" wasin our view likely to exist.

Had we not concluded that the Bid was coercive, we would have immediately cease tradedthe Plan, since we agree with the Commission's determination in WIC that, if a rights planis put into place in the face of a bid and without a vote of shareholders, it is, at the veryleast, necessary for the target company to demonstrate that it was necessary to do sobecause of the coercive nature of the bid or some other very substantial unfairness orimpropriety. We have concluded that the Bid is in fact coercive. In the circumstances, wedo not consider that it would be in the best interest of the holders of Shares toautomatically cease trade the bid because it was put into place in the face of the Bid andwithout a vote of the holders of Shares.

Has the time come?

The issues to be considered in determining whether the time to terminate the Plan hascome were outlined by the Commission in its decision in *In the Matter of MDC Corporationand Regal Greetings & Gifts Inc.* (1994), 17OSCB 4971 at p. 4979, as follows:

In our view, the question of "has the time come" cannot be answered merely bycounting the number of days which have passed since the announcement of a bid.The number of days, by itself, is not determinative in the absence of convincingevidence that "the interests of the --- shareholders would actually or potentially beharmed" (to quote *Lac*).

It is true that *Jorex* teaches that "there comes a time when the pill has to go".However, this is not to say that, once a take-over bid has been made, a shareholderrights plan can have no effect, and that it must automatically be struck down by theCommission so as to allow the bid to proceed at the stated expiry date of theacceptance period of the bid. If there appears to be a real and substantialpossibility that, given a reasonable period of further time, the board of the targetcorporation can increase shareholder choice and maximize shareholder value, then,absent some other compelling reason requiring the termination of the plan in theinterests of shareholders, it seems to us that the Commission should allow the planto function for such further period, so as to allow management and the board tocontinue to fulfil their fiduciary duties.

In our view, our determination of where the public interest lies required us, in thiscase, to consider two principal questions.

1. If the Plan is permitted to remain in effect for a reasonable further period, isthere, on the evidence, a reasonable possibility that a better offer will comealong during the period so that, whether or not this results in MDC raising itsbid, the shareholders of Regal will be advantaged?

2. If the Plan is not terminated prior to the end of the current period for theacceptance of the bid, is it likely that RGG will not extend the period foracceptance for such "reasonable further period", and thus deprive the Regalshareholders of the opportunity to decide whether they wish to accept theRGG bid?

Buzzi attempted to convince us that there was no reasonable possibility that a better offerwould be forthcoming. Tremblay attempted to convince us that Ivanhoe would not extendits offer if we allowed the plan to remain in effect.

On the other hand, Sullivan attempted to convince us that there was in fact a reasonablepossibility that a better offer would come along before February 15, 1999.

We have concluded that there is such a reasonable possibility. We also concluded thatthere was every reason to believe that, if we allowed the Plan to remain in effect for areasonable period of time, Ivanhoe would in fact extend the bid. In these cases biddershave a tendency to try to convince us that their bids will not be extended, but in fact theyalmost always are. (We note that, following the hearing, Ivanhoe did, in fact, extend thetime for acceptance of the Bid.)

Independence of the Special Committee

Mr. Steep, on behalf of Ivanhoe, argued that, because the CN Fund was the next largestshareholder to Ivanhoe in Cambridge, because Ivanhoe had in the past made a higheroffer to the CN Fund for its Shares than that contained in the Bid, and because the CNFund had an advantage not available to other holders of Shares in its representation onthe Cambridge Board, Cedraschi could not be considered an independent director, andaccordingly we should be sceptical of any views expressed on behalf of the SpecialCommittee as to share values or other matters.

We did not find this argument to be convincing. In our view, a representative of asignificant institutional shareholder who nevertheless forms part of the shareholder groupwhose securities are being bid for has, at least in the circumstances of this case, the sameinterest as the other offeree shareholders, and should be considered to be independent.

Bona fides of Special Committee

In *In the Matter of Lac Minerals Ltd. and Royal Oak Mines Inc.* (1994), 17 OSCB 4963 atp. 4970, the Commission expressed its reluctance to interfere with the board of a targetcompany's ability to carry out its duties under corporate or fiduciary law except to the extentthat it was necessary to do so in the interests of the target company's shareholders. TheCommission said the following:

"Except to the extent that we believed it was appropriate to do so in the interest ofthe Lac shareholders, we were reluctant to interfere with the Lac Board's judgementon the continued use of the Lac Rights Plan, particularly when to do so might relievethem of their duties under corporate or fiduciary law. Our reluctance was influencedby the fact that, unlike in the *Canadian Jorex* case, the Chairman of the Lac Boardindicated that he expected that they could develop a transaction that would creategreater value to shareholders within a limited period of time.

The Lac Board was charged with fiduciary duties to act in the best interests of thecorporation. If the board were to fail to properly carry out those duties it would beresponsible to the Lac shareholders. Such duties extended to the use of defensivetactics, such as the Lac Rights Plan, in the face of a take-over bid.

The position of the Lac Board was that it was doing what was expected of it underthe Lac Rights Plan and that it was attempting to maximize shareholder value. Wewere satisfied that in this case the Lac Board understood its responsibilities."

Although, in our view, it was improper for Ronald to tell Tremblay that, if Ivanhoe did notmake the offer that the Special Committee wanted, Ivanhoe should not proceed with itsproposed offer, we are satisfied from the evidence that the Special Committee otherwiseunderstood its fiduciary obligations, and was acting in a bona fide attempt to increase thechoices available to the holders of Shares and to maximize shareholder value. Indeed,Tremblay acknowledged as much. When asked whether he would not agree that, in theway they had conducted the process so far, the Special Committee had done what theybelieved to be in the best interests of the Cambridge shareholders as a whole, Tremblayresponded "I agree with you there, in the way that what they believed it was in the best ofinterests, yes."

Decision

Accordingly, at the conclusion of the hearing we announced our decision that the time hadnot yet come and that we were prepared to leave the plan in effect until February 15, 1999.However, we stated that, if the plan remained in effect on February 16, 1999 at thecommencement of business, an order would automatically issue cease trading the plan.

February 19th,1999.

"J. A. Geller" "H. M. Meyer" "David Brown"

Indexed as:
Laserworks Computer Services Inc. (Re)

Between
3004876 Nova Scotia Limited, appellant, and
Laserworks Computer Services Inc., respondent

[1998] N.S.J. No. 60

165 N.S.R. (2d) 296

37 B.L.R. (2d) 226

6 C.B.R. (4th) 69

78 A.C.W.S. (3d) 19

Docket: C.A. No. 141313

Nova Scotia Court of Appeal
Halifax, Nova Scotia

Freeman, Pugsley and Cromwell JJ.A.

Heard: December 9, 1997.
Judgment: February 13, 1998.

(41 pp.)

The Bankruptcy And Insolvency Act R.S.C. 1985, c. B-3; Proposals; Rejection of votes; Improper purpose; Class voting; Substantial injustice.

The Respondent made a proposal under the Bankruptcy and Insolvency Act (the BIA). The Appellant, a competitor but not previously a creditor, acquired sufficient claims to defeat the proposal and voted them over the respondent's objection at a meeting of creditors. At the hearing into the objection the Registrar disallowed the votes, finding they were exercised for an improper purpose, and restored the proposal. His decision was upheld on an appeal to the Supreme Court of Nova Scotia, where it was also found the appellant had breached requirements for class voting. The appellant appealed on the main grounds that the appellant's motive was not proven and in any event, not relevant.

Issue: The chief issue was whether the court's supervisory jurisdiction should be invoked to interfere in a proposal to creditors when it appeared the statutory process was being used for purposes not contemplated by Parliament.

Result: The appeal was dismissed with costs. The court's supervisory jurisdiction extended to proposals as well as petitions. Courts are empowered to remedy substantial injustice resulting not from motive alone but from use of the provisions of the Act for an improper purpose: tort-like behavior such as abuse of process or fraud in the bankruptcy context.

Counsel:

James A. Musgrave, for the appellant.
Roy F. Redgrave, for the respondent.
D. Bruce Clarke and Pamela J. Clarke-Priddle, for the respondent-trustee.

THE COURT: The appeal is dismissed, per reasons for judgment of Freeman J.A., Pugsley and Cromwell JJ.A., concurring.

1 **FREEMAN J.A.**:-- The respondent LaserWorks Computer Services Inc., a dealer in supplies for laser printers, made a proposal to its creditors under the provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the BIA).

2 A competitor, Datarite, operating through the appellant 3004876 Nova Scotia Limited, acquired the claims of eighteen creditors and voted them over the objections of LaserWorks at the meeting of creditors, defeating the proposal. Only two of the remaining sixteen creditors opposed the proposal.

3 Acceptance required votes representing a majority in number and two-thirds in value of the class of unsecured creditors present in person or by proxy. The Registrar of Bankruptcy of the Supreme Court of Nova Scotia in Bankruptcy, Tim Hill, found:

> Upon the vote being taken, fourteen creditors with a total claim value of $206,531.65 voted in favour of the proposal. Twenty creditors with a total claim of $140, 370.00 voted against the proposal. Thus 41% of creditors representing 59% of the claims voted pro, and 59% of the creditors with 40.5% of the claims voted con. The proposal was defeated, subject to the resolution of the objections before the court today.

4 At the hearing into the objections the Registrar, after hearing evidence from the appellant's solicitor Victor Goldberg, who was not counsel on the appeal, disallowed the appellant's votes. He found the proposal had been accepted by the votes of the other creditors. His decision was upheld by Justice Stewart on an appeal to the Supreme Court of Nova Scotia in Bankruptcy.

Issues and Standard of Review

5 The overriding issue is whether the court's inherent supervisory jurisdiction should be invoked to interfere in a proposal to creditors under the BIA when it appears the statutory process is being used for purposes not contemplated by Parliament.

6 The appellant submits it was a true appeal before Justice Stewart, and not a hearing de novo, on the authority of Re McCulloch Estate (1992), 13 C.B.R. (3d) 201 (Tr. Div.) and Cockfield Brown Inc. (Trustee of) v. Reseau de Television TVA Inc. (1988), 70 C.B.R. (N.S.) 59 (Que. C.A.) On further appeal to this court the grounds are whether Justice Stewart erred in:

> 1. Failing to reverse the Registrar's finding that 18 creditors of LaserWorks assigned their rights to the appellant;

2. Sustaining the Registrar's finding that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors;

3. Sustaining the Registrar's finding that the Appellant's purpose in acquiring and voting the claims was relevant; and

4. Concluding that there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant.

7 An appeal lies to this court under s. 193 of the BIA which reads in part:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> ....
>
> (e) in any other case by leave of a judge of the court of appeal.

8 The appellants assert future rights are involved and no leave is necessary. The respondents take no issue with this. Neither is issue taken with the jurisdiction of the Registrar and Justice Stewart to deal with the matters in question pursuant to the BIA. The issue is whether they erred.

9 The appellant's submission with respect to the standard of review is that:

> . . . the Registrar's discretion will not be disturbed on appeal unless he failed to consider or misconstrued a material fact or violated a principle of law. If the Registrar did not appreciate the nature of the evidence before him, it was open to the Supreme Court to substitute its discretion for that of the Registrar. There is also authority that the Registrar's decision should not be disturbed unless it was clearly wrong: Re Achilles (1993), 23 C.B.R. (3d) 20 B.S.S.C.).

10 It cites Industrial Acceptance Corp. v. Lalonde, [1952] 2 S.C.R. 109 p. 120; Re Gilmartin (a bankrupt), [1989] 2 All E.R. 835 (Ch. D.) p. 838; and Re Barrick (1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.) p. 290. In Industrial Acceptance Estey J., writing for the Supreme Court of Canada, held at page 120 that:

> A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law.

11 The respondent LaserWorks urges that this court should only substitute its own discretion when the Registrar is clearly wrong. Apparent failure by the Registrar to appreciate the nature of the evidence before him is too low a threshold:

> The court in Re Barrick ((1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.)) substituted its discretion for that of the trial judge only after ruling that he misapplied a legal test. Justice Taggert, at page 290, gives three reasons the Court of Appeal should substitute its discretion for that of the trial judge:

> In these circumstances, it would seem to me that the learned judge has not applied the correct test, has not given the effect that ought to be given to the trustee's report and has not appreciated the nature of the evidence which was before him. In these circumstances, I think we are justified for substituting our discretion for that of the trial judge.

12 On that basis the respondent submits the first three grounds of appeal fail.

13 The Trustee under the Proposal submits that "the Appellant has not satisfied the onus upon it in this appeal to overturn the decision of the Honourable Justice Stewart to decline to substitute her discretion for that of the Registrar."

14 The respondent also referred to the principles stated by McLachlin, J., in Toneguzzo-Norvel (Guardian Ad Litem of) v. Savein and Burnaby Hospital, [1994] 1 S.C.R. 114 at page 121, which this court has followed consistently:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see P.(D.) v. S.(C.), [1993] 4 S.C.R. 141, at 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as Geffen v. Goodman Estate, [1991] 2 S.C.R. 353, at 388-89 (per Wilson J.), and Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, at 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

15 These principles apply in bankruptcy matters, and provide guidance when, as here, the Registrar's findings have been upheld by a judge of the Supreme Court.

The Registrar's Decision

16 The Registrar based his decision on the following findings:

> Before turning to deal with these submissions, it is essential that I make some findings of fact. In large part the facts are uncontested. No affidavits were filed, but counsel agree that I may rely on the minutes of the meeting of creditors, the testimony by Mr. Goldberg upon the section 163(2) examination, and the list provided by Mr. Goldberg in compliance with his undertaking on the examination.
>
> I find that Datarite through its solicitor approached some but not all of the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently rights to vote on the proposal. The claims were obtained and the votes utilized to defeat the proposal. This would have the effect under section 57(a) of the BIA of placing LaserWorks into bankruptcy by virtue of a deemed assignment.
>
> I can only conclude that the purpose of Datarite was to effect the bankruptcy of LaserWorks. It is a reasonable supposition that the purpose was to remove a competitor from the marketplace. I find that it was the intention of Datarite to put LaserWorks in bankruptcy.

> I further find that the motive was to lessen competition.
>
> In my view, Datarite was engaged throughout in an improper purpose not contemplated by the BIA, the purpose of which is far removed from the use to which Datarite put it.

17 It is apparent that the Registrar, in speaking of "purpose", included both motive or intent and the steps taken to give effect to that motive or intent. While the record is somewhat sparse, as counsel have remarked, there was evidence in support of these findings. I am not satisfied that the Registrar failed to appreciate the nature of the evidence before him or that he was clearly wrong, or alternatively that he omitted the consideration of or misconstrued some fact, or violated some principle of law. The questions before this court relate to the effect of these findings.

18 The Registrar disallowed the votes of the eighteen creditors represented by the appellant because he considered they had been cast for an improper purpose. In the absence of authority specific to proposals to creditors, he applied jurisprudence related to bankruptcy petitions, stating:

> It has long been held that the court will not grant a petition in bankruptcy where the petition is filed for an improper purpose: Re E. De La Hooke (1934), 15 C.B.R. 485 (Ont. S.C.); Re Pappy's Good Eats Limited (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.); Dimples Diapers Inc. v. Paperboard Industries Corporation (1992), 15 C.B.R. (3d) 204 (Ont. G.D.); Re Shepard (1996), 40 C.B.R. (3d) 145 (Man. Q.B.).
>
> In Hooke the petitioner obtained an assignment of a judgment against the debtor for the sole purpose of filing a petition in bankruptcy and of removing the debtor as a business competitor. In that case, as is the situation in this case, there was no evidence that the debtor had any business dealings with the party seeking to place the debtor in bankruptcy. The petition was dismissed.
>
> In Hooke the court made extensive reference to the decision of the House of Lords in King v. Henderson, [1898] A.C. 720. The comments of James, L.J., at p. 732 are particularly germane here:
>
> > After what Lord Justice Cotton has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings.
>
> Lord Justice Cotton had commented that the proceedings in bankruptcy were not taken to obtain payment of the debt, but rather the debt was purchased for the purpose of taking the proceedings. I would simply add that in light of the decision I make here persons should certainly think twice before they purchase debts in order to defeat a proposal.
>
> It is my opinion that the eighteen creditors are tainted with the improper motive of Datarite. In Pappy's Good Eats the petition was filed by a creditor with a genuine claim. The creditor entered into an agreement with three franchisees of the debtor. This agreement provided that the creditor would prosecute the bankruptcy proceedings while the franchisees financed the proceeding in exchange for a share of the dividends. The motive of the franchisees was to bring about a bankruptcy so as to terminate the franchise agreements between them and the debtor.

> The court found that there had been an improper use of the bankruptcy legislation. The effect of the agreement was to embroil the creditor in the improper objectives of the franchisees who were intermeddling in the proceeding. This tainted the whole proceeding. Clearly where the object of the intermeddling party is to bring about the bankruptcy of the debtor an improper purpose is present. The court will act to prevent such an abuse of the legislation.
>
> The other cases I have referred to, Dimples Diapers Inc. and Shepard also deal with bankruptcy petitions instigated for an improper collateral purpose. In Dimples that purpose was to recover a trademark and a business opportunity. In Shepard that purpose was to obtain control of certain shares.
>
> While this case does not involve a bankruptcy petition, it does involve the placing of Laserworks into bankruptcy. In my view, it would be wrong to allow Datarite to do in the proposal process what it cannot do by petition. Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose. The court will not allow to be done by the back door what cannot be done by the front.
>
> By entering into this arrangement with the numbered company the eighteen creditors have tainted themselves and become embroiled in the improper purpose of Datarite. Their votes cannot stand. If Laserworks has the right to be free of this type of interference the Court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the BIA. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

19 While Datarite was not permitted to vote the claims it had acquired, they remained debts of the insolvent debtor.

Justice Stewart

20 The first ground of appeal to this court, the issue of whether the claims of 18 creditors were actually assigned to Datarite, does not appear to have been a ground of appeal before Justice Stewart.

21 On the next two grounds of appeal, whether the Registrar failed to appreciate the evidence before him in concluding that Datarite's purpose in acquiring and voting the 18 claims was an improper one, and whether such purpose was a relevant consideration, Justice Stewart, in upholding the Registrar, took a different route to arrive at the same conclusion. She stated:

> Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Haldane of the Judicial Committee of the Privy Council in British America Nickel Corporation v. M. J. O'Brien, [1927] A.C. 369 at p. 371 are, no less, here applicable:
>
>> To give a power to modify the terms on which debentures in a company are

> secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, namely, that the power given must be exercised for the purpose of benefitting the class as a whole, and not merely individual members only.

22 And later at p. 373, noting this to be a principle which does not depend on misappropriation or fraud, stated:

> . . . but their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

The court, applying the principle stated by Viscount Haldane, should not sanction a scheme if it appears that the majority have not voted bona fide in the interests of the class as a whole.

Justice Quilliam in an unreported decision of the High Court of New Zealand, Re: Farmers' Co-Operative Organization Society of New Zealand Limited (M 12/97, 4 August 1987) in addressing the very issue of a company whose proposal had been defeated by the votes cast by some of its direct competitors, in circumstances where the majority had the right to bind the minority by statute relied on the principle enunciated in British American Nickel Corp. Inc. v. O'Brien, supra, during the objection to votes application before him. He concluded the votes should be discounted as their votes were cast out of self-interest and not in the interest of the class of creditors as a whole, or of the company. Unlike the present case, he did not determine there was specific activity of an improper purpose other than recognizing the votes were cast by creditors in direct commercial competition with the company.

The Registrar, on his finding of facts, was not faced with a pre-existing creditor voting as it wished for whatever reason. He was faced with a unique set of circumstances where he found the appellant shelf company and Datarite, a competitor of Laserworks, involved a selective, secret arrangement with creditors against Laserworks, an arrangement that would hurt some creditors and favour other creditors, although as competitors rather than as creditors, given its purpose of removing Laserworks from the market place and diverting from it, its asset, the market share, so it could be available to Datarite, all of which would result in the balance of the creditors receiving little, if anything, and Laserworks having been deemed a bankrupt.

23 Justice Stewart found that Datarite was not entitled to use its votes for motives unrelated to the best interest of the creditor group and only pursuant to its own self interest in removing a potential competitor from the market place without regard to the interests of the other members of its class, the other voting creditors. She concluded:

> The Appellant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

24 On the fourth ground she found that while there had been no collusion by the eighteen creditors sufficient to deprive them of the right to vote, the Registrar was justified in determining that in the circumstances Datarite controlled the way the claims were voted. She upheld the Registrar's decision and declined to interfere with it.

Assignment--The First Ground

25 The appellant submits that the judge erred when she declined to address and reverse the Registrar's finding that 18 unsecured creditors of LaserWorks assigned their rights to the appellant. On a proper appreciation of the evidence, it submits, no assignment took place. It states in its factum:

> The appellant did not take issue with the Registrar's finding that four of the 18 creditors received payment for them prior to the vote. . . . Each of the four creditors provided executed assignments and proxies to Mr. Goldberg, and each assignment was completed by payment. The 14 remaining creditors did not receive payment for their claims prior to the vote, and the appellant submits that the learned Registrar failed to appreciate the evidence in this regard when he concluded that the claims of these 14 creditors had been assigned to the appellant before the vote was taken.

26 LaserWorks submits that the Registrar did not decide whether or not the claims voted by Datarite were assigned:

> The conclusion of the Registrar with respect to the assignment issue is:
>
> > Given my findings with respect to the intent and motive of Datarite, I find it unnecessary to consider whether Datarite should have exercised 1 vote or 18.
>
> The reference to 1 vote or 18 relates to the assignment of claims. If the 18 claims had been assigned to the Appellant, the authorities establish that only one vote could be cast on the proposal. The Registrar found it "unnecessary to consider" this issue. We submit that the Registrar would need to consider the issue before making a decision.

27 It seems reasonable that the Registrar did not intend to decide whether the claims were assigned because it would not determine the question before him. Even if the appellant were restricted to voting as one creditor, leaving a majority of creditors in favor of the proposal, the value of the claims voted by the appellant was sufficient to defeat the proposal and thus achieve the appellant's objective.

28 If the claims had been assigned to the appellant, the voting rights would have been merged and the appellant could only cast one vote for the value of the claims it had acquired. If the creditors retained their own claims, the appellant could have voted once for each creditor for whom it held a proxy. There is authority for this proposition and the parties seem in agreement with it. The rationale is clear. Each creditor has a vote, to be exercised in person or by proxy. If the claim is assigned, the assignor ceases to be a creditor. It loses its right to vote in person or to control the vote of the proxy. The assignor becomes a creditor and is able to vote its claim, no matter the amount of the claim. If it acquires the claims of other creditors the amount of its claim increases, but it does not pluralize itself. It remains one creditor, entitled to one vote.

29 The appellant referred to Toia v. Cie de Cautionnement Alta Inc. (1989), 77 C.B.R. (N.S.) 264 (Que. S.C.). The respondent insurance company paid out 19 claims against a bankrupt under a performance bond; each claimant signed a release and subrogated its claims to the respondent, which filed 19 proofs of claim. The Official Receiver permitted 19 votes but the Quebec Supreme Court reversed this, allowing only one vote. The appellant purports to distinguish Toia because "there the respondent completed the assignments by payment prior to the vote."

30 In my view it is of small importance whether the appellant bought for cash or on credit. The situation seems clear when creditors authorize votes on their behalf by proxy: each creditor is entitled to its vote and the proxy may cast votes for several creditors. It is equally clear when a creditor assigns its claim to another creditor: the assignee creditor has only one vote. This was the case with the four creditors whose assigned claims were accepted and paid for by the appellant. It is less clear with respect to the remaining fourteen creditors who had executed assignments to the appellant. The appellant says they had not yet been accepted, pending proof of the claims. However they had to be proven before they could be voted, and their values were proved for the purpose of calculating their percentage of the total of the unsecured claims. Any condition on the assignment would appear to have been met.

31 The intention of the parties must be determined: did the appellant vote those claims on its own behalf, or as an agent exercising the rights of the original creditors by proxy? If it had been necessary for the Registrar to decide this question, there was evidence before him that the original creditors had given control over their claims to the appellant by entering into enforceable contracts to assign them. That is, while the appellant voted the claim in the form of proxies, in fact it had acquired sufficient interest in the claims to vote them in its own right, as assignee, as though the assignments had been fully executed. It is clearly an improper practice for an assignee to purport to vote as the proxy of a creditor which has assigned its claim, thereby ceasing to be a creditor. If Datarite was otherwise entitled to vote at the creditor's meeting, it had one vote for the full value of the claims it had acquired. It was not justified in voting by proxy.

32 I would dismiss this ground of appeal.

Evidence of Datarite's purpose--the second ground

33 Mr. Goldberg testified as follows to Datarite's purpose in buying claims and voting against the proposal:

> Q. Can you tell me the benefit the numbered company will get in the bankruptcy of LaserWorks?
>
> A. Well, the purpose of the numbered company hopefully in buying the claims is that it'll buy the claims at a reduced price and get full payment one day.

34 The appellant states that Mr. Goldberg's evidence was uncontradicted, and submits:

> It is respectfully submitted that the Registrar was clearly wrong in his appreciation of the evidence. The learned Judge concluded that the Registrar made a finding of credibility with respect to Victor Goldberg's evidence on this issue. However, the

> Registrar's decision does not indicate that Mr. Goldberg's evidence on this key issue was even considered. The Registrar simply failed to address Mr. Goldberg's evidence on this issue at all. It is therefore open to this Honourable Court to substitute its discretion for that of the Registrar. It is submitted that the Registrar could only find an improper purpose on the record by overlooking the only piece of direct evidence before him on Datarite's intentions.

35 Mr. Goldberg was obviously only stating his client's ostensible intentions, not its true ones. The Registrar in fact had commented on Mr. Goldberg's evidence after quoting a passage from the minutes indicating how he had responded to certain questions. He said:

> It is not unfair to say that Mr. Goldberg was obtuse to a very great degree. While this does not necessarily confirm suspicion as to the motives of his client, it does explain the concern expressed by the principals of LaserWorks.

36 The evidence before the Registrar included the proposal itself, which shows total liabilities of $585,459 of which $247,651 was unsecured, $334, 838 secured and $2,970 preferred. Assets totaled $306,158 including book debts of $170,000, leased vehicles $ 95,958, stock in trade $18,500, cash in the bank (which was the principal secured creditor) $8,000 plus fixtures, furnishings and equipment. Virtually all of the assets would be subject to security. The overall deficiency is shown as $279,301. It is difficult to see a basis for Mr. Goldberg's client's optimism that it might get full payment for the claims it bought at reduced value, or indeed, to see any significant source of dividends for unsecured creditors, on a bankruptcy.

37 Datarite had not been a creditor of LaserWorks before the proposal. There was evidence, however, that it had been a competitor. The Registrar was entitled to consider the evidence as a whole in making findings of fact and drawing inferences that led him to the conclusion that:

> ... Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose...

38 In my view the Registrar did not fail to appreciate the evidence nor otherwise err in arriving at this conclusion. Neither did Justice Stewart err in upholding him. I would dismiss this ground of appeal.

Is Purpose Relevant? The Third Ground.

(i) The Statute

39 The appellant submits that the trial judge erred in upholding the Registrar's decision that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors, and that its purpose was relevant. In view of the conclusion on the second ground that the Registrar did not err in finding improper purpose, the appellant is left with the relevancy argument. It argues that the authority relied on by the Registrar, De La Hooke, Pappy's Good Eats, Dimples Diapers and Shepard, arises under s. 43(7) of the BIA which deals only with bankruptcy petitions:

> 43(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition. (emphasis added.)

40 It cites the discussion of the discretion thus created in Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada (3d) at p. 2-50:

> Section 43(7) permits the court to dismiss a petition if it concludes "that for any other sufficient cause no order ought to be made". Section 43(7) confers a discretion; the exercise of that discretion must be founded on sound judicial reasoning based on credible evidence and must be exercised judicially according to common sense and justice in a manner which does not occasion a miscarriage of justice.

41 Section 43(7) clearly does not create the supervisory jurisdiction of the court over the bankruptcy regime; it is simply a concrete application of a discretionary power inherent in the scheme of the BIA. Each step in the bankruptcy process, whether initiated by a creditor's petition for a receiving order or a debtor's assignment for the benefit of creditors, is supervised by court officials or the court itself. For example s. 108 in Part V, the Administration of Estates, relates to "any meeting of creditors". At the meeting which gave rise to this appeal the chairman applied s. 108(3):

> 108(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

42 Section 187(9) provides a broad directive:

> 187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

43 The short answer to the question raised by this ground of appeal is that motive or purpose is relevant to a court authorized to remedy substantial injustice.

44 The appellant takes the narrow position that proposals are outside the discretionary supervisory jurisdiction of the court because they are not specifically included in s. 43(7) or some equivalent provision. This submission cannot be sustained.

45 There is a similarity between a creditor's petition for a receiving order under s. 43 and refusal of a proposal. In either case it is something done by a creditor or creditors that places the debtor in bankruptcy, likely against its will. But a proposal is also similar to an assignment: the debtor has itself resorted to protection under the BIA and its proposal will be deemed to be an assignment unless it succeeds in persuading its creditors to accept it in their own best interests.

46 The appellant submits that s. 54 is the provision in the proposals Part of the BIA which corresponds with s. 43(7). S. 54 provides:

> 54(1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

47 While s. 43(7) provides an occasion for the exercise of the court's supervisory jurisdiction, an examination focused on the merits of the petition itself, s. 54(1) does not. Such an examination of a proposal is not necessary at that stage. The validity of the claims voted at the creditor's meeting at which the proposal is accepted or refused is subject to the court's scrutiny under s. 108(3). If the proposal is refused by a regular vote of creditors it vanishes and further examination is unnecessary; the debtor is deemed under s. 57(a) to have made an assignment in bankruptcy and the matter proceeds as on an actual assignment. If the creditors approve the proposal, it is then examined on its merits under s. 59, which provides:

> 59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

48 Proposals are therefore just as much a part of the bankruptcy regime, and just as subject to the supervision of the court exercising an equitable jurisdiction under the statute, as petitions and assignments. In Whiteman v. UDC Finance Ltd., [1992] 3 NZLR 684, Hardie Boys J., writing for the New Zealand Court of Appeal with respect to the New Zealand Insolvency Act, which varies in detail but not in principle from our own, said at p. 691 that proposals are merely

> . . . the other side of the coin to a petition for adjudication.

49 The only distinction between petitions and proposals in the exercise of the court's supervisory jurisdiction is that under the scheme of the BIA occasions for judicial scrutiny occur at different stages of the process. In the present appeal, court intervention was occasioned by objections to proofs of claims affecting the right to vote at the creditors' meeting considering the proposal. The correct procedure was followed, and the objections were considered by the Registrar who had jurisdiction under s. 187(9) to remedy substantial injustice.

50 Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the BIA. These are established in several sections, including s. 109(1), persons who had not duly proved and lodged a claim; s. 54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s. 110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s. 111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s. 112, a creditor holding security (subject to conditions); and s. 113 (2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

51 (It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)

52 However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108 (3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in Dimples Diapers.

53 Tortious or tort-like behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See Shepard.) In my view that is why Parliament chose the language it did in s. 187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.

(ii) The Authorities

54 The four cases cited by the Registrar establish that the threshold is crossed when the BIA is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.

55 Farley J. held in Dimples Diapers that:

> . . . the Bankruptcy Act, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of Canada, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

56 In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

57 In a vigorous judgment in Dimples Diapers Farley J. dismissed the bankruptcy petition because it was brought for an improper purpose, to recover the diaper trademark and business opportunity, and awarded damages for abuse of process and conspiracy against three creditors. He held at p. 219:

> ...The tort of abuse of process consists in the misuse of a legal process for any purpose other than that which it was designed to serve. It is immaterial in establishing abuse of process that the process was properly commenced or founded by the defendants and it does not matter that the process be concluded in the instigator's favour. The improper purpose is the gravamen of liability. See Unterreiner v. Wilson (1982), 40 O.R. (2d) 197, 24 C.C.L.T. 54, 142 D.L.R. (3d) 588 (H.C.), at p. 203 [O.R.], appeal dismissed (1983), 41 O.R. (2d) 472, 146 D.L.R. (3d) 322 (C.A.), and J.G.Fleming, The Law of Torts, 7th ed. (Sydney: Law Book, 1987) at pp. 591-592.
>
> Potts J. In R. v. Cholkan & Co. v. Brinker (1990), 71 O.R. (2d) 381, 1 C.C.L.T. (2d) 291, 40 C.P.C. (2d) 6 (H.C). at p. 8 [C.P.C.] said:
>
> Most recently, Montgomery J. writing for the divisional Court in Bentham v. Rothbart (1989), 36 O.A.C. 13 (Div. Ct.), stated:
>
> The constituent elements of the tort of abuse of process are: (a) a collateral improper purpose such as extortion; and (b) a definitive act or threat in furtherance or a purpose not legitimate in the use of the process.

58 Montgomery J. was clearly using "extortion" as an example only. Any crime or tort would be an improper purpose.

59 In de la Hooke the petition was dismissed when petitioning creditors, who had had no business dealings with the debtor, obtained an assignment of a judgment debt he owed for the sole purpose of filing a petition in bankruptcy to remove him as a business competitor who was using a similar trade name. Registrar Cook cited a number of leading English cases relevant to the circumstances of the present appeal. These included King v. Henderson, [1898] A.C. 720 at p. 731 which considered abuse of process or fraud on the court; Ex Partre Griffin; in re Adams (1879), 12 Ch. Div. 480 in which a worthless debt was purchased to take proceedings in bankruptcy to force the debtor to give up a just debt, causing Brett L.J. to remark, "a viler fraud I have never heard of"; Ex parte Harper; In re Pooley (1882), 20 Ch. D. 585 at p. 692 in which buying a debt to force a bankruptcy in order to get rid of a trustee was found "a gross abuse of the bankruptcy laws;" and In re a Debtor [1928] 1 Ch. 199 at p. 211 in which the bankruptcy laws were used for the collateral purpose of extortion.

60 In Pappy's Good Eats a petition was denied when three franchisees of the debtor, who were not creditors, contracted with the petitioning landlord, who had a $65,000 unsatisfied judgment against the debtor, to pay the landlord's costs to petition the debtor into bankruptcy so they would be relieved of obligations under their franchise agreements. Henry J. held the effect of the agreement was to "embroil the petitioning creditor in the improper objective of the purchasers who as non-creditors have no status in these proceedings and are intermeddling in it. The whole proceeding is inescapably tainted; the petition must be dismissed." He found that "the abuse occurred when the parties agreed or arranged improperly to use the facility of the Act to advance the objectives of the franchisees to cause injury to the debtor."

61 In Shepard it was found that the purpose of the petitioner was to gain control over certain shares of the debtor, an important business advantage. "It is not appropriate or indeed, correct in law, to have the courts facilitate such an objective when the objective is very clearly the main purpose of the application." This finding is consistent with a finding of substantial injustice resulting from abuse of process.

(iii) The Present Case

62 It is most significant that the appellant was not a creditor of LaserWorks prior to the proposal. Intermeddling by strangers to the pre-existing debtor creditor relationship for an improper purpose was a determinative factor in Pappy's Good Eats. The practice of buying dubious claims against an insolvent for purposes foreign to the bankruptcy process was denounced in the English cases cited in de la Hooke. The Registrar in the present case understandably looked askance at it. Few legitimate reasons come to mind for buying into a bankrupt estate. When somebody does so, it is a matter of common sense to assume, subject to correction, they intend to use the bankruptcy process for some purpose it was not meant for. In the present case it was readily apparent that mischief was afoot.

63 The "orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis" was not the purpose behind the acts of the appellant. The appellant made separate approaches to each of the eighteen creditors whose claims it succeeded in acquiring. It negotiated a separate deal with each for varying considerations presumably seen to be more advantageous to the creditor than reliance on the proposal. From most of them it obtained an agreement, an executed assignment and a proxy. It purported to vote the proxies of former creditors whose claims had been assigned to it. Its purpose was not an orderly recovery of debts from the debtors assets but to limit competition by the debtor in its own marketplace by rejecting the debtor's proposal and forcing it into bankruptcy.

64 The appellant was acting on its own making sharp use of the provisions of the BIA for its own advantage. There was no evidence that the co-operating creditors were part of a conspiracy with the appellant to injure the debtor. Otherwise the tort of conspiracy to injure could be found where the predominant purpose of the appellant's conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful: Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452.

65 It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the BIA to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the BIA. Use of the Act to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.

66 No distinction in principle is possible between the present case and the four cited by the Registrar. He identified the problem and he applied the remedy. He was upheld on appeal in the Supreme Court. I would dismiss this ground of appeal.

Class voting--The Fourth Ground

67 In upholding the Registrar Justice Stewart added a string to his bow by introducing the class voting analysis of Viscount Haldane in British American Nickel. In light of the holdings respecting the second and third grounds of appeal, it is not necessary to the outcome to decide this ground.

68 The appellant submits that the trial judge was wrong in concluding there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant:

> . . . There was no abuse on a minority of the unsecured creditors and no duty was imposed on the Appellant to cause votes to be cast in the best interest of the class. Without such a duty the learned Judge was without authority to consider Datarite's motives and the votes in question should have been allowed.

69 In British America Nickel Viscount Haldane stated that where a power is conferred on a special class, a majority in exercising a power to modify the rights of a minority must exercise that power in the interests of the class as a whole.

> . . . But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member...

70 In the present case the minority creditors saw their alternative of furthering their best interests by voting in favour of the proposal disappear when the votes amassed by the appellant were exercised, not in the interest of making the most favourable recovery from a combination of a distribution of the assets of LaserWorks and its continuance in business as a customer or potential customer, but in the interests of removing a competitor of Datarite. Justice Stewart was concerned that the other creditors, as well as the debtor, suffered from the abusive use of the provisions of the BIA. Of the sixteen creditors who did not assign their claims to Datarite, fourteen voted in favour of the proposal.

71 The rationale for Viscount Haldane's conclusion in British America Nickel was carefully reviewed by Hardie Boys J. in Whiteman v. UDC Finance Ltd. The court found it should not intervene in the refusal of a proposal by creditors including several who were being sued by the debtor, and who therefore had a collateral interest in seeing him out of business.

72 Hardie Boys J. cited the same passage quoted above by Justice Stewart from Vicount Haldane's judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:

> ...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

73 Hardie Boys J. considered Re Farmers' Co-operative, which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed.

> ...In a later development of the same matter, but not now involving the Court's sanction under s. 205, Gallen J. accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the British America Nickel case. Immediately after the passage already quoted, his Lordship said
>
> > Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.
>
> Thus in Pender v. Lushington (1877) 6 Ch. D. 70, 75-76 Jessel MR said there is:
>
> > . . . no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.
>
> While the voting rights conferred by Part XV of the Insolvency Act are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: King v. Henderson [1898] AC 720, Re King, ex parte Commercial Bank of Australia Ltd. (No. 2) [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be

> denied that right because he may have some other motive as well...

74 If the exception made for fraud is broadened to "substantial injustice" I would take Hardie Boys J.'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.

75 A Canadian case supporting a broad interpretation of the right of creditors to vote on proposals is Re Bedard Louis Inc. (1991) 22 C.B.R. (3d) 218. The debtor sued three creditors who had sought to seize his goods before judgment for amounts far exceeding their claims against him. One creditor petitioned for a receiving order, and the Quebec Superior Court rejected the debtor's argument that the petitioner was not a creditor because of the large undecided actions. The debtor was declared bankrupt and later filed a proposal. The trustee refused to let the three creditors vote at a creditors' meeting considering the proposal because of a possible conflict of interest. The Superior Court allowed an appeal against the trustee's decision, and the Quebec Court of Appeal upheld the Superior Court, holding (headnote) that:

> No provision of the Act authorizes the trustee to exclude a creditor whom he considers to have a conflict of interest. The debtor's action for damages against the creditors, which constituted a debt not yet payable, did not strip the creditors of their status of ordinary creditors. By the proposal, the debtor presented the creditors with terms of payment which were different from those provided legally by contract.
>
> The Act was intended to allow the voting of all duly acknowledged creditors. Exceptions to that rule were properly specified in the Act and none of them pertained to a creditor against whom a debtor had filed legal proceedings.

76 The Proposals Part of the BIA recognizes only two classes of creditors, secured creditors who are presumably protected by the security they hold, and unsecured creditors, all the others. This does not appear to meet Viscount Haldane's criterion of a special class bound to exercise its voting rights for the benefit of the class as a whole. That concept seems surplus to and difficult to reconcile with the scheme of the BIA where, as the Quebec Court of Appeal found in Bedard, all duly acknowledged creditors are entitled to vote as they please, subject to exceptions set out in the Act (and the exception for tortious or criminal behavior.)

77 As remarked above, those exceptions reflect the manner in which Parliament dealt with conflicts of interest which might arise in the context of voting on proposals. Parliament has obviously legislated on the subject and cannot be assumed to have created by implication an exception for general, unspecified, conflicts of interest. The mere fact that a creditor is also a competitor of the debtor or otherwise in a conflict of interest with the debtor does not give rise to a statutory exception. The scheme for protecting minority creditors adopted under the BIA was not a class voting concept but rather a system of specific exceptions coupled with a discretionary power in the courts to remedy substantial injustice.

78 It is not necessary to make a final determination on this point. The rational of Justice Stewart's decision is found in her adoption of the Registrar's conclusions as to improper purpose in the following passage:

> The applicant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances

principle of class voting. He did not err in concluding improper purpose is relevant.

79 That is, while the Registrar's decision was consistent with considerations of class voting, he was upheld on his findings of improper purpose.

80 I would dismiss the fourth ground of appeal.

Conclusion

81 The appellant attempted to abuse the provisions of the BIA by using them to intermeddle for an improper purpose with the proposal of a debtor to its creditors, giving rise to a substantial injustice. This affected not only the debtor but the remaining creditors who supported the proposal. The Registrar made no error in discerning this from the evidence and in exercising the court's discretionary jurisdiction to remedy substantial injustice. He was upheld on appeal to the Supreme Court. The appellant's actions are not to be condoned. I would dismiss the appeal with costs which I would fix costs at $3,000 plus disbursements to the Respondent and $3,000 plus disbursements to the Trustee.

FREEMAN J. A.
Concurred in:
PUGSLEY J.A.
CROMWELL J.A.

qp/d/bfd

Court File No.: CV-11-9283-00CL

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

AND IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS INC.
(the "**Applicant**")

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

BOOK OF AUTHORITIES
(returnable 14 February, 2012)

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