Court File No. CV-19-616077-00CL

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

BOOK OF AUTHORITIES OF THE FORMER GENSTAR U.S. RETIREE GROUP COMMITTEE

(Motion on April 25, 2019 for a Representation Order and Reinstatement of Benefits under the Genstar U.S. Plans)

April 23, 2019

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TAB 1

Aveos Fleet Performance Inc. (Arrangement relatif à), 2013 QCCS 5762

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2013

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF :

AVEOS FLEET PERFORMANCE INC. /
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
-and-
AERO TECHNICAL US, INC.
Insolvent Debtors

-and-

FTI CONSULTING CANADA INC.
Monitor

-and-

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
Applicant

-and-

WELLS FARGO BANK NATIONAL ASSOCIATION, as holder of a power of attorney
-and-
CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH, as fondé de pouvoir and administrative agent and collateral agent for the Second Lien Lenders
-and-
AVEOS HOLDING COMPANY, as holder of a power of attorney

-and-

BREOF/BELMONT BAN L.P.
Respondents

-and-

AON HEWITT, as administrator of the pension plans of Aveos Fleet Performance Inc./ Aveos Performance Aéronautique Inc. and the former and retired employees of Aveos Fleet Performance Inc.
Impleaded party

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") and its related entity Aero Technical US, Inc. applied for and this Court issued an initial order ("Initial Order") under the *Companies' Creditors Arrangement Act* [1] ("C.C.A.A.") on March 19, 2012.

[2] Aveos' operations had largely had been shutdown prior to the C.C.A.A. filing. The remainder of its normal operations were shutdown following the C.C.A.A. filing and most of the remaining employees were laid off.

[3] The present litigation pits the rights of a pension fund to obtain priority for the payment of its deficit against the rights of the Respondent secured lenders ("Secured Lenders") to recover their loans and advances.

[4] The Superintendent of Financial Institutions (the "Superintendent") has filed a motion seeking a declaratory judgment which has been contested by the Secured Lenders. The Superintendent is supported by the pension plan administrator, Aon Hewitt ("Aon").

[5] Aveos has maintained neutrality on the aforementioned issue. However, Aveos has made representations on a secondary issue arising from a recent payment received from Air Canada which, according to the manner in which this payment is applied, could reduce the quantum of the priority treatment sought by the Superintendent.

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

Aveos

[50] As indicated, Aveos has taken no position on the principal debate concerning the priority as between the Secured Lenders' security and the deemed trust, over the sum of $2,804,450.00.

[51] Aveos has however taken the position that with respect to the sum received from Air Canada, it has the right to use these funds for the benefit of the employees in accordance with its agreement with Air Canada but more significantly to impute payment against specific amounts as it wishes. Accordingly, Aveos has made it known that it intends to use $600,288.00 of the $5,361,499.00 (i.e. the remaining sum Air Canada was contributing to its October 2007 pension deficit) to pay the Aveos special payments for Aveos' pension deficit which were due and unpaid for February and March 2012 in the amount of $254,950.00 each and an additional $90,388.00 on account of the special payment that was due for the month of April 2012. Such payments would operate to reduce the amount of $2,804,450.00 claimed by the Superintendent to be protected by the deemed trust. Accordingly, with such imputation and if the Superintendent is given priority for such sum, it will be reduced to $2,204,162.00.

[52] The Superintendent and Aon contest this imputation so as to preserve their deemed trust for the full amount of $2.8 million.

[53] The Superintendent and Aon submit that Aveos received the fund from Air Canada in trust (for the former employees of Air Canada). In Québec law, absent agreement, it is the debtor that has the right to impute payment. However, the Superintendent and Aon submit that the debtor of the sum of $600,288.00 is Air Canada and not Aveos since this sum represents the balance of special payments due to defray the deficit for the pension plan with regard to former Air Canada employees.

DISCUSSION

[54] One purpose of insolvency law is to provide for a fair distribution of a debtor's assets given that there is not enough money to pay all creditors [18]. The preferences accorded certain types of claim created by the laws passed by Parliament reflect policy decisions of the legislator. Parliamant decides what is fair.

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[18] Houlden, Morawetz and Sarra, "*The 2012-2013 Annoted Bankruptcy and Insolvency Act*", Toronto, 2012, p. 2.

[55] The statutory mechanism of the deemed trust to protect sums due to the Crown has been given much attention before the courts. While the law appears settled regarding deemed trusts in favour of the Crown, questions remain concerning deemed trust claims of pension funds.

[56] An understanding of the state of the law and the policy reflected in this law requires a survey of the decisions of the courts considering such laws.

[57] The Superintendent did not urge that Section 8(2) P.B.S.A. creates a true trust. In similar circumstances, analyzing similar statutory language, the Supreme Court of Canada in *Sparrow*[19] stated that the deemed trust is not a real one as the subject matter cannot be identified from the date of the creation of the trust.

[58] Clearly, then, either at common law or in virtue of Article 1260 of the Civil Code of Québec ("C.C.Q."), no real trust exists in the present case since the property subject to the trust is not readily identifiable as funds were not segregated as required by Article 8(1) P.B.S.A., but rather, commingled. This situation is common; thus, the need for the legislator to create the deemed trust in Section 8(2) P.B.S.A. to protect sums due to pension plans.

[59] In *Sparrow*, the Supreme Court of Canada was faced with the deemed trust created by Section 227(4) and 227(5) of the *Income Tax Act* ("I.T.A.") [20] in effect in 1997 which read as follows:

> "(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act,* in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (a) deemed by subsection 9(4) to be held in trust for Her Majesty […]
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment , receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

[60] The text is similar to Section 8 P.B.S.A. It should be noted that Section 8(2) P.B.S.A. has not been amended since 1997.

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[19] *Royal Bank of Canada vs. Sparrow Electric Corporation, op.cit.*, para. 31.
[20] R.S.C. , 1985, c. 1 (5th Supp.).

[61] In *Sparrow*, the secured creditor held perfected security interests over the debtors' inventory in virtue of the *Alberta Personal Property Security Act* [21] and Section 178 (now 427) of the *Bank Act* [22].

[62] Gonthier, J. while in dissent agreed with the basic analysis of Iacobucci, J. writing for the majority, that property validly encumbered by security was not attachable by the deemed trust under the I.T.A. [23].

[63] Iacobucci, J. for the majority was explicit on the competition of the deemed trust with the security interests:

> "The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer." [24]

[64] Following *Sparrow*, Sections 227(4) and 227(5) I.T.A. were replaced by 227(4) and 227(4.1) [25] wherein language was added which was subsequently characterized by the Supreme Court as follows:

> 'It is apparent from these changes that the intent of Parliament when drafting Section 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect." [26]

[65] Similar amendments were brought in 1998 to the *Canada Pension Plan Act* [27] and the *Employment Insurance Act* [28] and in 2000 to the *Excise Tax Act* [29]. What is noteworthy in this legislative evolution, is that no similar amendments to overcome *Sparrow* were ever brought to Section 8(2) P.B.S.A.

[66] In the present case, when the deemed trust for the special payments arose, the property of Aveos was encumbered by fixed charges in favour of the

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[21] S.A. 1988 c. P-4.05.
[22] R.S.C. 1985 c. B-1.
[23] Gonthier, J. at para. 39 and Iacobucci, J. at para. 98 to 99.
[24] *Ibid*.
[25] S.C. 1998, c.19.
[26] *First Vancouver Finance vs. M.N.R.*, [2002] 2 S.C.R. 720, para. 28.
[27] R.S.C. , 1985, c. C-8; amendments at S.C. 1998 c. 19.
[28] S.C. 1996, c. 23; amendments at S.C. 1998 c. 19.
[29] R.S.C. , 1985, c. E-15; amendments at S.C. 2000 c. 30.

Secured Lenders. Those fixed charges were created in 2010, except for the security in the Northwest Territories which was perfected in 2011. The deemed trust arose either upon the liquidation of Aveos (which would not have been before the C.C.A.A. filing on March 19, 2012) or at the earliest when a special payment became due following the actuarial valuation report filed in June 2011. Even if the obligation to make the special payments was somehow retroactive to December 31, 2010 (which was not argued by the Superintendent), the fixed charges in favour of the Secured Lenders were already perfected at such date. Moreover, Aveos made the special payments up to and including January 2012 so it is difficult to deem the trust prior to any payments being in default.

[67] Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is at best subordinate to the security of the Secured Lenders.

[68] This Court also agrees with the Secured Lenders second position, that is that the deemed trust to protect or give preferential treatment to the pension special payments is not effective in a C.C.A.A. proceeding at least where secured creditors with prior perfected security are not paid in full, for the reasons which follow.

[69] In the *Century* [30] case, the Supreme Court was called upon to consider whether a statutory deemed trust created under the *Excise Tax Act* [31] would be given effect in a C.C.A.A. matter.

[70] The deemed trust created under Section 222(3) of the *Excise Tax Act* operated "despite (…) any other enactment of Canada (except the Bankruptcy and Insolvency Act)". Section 18.3(1) C.C.A.A. (as it then read) negated the effect of any deemed trust in favour of the Crown except those created under the I.T.A., the *Canada Pension Plan Act* and the *Employment Insurance Act* all for source deductions.

[71] After examining the legislative history, Deschamps, J. writing for the majority, held that Parliament did not intend for the C.C.A.A. to protect the Crown's deemed trust priority for GST claims payable under the *Excise Tax Act*. Deschamps, J. stated that where Parliament's intent is to protect deemed trust claims in insolvency matters, Parliament clearly states so. Absent an express statutory basis for concluding that GST claims enjoy preferred treatment under the C.C.A.A. (or the B.I.A.), no such protection exists [32]. Fish, J. writing minority reasons was even more explicit that the protection of a deemed trust claim in an

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[30] *Century Services Inc. vs. Canada (P.G.), op.cit*.
[31] *Op.cit.*
[32] *Century Services Inc. vs. Canada (P.G.), op.cit*., para. 45.

insolvency requires a statutory provision creating the trust and a provision in the B.I.A. or C.C.A.A. explicitly preserving the effective operation of the deemed trust [33].

[72] In the present case, while Section 8(2) P.B.S.A. creates the deemed trust, there is no provision of the C.C.A.A. that confirms or preserves it.

[73] Parliament has enacted such "preserving" provisions for deductions at source in Section 37(2) C.C.A.A. (see also Section 86(2) B.I.A.). This is a *Sparrow* legacy amendment. There is no such preservation for the Section 8(2) P.B.S.A. deemed trust.

[74] The Superintendent seeks to distinguish *Century* because there, the confirming provisions recognizing the deemed trust were necessary given that Parliament made the Crown an ordinary creditor in insolvencies in 2005. This is now reflected in Section 37(1) C.C.A.A. Thus, it was necessary for Parliament to specifically recognize the Crown deemed trusts for source deductions in Section 37(2) C.C.A.A. lest they be subsumed by Section 37(1) C.C.A.A. and treated as ordinary claims. Since the Section 8(2) P.B.S.A. deemed trust was never rendered ineffective by insolvency legislation (such as Section 37(1) C.C.A.A.) than there is no need for specific confirmation in the C.C.A.A., argues the Superintendent.

[75] Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in *Century* does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the "general rule that deemed trusts are ineffective in insolvency" [34].

[76] More significantly, however, to indicate the intention of the legislator not to preserve the Section 8(2) P.B.S.A. deemed trust, are the 2009 amendments to the C.C.A.A. (and the B.I.A.). Sections 6(6) and 36(7) C.C.A.A. provide that an arrangement may only be sanctioned or an asset sale approved by the court, if provision is made for the payment of certain enumerated pension obligations including obligations under the P.B.S.A. These obligations do not however include special payments but rather are limited to deductions from employee salaries and normal cost contributions of the employer (neither of which is in issue in the present case). Similar protection was given in the B.I.A. for bankruptcy liquidations and receivership sales (see Sections 81.5 and 81.6 B.I.A.).

[77] The protection of Section 6(6) C.C.A.A. is not extended specifically to Section 8(2) P.B.S.A. or generally to special payments for actuarial deficits.

[33] *Ibid,* para. 96.
[34] *Ibid,* para. 45.

Moreover, in the next seminal case of the Supreme Court of Canada dealing with deemed trusts in insolvency, Deschamps, J., in the matter of *Indalex* [35], quotes from the report of Parliament's Standing Committee on Banking, Trading and Commerce to conclude that Parliament considered giving special protection to pension plan members in matters of insolvency but chose not to [36].

[78] The deemed trust in Indalex was a deemed trust under the *Pension Benefits Act* (Ontario) [37] which is legislation similar to the P.B.S.A.

[79] Given that the liquidation of Aveos took place in a C.C.A.A. context and that this statute provides no order of collocation or preference, provincial priorities continue to apply [38].

[80] In Ontario, as disclosed in the *Indalex* case, Section 30(7) of the *Personal Property Security Act* [39], subordinates security interests to the deemed trust created by the *Pension Benefits Act* [40]. Counsel for the Superintendent conceded that there is no equivalent provision in Québec provincial law that would give priority to the deemed trust in the present case. Accordingly, there is no basis for a priority claim for the Section 8(2) deemed trust based on Québec law.

[81] The Superintendent argues that it is unfair that Secured Lenders have a better rank in a C.C.A.A. liquidation vis-à-vis the pension than they would have otherwise. This however is not the case. Section 6(6) C.C.A.A. and Sections 81.5 and 81.6 B.I.A. are in harmony. The special payments are not protected and would not have priority over the rights of a secured lender in any scenario: bankruptcy, receivership or C.C.A.A. regime.

[82] The Superintendent also submits that Parliament's intent should also be gleaned from the amendments to the P.B.S.A. in 2009 limiting the deemed trust to the actual payment deficit and not to the whole actuarial deficiency (see Sections 29(6.2) and 29(6.5) P.B.S.A.) The actuarial deficit of the Aveos non-unionized pension plan is approximately $29,748,200.00. This argument is not however logically helpful to extend the protection of Section 8(2) P.B.S.A. to special payments due by a company under C.C.A.A protection. It is plausible that such an amendment was motivated by Parliament's desire not to subordinate

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[35] *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit.*
[36] *Sun Indalex Finance, LLC vs. United Steelworkers*, *op.cit.,* para. 81 and 82.
[37] R.S.O. 1990, Chapter P-8.
[38] *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit,* para. 51 and 52.
[39] *Op.cit.*
[40] Nevertheless, it was held in *Indalex* that any deemed trust would be superseded by the priority accorded to the interim (debtor in possession) lender by the C.C.A.A. judge because of the doctrine of federal paramountcy.

or dilute ordinary creditors by a mutli-million dollar pension claim. In any event, the argument does not bolster the position vis-à-vis secured claims.

[83] The Superintendent legitimately poses the rhetorical question of what use is the deemed trust? Certainly it is useful for the protection of special payments but only vis-à-vis creditors who do not hold security over the assets of the debtor company which was perfected prior to the deemed trust attaching to the assets.

[84] The beneficiaries of the pension plan may be vulnerable as the Superintendent and Aon submit and as such merit protection for their pension entitlements as a matter of public policy [41]. However, the balance of competing policies is a matter for Parliament whose task is to define policy priorities and to reflect such choices in statutes. As Fish, J. stated in *Century,* legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary [42].

[85] Finally, the Superintendent submitted that paragraph 19 of the Initial Order of March 19, 2011, permitting Aveos to interrupt the payments of the pension plan should be abrogated and that Aveos should be ordered to pay the $2,804,450.00 to the pension fund.

[86] In this regard, an issue arises as to whether the special payments constitute pre or post-filing obligations. Of course, if the obligation is a pre-filing obligation (*albeit* payable in instalments after filing) then it is arguable such amounts be the subject of a proof of claim in an arrangement and not be paid after the C.C.A.A. filing.

[87] The reason advanced that the obligation is pre-filing is that pension entitlement is part of the consideration or remuneration for labour services rendered by employees which in this case were all rendered pre-filing. The undersigned does not think it is necessary to characterize the special payments as pre or post-filing to decide this point in the circumstances of this case.

[88] The interruption of payments to the pension plan has been allowed by C.C.A.A. courts when necessary to enhance liquidity to promote the survival of a company in financial distress [43]. In *Nortel* [44], the company was being put through a sales process and did not appear to be able to continue its normal business operations.

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[41] *Monsanto Canada Inc. vs. Superintendent of Financial Services*, [2004] 3 S.C.R. 152.
[42] *Century Services Inc. vs. Canada (P.G.), op.cit.,* para. 95.
[43] *Sproule vs. Nortel Networks Corporation, op. cit.,* para. 45 and 46; *AbitibiBowaters, op.cit.,* para. 49 and 50.
[44] *Sproule vs. Nortel Networks Corporation, op. cit.*

[89] The situation in the present case was not essentially different on March 19, 2012. However, the unfolding of the facts made it clear in short order that Aveos would not continue in business. Employees were not recalled to continue anything akin to normal business activity. The sales or divestiture process was approved by this Court on April 20, 2012. There were a number of sales and four (4) distributions of funds to the Secured Lenders between October 24, 2012 and October 21, 2013. The Superintendent was or should have been fully aware of the situation. However, no application was brought by the Superintendent or by Aon to vary the Initial Order as sought herein.

[90] Had an application been brought, the Secured Lenders could have decided on a course of action which may have included provoking a bankruptcy or a receivership.

[91] While the undersigned would not go so far as to say that priorities cannot be revisited following a sale, vesting order and distribution as did Campbell, J. recently in *Grant Forest* [45], I do believe that the Court should be extremely hesitant to alter the Initial Order, retroactively, after such a long period of time has elapsed and salient events in the C.C.A.A. process have occurred. As Farley, J. said :

> "Come back relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question." [46]

[92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights, may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" [47] in civil law.

[93] It should also be noted that even in its petition for declaratory relief filed in April 2013, the Superintendent did not seek a modification of the Initial Order. The issue arose at the hearing.

[94] In the circumstance described above, the Superintendent's delay in seeking a modification to the Initial Order appears unreasonable given that the

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[45] *Grant Forest Products Inc. (Re),* 2013 ONSC 5933.

[46] *MuscleTech Research and Development Inc.,* (2006) 19 C.B.R. (5th) 54; see also *Re White Birch Paper Holding Company (Arrangement relatif),* 2012 QCCS 1679, para. 245.

[47] *Banque Nationale du Canada vs. Soucisse et al*., [1981] 2 S.C.R. 339; see *also Baronet Inc. (Arrangement*), 2008 QCCS 288 (Parent, J.) where a three-month delay in a comeback motion was not considered unreasonable.

other parties, particularly the Secured Lenders have relied on that Initial Order, in good faith.

[95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.

[96] Given the conclusion on the priorities over the special payment of $2.8 million it is not strictly necessary to decide whether Aveos may impute $600,288.00 against the $2.8 million.

[97] However, should it become necessary for the parties, the Court will adjudicate on the question.

[98] In Québec law the general principle set out by Article 1569 C.C.Q. is that a debtor has the right to impute payment. Various exceptions and qualifications set out in the C.C.Q. do not apply to the present circumstances.

[99] Here it is agreed that Aveos received the $5.3 million from Air Canada in trust. The Superintendent and Aon plead that if the debtor is not Aveos, but rather Air Canada (who was liable to make the special payments to defray its pension deficit) then it is Air Canada and not Aveos that may impute the payment.

[100] In the opinion of the undersigned, though Air Canada may have been the debtor vis-à-vis Aveos in virtue of the agreement of 2007 (or even the October 2013 agreement), once in receipt of the funds, Aveos is the debtor vis-à-vis the former employees and thus has the right to impute payment.

[101] Even if Aveos holds the funds in trust, Aveos nevertheless has the right to impute payment of these funds since in Québec law, the trustee has "the control and exclusive administration of the trust patrimony" and "has the exercise of all of the rights pertaining to the patrimony" (Article 1278 C.C.Q). The undersigned would include in those rights, the right to impute payment as foreseen by Article 1569 C.C.Q.

[102] Accordingly this Court will declare as such in the conclusions of this judgment.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[103] **DISMISSES** the Motion for a Declaratory Judgment of the Superintendent of Financial Institutions;

[104] **DECLARES** that the rights of the Respondent secured lenders in virtue of their security rank in priority to the deemed trust created by Section 8(2) of the *Pension Benefits Standards Act* for the special payments due by Aveos Fleet Performance Inc. and aggregating $2,804,450.00.

[105] **DECLARES** that Aveos Fleet Performance Inc. has the right to impute payment of the sum of $600,288.00 forming part of the funds received or to be received from Air Canada in the amount of $5,361,499.00 as follows:

105.1. To the instalments for special payments to the Superintendent of Financial Institutions with respect to the pension plan for non-unionized employees of Aveos Fleet Performance Inc. for February 2012 ($254,950.00), March 2012 ($254,950.00) and April 2012 ($90,388.00);

[106] **THE WHOLE**, with costs against the Superintendent of Financial Institutions and Aon Hewitt.

_____

MARK SCHRAGER, J.S.C.

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Me Ari Y. Sorek
Dentons Canada L.L.P.
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Me Bernard Boucher
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Dates of Hearing: October 21 and 22, 2013

TAB 2

Aveos Fleet Performance Inc. (Arrangement relatif à), 2012 QCCS 6796

SUPERIOR COURT

Commercial Division

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

AVEOS FLEET PERFORMANCE INC. /
AVEOS FLEET PERFORMANCE AÉRONAUTIQUE INC.
Insolvent Debtor/Petitioner

and

AERO TECHNICAL US, INC.
Insolvent Debtor

and

FTI CONSULTING CANADA INC.
Monitor

and

NORTHGATEARINSO CANADA INC.
Petitioner

and

CREDIT SUISSE AG CAYMAN ISLANDS BRANCH
Secured creditor

JS 1319

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") is subject to an order under the *Companies' Creditors Arrangement Act* ("C.C.A.A.')[1] It has sold or seeks to sell all of its assets and is not operating its business. Can it invoke Section 32 C.C.A.A. to cancel an executory contract? This is the principal issue before this Court.

FACTS

[2] Aveos and its related entity, Aero Technical US, Inc. (collectively, the "debtors") applied for and this Court issued an initial order under the C.C.A.A. on March 19, 2012. A stay was issued until April 5, 2012, at that time and has subsequently been extended. F.T.I. Consulting Canada Inc. was named monitor. The record of the Court and particularly the orders and reasons of the undersigned indicate that in the hours following the initial order, the entire board of directors (but one) of Aveos resigned. Most of the remaining employees (i.e. those who had not been laid off prior to the C.C.A.A. filing) were laid off immediately following the initial order and the day-to-day operations of Aveos were shut down.

[3] The remaining director signed the affidavit in support of a Motion Seeking the Appointment of a Chief Restructuring Officer ("C.R.O."), in virtue of which Mr. Jonathan Solursh of the firm R.e.I. Consulting Group, an independent consultant, was named C.R.O. and has acted in such capacity since then. The remaining director resigned following such appointment.

[4] Much time and effort were spent in the month following the filing with the emergency situations of a company not having sufficient cash to operate in the normal course, being in possession of property claimed by third parties and having 2800 former or present employees owed millions of dollars in the aggregate. Nevertheless, the C.R.O. quickly concluded with the support of the Monitor that Aveos had to be sold.

[1] R.S.C. 1985, c. C-25

[5] On April 29, 2012, this Court issued an order approving the "Divestiture Process" put forward by the C.R.O. in virtue of which Aveos was offered for sale. The C.R.O. determined that Aveos' three (3) divisions (i.e. engines, components and air frames) should be marketed with a view to separate sales as it was unlikely that anyone would purchase all three (3) divisions. The C.R.O. believed that the value could be maximized by seeking to split Aveos into three (3) enterprises although there was no impediment to any one person acquiring all three (3) divisions. It was certainly hoped that all three (3) divisions would be sold on a going concern basis and would recommence operations and this in the interest of all stakeholders.

[6] As the Court record indicates, at no time did any party bring a motion to end the stay period with a view to petitioning Aveos into bankruptcy.

[7] The C.R.O. and Monitor have reported on an ongoing basis and also gave evidence in the present matter before the undersigned. The Divestiture Process has given rise to over 10 transactions. Unfortunately, only one sale (for the components division) has been made on a going concern basis where approximately 200 jobs should be conserved. However, and significantly, although the process of seeking bids has ended, the C.R.O. and the Monitor testified before the undersigned that a "latecomer" has appeared, and is performing a due diligence investigation with a view to making an offer to acquire the engine maintenance division of Aveos. The engine maintenance equipment remains in the hands of a liquidator but the scheduled auction has now been postponed. The interested party is in the same type of business, so that the tax losses of Aveos may have value as part of the transaction and this could potentially lead to the filing of a plan of arrangement with some benefit for unsecured creditors. Though the engine maintenance contract with Air Canada was sold as part of the Divestiture Process, it represented approximately 55 % of the engine maintenance business. Accordingly, there is a potential value in the business enterprise beyond the liquidation value of the tangible assets.

[8] Against this status update of the C.C.A.A. file is the dispute between Aveos and the present Petitioner, Northgatearinso Canada Inc. ("N.G.A.").

[9] Aveos was created as a result of the C.C.A.A. restructuring of Air Canada. It was the former maintenance department of Air Canada. Initially, it depended on Air Canada's support for payroll and human resources. As part of the process of separating Aveos from Air Canada, Aveos sought to outsource its human resources and payroll departments. To this end, a process to select a service provider was put in place. The goal of Aveos

was to have a completely outsourced human resources and payroll system that would include computer access for employees through a portal where they could access their files and view their status (e.g. benefit accruals) and even input information (e.g. change beneficiaries in insurance plans). The service would include a call center to handle employee questions.

[10] The establishment of the system had many challenges and complicating factors, such as the fact that some Aveos' personnel were Air Canada's employees that had been seconded to Aveos.

[11] Originally, an operating system completely independent from Air Canada and its services providers was targeted for autumn 2010. This date was extended due to extraneous considerations to July 14, 2011, which was fortunate given all of the developmental problems experienced as will be addressed below.

[12] The "Global Master Services Agreement" ("G.M.S.A.") with N.G.A. was signed between Aveos and N.G.A. in January 2011. By the time of the C.C.A.A. filing in March 2012 not all outstanding operational issues had been resolved. The relationship was fraught with frustration on both sides. Aveos felt that N.G.A. took too long to install systems and was unable to provide certain services altogether. Costs ran over those stipulated in the G.M.S.A. for services not covered under the agreement. All of this caused Aveos to lose confidence in N.G.A.

[13] N.G.A. was frustrated by the ongoing changes in Aveos management personnel charged with the implementation of the system, so that from N.G.A.'s point of view, once it finally "educated" one member of the Aveos team he she was replaced so that Aveos throughout did not fully understand what the system was designed to do, and by extension, what the system could not do.

[14] Aveos felt that N.G.A. as the expert should tell it not merely what was needed, but what was missing in the system to address Aveos' needs. Instead, the Aveos' personnel in charge learned piecemeal that features that they wanted or needed were not available or at least not included in the contract price. This situation was severe enough to cause Aveos to engage the services of Deloitte at the beginning of 2012 as a consultant to help Aveos resolve the continuing issues arising during implementation of the services to be provided by N.G.A. under the G.M.S.A.

[15] N.G.A. felt not only did Aveos fail to understand the system, but it provided incomplete or incorrect data to N.G.A. for input and thus further complicated matters.

[16] The problems with N.G.A. were such that Aveos has sought cancellation of the G.M.S.A. not only under Section 32 C.C.A.A. but also Aveos seeks resiliation for cause pursuant to the law of contracts generally based on N.G.A.'s alleged faulty execution of its obligations.

[17] The level of frustration existing between N.G.A. and Aveos continued after the C.C.A.A. filing. The lay-offs and the shut down of day-to-day operations required services not contemplated by the G.M.S.A. Obtaining such services in a timely manner from N.G.A. was the subject of ongoing extensive and tense negotiations over a period of approximately one month. Aveos was now represented by the C.R.O. and his staff with the support of the Monitor.

[18] Before the undersigned, the representative of the Monitor diplomatically described the situation between N.G.A. and Aveos prior to the C.C.A.A. filing as a "failed business relationship". Unfortunately, the situation did not improve during the post-filing period.

[19] Upon learning of the initial filing under the C.C.A.A., N.G.A. communicated with Aveos. The thrust of N.G.A.'s written and verbal communications were either a refusal to continue services under the existing contract and seeking assurance of payment going forward (according to Aveos) or a request as to what would be required given the change of operations and personnel as described above (according to N.G.A). There followed a series of exchanges including numerous conference calls which gave rise, in succession, to three Memoranda of Understanding dated March 26, April 10 and April 13, 2012 which outlined the services to be provided by N.G.A. to Aveos and the pricing in respect thereof.

[20] Aveos had payroll needs because 120 employees had been recalled. Also payroll periods which fell on both sides of the C.C.A.A. filing date required special attention. Certain "claw-back" amounts previously set off against amounts due to employees had to be paid post-filing. Records of employment had to be issued in order for employees to be able to claim benefits from the government unemployment insurance program.

[21] Other ongoing services under the G.M.S.A. were obviously not required as Aveos' operations were not continuing as had been the case prior to the C.C.A.A. filing.

[22] From N.G.A.'s point of view, the demands being made by Aveos were exorbitant mainly because the time delays were extremely aggressive. Many of the services requested were not what the system was designed to do. For example, records of employment resulting from mass layoffs were

not designed into the system, nor were reversing deductions from past pay periods and ledgering these reversals in the former pay period already closed for purposes of data entry. The system had to be (re-)designed to accommodate these needs.

[23] From the C.R.O's point of view, N.G.A.'s performance failures experienced by Aveos pre-filing now continued into the post-filing period. N.G.A.'s difficulty to meet tight time deadlines imposed by the C.C.A.A. circumstances and the exorbitant pricing made it such that Aveos, through the C.R.O., sought and engaged an alternate payroll service provider as of May 1st, 2012. The price for a one-year contract albeit encompassing far less extensive services than those under the G.M.S.A., is one-half of N.G.A.'s monthly fee. Indeed, the representative of the C.R.O. testified that the exorbitant pricing under the three (3) Memoranda of Agreement was only accepted because there was no alternative at that time. As such, $240,000.00 was paid by Aveos to N.G.A. for the 4-week period between the end of March and the end of April 2012.

[24] In one instance, where the payroll included the reversal of amounts previously set off, N.G.A. could not produce the work product at all or at least on time such that the C.R.O. organized staff to produce 800 pay cheques manually. Moreover, the data in question was entered into the database by N.G.A. in the current as opposed to the old, pre-filing period in consideration of which the payments were being made. This caused Services Canada to question whether the employees were indeed eligible for Unemployment Insurance ("UIC") benefits. Apparently, much energy was expended in order to correct this situation and the results were additional delays for employees to receive their UIC benefits.

[25] Effective May 1st, 2012, Aveos gave notice to N.G.A. that it was cancelling the G.M.S.A. and the three (3) Memoranda of Agreement for faulty performances both pre and post-filing. Alternatively, Aveos took the position that it was cancelling and repudiating the agreements pursuant to its rights to do so under Section 32 C.C.A.A. N.G.A. claims $501,381.00 which is the indemnity provided by the G.M.S.A. where cancellation is for "convenience", i.e. without cause. N.G.A. also claims the sum of $91,377.00 for unpaid services rendered under the three (3) Memoranda of Agreement.

[26] Crédit Suisse, the secured creditor, has taken the position that whatever sums might be due to N.G.A., they fall within the definition of "claim" in Sections 2 and 19 C.C.A.A. and are not post-filing claims as postulated by N.G.A. Thus, any payment would be subordinate to the rights of Crédit Suisse.

ISSUES

[27] Is Section 32 C.C.A.A. available to Aveos as a means to resiliate or cancel the G.M.S.A.?

[28] Aside from Section 32 C.C.A.A., does Aveos have the right to resiliate the G.M.S.A. because of the alleged faulty execution by N.G.A. of its obligations there under?

[29] Does N.G.A. have the right to claim the cancellation indemnity of $501,381.00 foreseen by the G.M.S.A.? If so, is the amount due immediately by Aveos as a claim arising after the C.C.A.A. filing, and as such not subject to the stay of proceedings? In the alternative, is the amount due but subject to be treated as a (pre-filing) ordinary or unsecured claim to be dealt with under an arrangement, if any, or a bankruptcy?

[30] Is the sum of $91,377.00 due immediately for services rendered by N.G.A. to Aveos after the C.C.A.A. filing?

POSITION OF N.G.A.

[31] N.G.A. contends that Section 32 C.C.A.A. does not apply in the circumstances where Aveos ceased to carry on business, is being liquidated and as such will not propose an arrangement to its creditors. N.G.A. argues that Section 32(1)(b) C.C.A.A. does not apply to such a scenario. The purpose of Section 32 C.C.A.A. is to allow a debtor company to rid itself of contractual obligations which are an impediment to an arrangement. Where no arrangement will be filed, Section 32 C.C.A.A. should not apply according to N.G.A.

[32] Moreover, since the G.M.S.A. contains a provision allowing for cancellation without cause, such recourse must be used before reverting to a statutory mechanism to seek cancellation of the contract. In other words, according to N.G.A., Aveos must pay the stipulated cancellation penalty of $501,381.00 to achieve cancellation in such manner rather than having recourse to Section 32 C.C.A.A.

[33] The resiliation of the G.M.S.A. for faulty execution is not available to Aveos because on the facts of the case, N.G.A. is not at fault having fulfilled its contractual obligations at all relevant times.

[34] The $501,381.00 cancellation penalty is not a claim provable within the meaning of the C.C.A.A., but rather is a post-filing claim. This claim arises from the unilateral cancellation of the G.M.S.A. by Aveos after the

C.C.A.A. filing. N.G.A. continued to render services after the filing albeit in a modified manner, at Aveos' request and in order to respond to Aveos' needs in the situation as it unfolded after the C.C.A.A. filing. On or about May 1st, 2012, approximately five (5) weeks after the C.C.A.A. filing, Aveos cancelled the G.M.S.A. and as such the obligation of Aveos to pay the penalty of $501,381.00.00 arose after the filing. Consequently, it is not a provable claim, but rather an amount arising and payable after the C.C.A.A. filing.

[35] Similarly, the $91,377.00 representing charges for services rendered after the filing, and at the request of and as agreed with Aveos, are currently due. This is not a claim provable to be dealt with under an arrangement, according to N.G.A. As such, it should be paid by Aveos immediately, as were the other amounts for services rendered after the C.C.A.A. filing, the whole as pleaded by N.G.A.

DISCUSSION

[36] Section 32 C.C.A.A. provides a mechanism for a debtor company to "disclaim or resiliate" agreements to which it is a party at the time of the initial C.C.A.A. filing. This disclaimer is achieved by notice given by the debtor to the co-contracting party.

[37] The debtor company's notice to disclaim may be contested by the other party to the contract as N.G.A. has done in the present case. It then falls upon the Court to make (or not) an order of disclaimer :

[38] Section 32(4) C.C.A.A. provides as follows :

> "Factors to be considered
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> 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;
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> b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
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> c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[39] On the face of the drafting of Section 32(4) C.C.A.A., the matters listed are not an exhaustive enumeration of the matters that this Court may consider in deciding whether to approve the cancellation of a contract where the notice is contested.

[40] Section 37(4)(c) C.C.A.A. is not in issue in these proceedings because N.G.A. did not allege nor prove any financial hardship arising from the G.M.S.A. There is the obvious lack of revenue stream when the contract is cancelled (approximately $80,000.00 per month), but it was not contended that the loss of this, *per se* constituted, in this particular case, the "financial hardship" to which subparagraph (c) refers.

[41] Section 32(4)(b) C.C.A.A. addresses the issue of whether the cancellation of the contract would "enhance the prospects of a viable" arrangement being made.

[42] The Monitor filed a report and its representative, Ms. Toni Vanderlaan, testified before the undersigned.

[43] The Monitor confirmed that it had approved the proposed cancellation of the G.M.S.A. as foreseen by Section 32(4)(a) C.C.A.A. In so doing, the Monitor considered the cost of continuing the G.M.S.A., which as indicated above represents approximately $80,000.00 per month prior to the C.C.A.A. filing. The alternate provider engaged by Aveos after May 1st (Ceridian), was considerably cheaper at $40,000.00 per year albeit that the scope of the service under the G.M.S.A. provided by N.G.A. was much broader than those provided by Ceridian. In any event, the Monitor determined that the G.M.S.A. was far too expensive given the cash position of Aveos and its payroll and human resources needs in any scenario post C.C.A.A. filing.

[44] In addition to cost, the Monitor concluded that cancelling the G.M.S.A. would enhance the prospect of filing an arrangement. The Monitor underlined that not merely was the G.M.S.A. expensive, but it was undesirable. As stated above, Ms. Vanderlaan summarized the relations between N.G.A. and Aveos at the time of the C.C.A.A. filing as a "failed business relationship". It is clear to the Court that the systems provided by N.G.A. either did not do what they were supposed to do or if they did do what they were supposed to do, then there was a breakdown in communication between N.G.A. as service provider and Aveos as consumer as to what the requirements of Aveos were.

[45] The representative of N.G.A., Mr. Latulippe, referred on a number of occasions to the fact that the representatives of Aveos responsible for the negotiation and implementation of the G.M.S.A. with N.G.A. did not properly

understand what the system was designed to do. This may have been so, but it became evident during the hearing before the undersigned that N.G.A. was lacking in its ability both before and after the C.C.A.A. filing to understand its client's needs and to address them adequately or where that was not possible to explain such inability in a timely and comprehensible fashion. It was therefore not conceivable that Aveos could use the G.M.S.A. going forward because of all of the problems associated with it.

[46] Moreover, the system described in the G.M.S.A. was designed for a company with approximately 3,000 employees. After the C.C.A.A. filing, Aveos only had a fraction of that number on a descending basis. Since the Divestiture Process was based on the premise that no one acquirerer would seek to purchase all three (3) divisions of Aveos, then any possible purchasers would not want the contract based purely on the number of employees. Aside from such consideration, the system did not work very well and the likelihood was that any acquirerer would be an operator in the industry and already have its own payroll and human resources systems in place. The sale or assignment of the G.M.S.A. as part of a sale of assets was not an alternative in the view of the Monitor even absent all the problems experienced by Aveos with the system. Thus, in any possible scenario, the G.M.S.A. was of no use to Aveos and could not enhance, in any scenario, the making of an arrangement.

[47] However, and as stated above, N.G.A. contends that cancellation under Section 32 C.C.A.A. is not available because Section 32(4)(b) C.C.A.A. does not apply. According to N.G.A., there is no discussion to be had about the prospect of an arrangement since early on in the C.C.A.A. process, Aveos shut down its normal operations and went into liquidation mode. Thus, no plan of arrangement will be made, so that an essential element for the application of Section 32 C.C.A.A. is not met according to N.G.A.

[48] The text of Section 32(4)(b) C.C.A.A. does not impose as a condition for resiliation that there be a plan of arrangement or even the certainty that there will be a plan of arrangement filed. Rather 32(4)(b) C.C.A.A. requires that the cancellation of the G.M.S.A. enhance the prospects of a viable arrangement. It is clear from the Monitor's analysis referred to above that the cancellation would rid Aveos of an expensive contract for a system which never functioned in a completely satisfactory manner, and that under the best of circumstances was inappropriate for a company with less than 2,800 employees, and where the relationship with the service provider (both pre and post C.C.A.A. filing) had failed. Viewed in this way, the disclaimer could only enhance the possibility of an arrangement.

[49] It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan [2]. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan.

[50] Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos [3]. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act.[4] Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.

[51] A sales process, particularly when assets are offered on a going concern basis together with intangible property (e.g. customer contracts) can lead to a result where one or several operating business entities similar to those operated by the debtor pre C.C.A.A. filing, continues after the C.C.A.A. process is completed. The ability to file an arrangement can largely be a function of the sales proceeds received and the amounts available to different stakeholders, particularly secured creditors. The point is that the existence of a sales process or "liquidation" does not *per se* mean that an arrangement is not a possibility. The fact that Aveos ceased operations was a function of cash (or the lack thereof), but the sales process was specifically designed to enhance the possibility of going-concern sales. Indeed, the timetable was short, specifically so as to limit the deterioration of critical mass of such things as customer base and labour pool. Despite the fact that only one division (components) of Aveos was sold on a going concern basis through the process, the C.R.O. testified at the hearing that a new prospective purchaser had come forward to possibly purchase the engine maintenance center together with tax losses arising from Aveos' operations. This could result in a plan of arrangement being filed with benefit for unsecured creditors.

[52] Accordingly, in the view of this Court, the shutdown of Aveos' normal operations and the implementation of a sales process does not in itself, eliminate the application of Section 32 C.C.A.A. as argued by N.G.A.

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[2] *Timminco Limited (Re)*, 2012 ONSC 4471 at par. 52 to 57; *Boutique Jacob inc. (Arrangement relatif à),* 2011 QCCS 276 at par. 38 to 41 and 46; *Homburg Invest inc. (Re)*, 2011 QCCS 6376 at par. 103-106; *9145-7978 Québec inc. (arrangement relatif à*), 2007 QCCA 768 at par. 26 to 29.

[3] *Timminco Limited* (Re), op.cit, at par. 52-27

[4] *Sproule vs. Nortel Networks Corporation 2009 ONCA 833; First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299; *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 3367; *Brainhunter Inc. (Re),* (2009) 62 C.B.R. (5th) 41 (ONSC); *Anvil Range Mining Corp. (Re)*, (2002) 34 C.B.R. (4th) (ONCA)

[53] As indicated above, the undersigned has considered the evidence of the C.R.O. with respect to the late bidder. C.C.A.A. issues generally must be decided in "real time" if for no other reason so as to achieve the broad remedial purpose of the legislation[5] of providing a means for financially-strapped enterprises to correct problems and continue in business. This is all the more so in a process such as the Aveos Divestiture Process where the parties' business judgment dictates that the debtor be offered for sale but the parties do not know ahead of time what the outcome of such process will be. The situation evolves constantly and rapidly. The Court's decisions along the way cannot be frozen in time lest those decisions be unrealistic and unhelpful to the process. In any event, even if the undersigned only considered the facts as they were at the date of the notice to disclaim the G.M.S.A. as urged by N.G.A., the undersigned would still be of the opinion that Section 32 C.C.A.A. is available to Aveos for the reasons given above pertaining to the interpretation of Section 32 C.C.A.A.

[54] N.G.A. also submitted that since the G.M.S.A. contains a mechanism to cancel where cancellation for cause under the common law of contracts is not available, then Section 32 C.C.A.A. cannot apply. The argument put forward by N.G.A. is based on the decision in the matter of Hart Stores [6] where Mongeon, J.S.C. held that Section 32 C.C.A.A. did not apply to the cancellation or termination of verbal contracts of employment having no fixed term.

[55] The reasoning in that case was that the mechanism in Section 32 C.C.A.A. was inappropriate to cancel a verbal contract of indeterminate term where the law (Article 2091 of the Civil Code of Québec) provided a mechanism for unilateral cancellation. In this Court's opinion that reasoning does not apply to a written service agreement of determinate term such as the G.M.S.A.

[56] Moreover taken to its logical conclusion, the argument is not really of any help to N.G.A. for the following reason. If Aveos could not rely on Section 32 C.C.A.A. and was obliged to rely on the cancellation for convenience clause in the G.M.S.A., the penalty of $501,381.00 would nonetheless constitute a provable claim payable under an eventual plan of arrangement or bankruptcy.

[57] "Claim" is defined in Section 2 of the C.C.A.A. by reference to the *Bankruptcy and Insolvency Act* ("B.I.A.") [7]. Section 19 C.C.A.A. introduced

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[5] *Century Services Inc. vs. Canada (Attorney General),* [2010] 3 S.C.R. 379
[6] Re *Hart Stores Inc*., 2012 QCCS 1094
[7] R.S.C. *c*. B.-3

in the 2007 amendments which came into force in 2009, includes in claims that can be dealt with under a plan of arrangement the following:

> "19.(1)(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii)."

This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case. Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.

[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the *B.I.A.* which are substantially similar to Section 19 C.C.A.A.).

[59] Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors.

[60] The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors. [8] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9]. The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims [10].

[61] Consequently, N.G.A.'s argument based on the cancellation of the G.M.S.A. without cause after the C.C.A.A. filing date is not helpful to N.G.A., since even if correct, the argument would give rise to a claim provable only.

[62] Moreover, the parties cannot write out part of the C.C.A.A. from contracts. [11] This is against public policy. Parties to a contract cannot exclude in advance the application of the C.C.A.A. It would be offensive to the wording of Section 32 and the C.C.A.A. in general if Section 32 C.C.A.A. could not achieve its purpose as a result of the drafting of the contract which

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[8] *Pine Valley Mining Corporation (Re),* 2008 B.C.S.C. 368 para. 37-42; *Canwest Global Communications Corp. (Re),* 2010 O.N.S.C. 1746, para. 29-31, 33-35

[9] *Canwest Global Communications Corp. (Re),* op.cit.

[10] *Timminco Limited (Re*), op.cit., para. 44

[11] Section 8 C.C.A.A.

the debtor sought to cancel. This would defeat the rehabilitative purpose of the C.C.A.A. and thus would be contrary to the public policy of the C.C.A.A.

[63] Consequently, Section 32 C.C.A.A. is available to Aveos in order to cancel the G.M.S.A. The appropriate order will issue.

[64] Because of the manner in which the Court has answered the first issue set forth hereinabove (i.e. the application of Section 32 C.C.A.A.) it is not necessary to analyse whether Aveos could cancel the G.M.S.A. for cause because of alleged faulty execution by N.G.A. in virtue of the law of contracts generally.

[65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. The Court renders no judgment on whether the amount of any such claim is $501,381.00 or any other amount in the circumstances. That will have to be determined at a later date, if necessary.

[66] The final issue requiring determination is the matter of N.G.A.'s claim for $91,377.00 for system maintenance. This amount represents the fee of $10,153.00 per week stipulated in the memorandum of understanding of April 13th. Such an amount was paid for the period up to the end of April 2012. The $91,377.00 represents $10,153.00 per week for the 9-week period commencing April 30, 2012, i.e. the expiry of the term of the last memorandum of understanding.

[67] N.G.A. needed the data maintained in the system to complete the records of employment ("R.O.E.") for each of the employees. It had contracted to make "best efforts" to complete those R.O.E.s by April 28, 2012. Mr. Latulippe, N.G.A.'s representative, testified that N.G.A. completed all of the R.O.Es by April 28th, except for 50 which were problematic and could not be completed until the end of June. Accordingly, N.G.A. required the data to be maintained until that time. He conceded that there was no explicit agreement in place after April 30, 2012 for Aveos to pay such weekly system maintenance fee.

[68] Even though N.G.A. only contracted to make best efforts to complete the R.O.E.s before April 28th, if N.G.A. needed to maintain the data in the system after April 28th, it was not justified, without Aveos' consent, to charge the $10,153.00 per week to maintain the data in the system. The "best efforts" clause may have attenuated N.G.A.'S obligation to complete by April 28th but did not impose an obligation on Aveos after that date without its consent. It had been agreed after the C.C.A.A. filing that the services to be provided by N.G.A. and paid for by Aveos were set

forth in the memoranda of understanding. There was no obligation to pay for system maintenance after April 28th.

[69] The Court adds that the fact that the cancellation of the G.M.S.A. takes effect according to Section 32(5) C.C.A.A. on the 30th day following Aveos' notice of May 7, 2012 does not entitle N.G.A. to charge for services under the M.G.S.A. not provided nor for services not agreed to under the memoranda of understanding. Accordingly, the claim for $91,377.00 will be denied.

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[70] **DISMISSES** Northgatearinso Canada Inc.'s "Amended Motion to Strike *De Bene Esse* Notice by Debtor Company to Disclaim or Resiliate an Agreement and for Payment of Post-filing Obligations", dated July 9, 2012;

[71] **DECLARES** and **ORDERS** resiliated as of June 6, 2012 the following agreement, namely: "Global Master Services Agreement" between Aveos Fleet Performance Inc. and Northgatearinso Canada Inc. dated June 30, 2010 as amended from time to time including, *inter alia*, by subsequent Memoranda of Agreement".

[72] THE WHOLE with costs against Northgatearinso Canada Inc.

Montreal, November 20, 2012

MARK SCHRAGER, J.S.C.

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Dates of Hearings: September 28, October 18, 19 and 30, 2012

TAB 3

Bloom Lake, g.p.l. (Arrangement relatif à),
2015 QCCA 1351

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025441-155
500-09-025469-156
(500-11-048114-157)

DATE: AUGUST 18, 2015

PRESIDING: THE HONOURABLE NICHOLAS KASIRER, J.A.

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

500-09-025441-155

MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees
APPLICANTS – objecting parties
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC
RESPONDENTS – petitioners
and
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
IMPLEADED PARTIES – impleaded parties

and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY – monitor
and
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by THE SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
IMPLEADED PARTIES – objecting parties

500-09-025469-156

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254
SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285
APPLICANTS – objecting parties
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC
RESPONDENTS – petitioners
and
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
IMPLEADED PARTIES – impleaded parties
and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY – monitor
and
HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by
THE SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA
MICHAEL KEEFER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, as representatives of the salaried / non-union employees and retirees

IMPLEADED PARTIES – objecting parties

and

QUEBEC NORTHSHORE AND LABRADOR RAILWAY COMPANY INC.
IRON ORE COMPANY OF CANADA

IMPLEADED PARTY – impleaded parties

JUDGMENT

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[1] Sitting as judge in chambers pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*[1] ("CCAA") and articles 29, 511 and 550 C.C.P., I am seized of two motions for leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Stephen Hamilton), rendered on June 26, 2015. The Superior Court dismissed contestations made on behalf of the petitioners, who are, respectively, representatives of non-union employees and retired employees (petitioners in court file C.A.M. 500-09-025441-155 and hereinafter designated the "Salaried Members") and the Syndicat des Métallos, sections locales 6254 and 6285 (in court file C.A.M. 500-09-025469-156, hereinafter referred to together as the "Union"). In so doing, the Superior Court confirmed the respondent's request to grant priority to an interim lender charge over claims made by the petitioners based on deemed trusts in pension legislation. The Court also suspended certain payments due under pension plans as well as for post-retirement benefits.

[2] The Union filed an amended motion prior to the hearing. Both motions for leave also ask for orders to suspend provisional execution of the judgment notwithstanding appeal.

I Background

[3] The facts are usefully and completely recounted in the judgment *a quo*.[2]

[4] On May 20, 2015, the CCAA Judge Hamilton, J. granted a motion for the issuance of an initial order to commence proceedings under the CCAA to respondents Wabush Iron Ore Co. Ltd., Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Railway Co. Ltd. (the "Wabush CCAA Parties"). The CCAA proceedings as they concern the Wabush CCAA Parties were joined to CCAA proceedings started some four months earlier involving the "Bloom Lake CCAA Parties".[3]

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

2 2015 QCCS 3064.

3 The pre-existing CCAA proceedings were commenced on January 27, 2015, by an initial order issued by Castonguay, J. of the Superior Court, in respect of Bloom Lake General Partner Ltd., Quinto

[5] Prior to the filing of the motion, Wabush Mines operated an iron ore mine located near the Town of Wabush and Labrador City, in the province of Newfoundland and Labrador, with facilities at Pointe-Noire, Quebec.

[6] The Wabush CCAA Parties are currently involved in a court-ordered sales process, originally commenced in the Bloom Lake CCAA proceedings, whereby they seek to sell assets with a view either to concluding a plan of compromise with their creditors (including the petitioners) or disposing of assets and distributing the proceeds to creditors (including the petitioners).

[7] The Wabush CCAA Parties have two defined pension plans for their employees, one for salaried employees and the other for unionized employees paid an hourly wage. Because some employees work in a provincially-regulated setting in Newfoundland and Labrador and others work in federally-regulated industries, the plans are subject to oversight by both the federal Office of Superintendent of Financial Institutions and the Newfoundland and Labrador Superintendent of Pensions.

[8] Both plans are underfunded. The CCAA Judge set forth estimated amounts to be paid as winding-up deficiencies, monthly amortization payments and lump-sum "catch-up" amortization payments. He noted as well that the Wabush CCAA Parties provide other post-employment benefits ("OPEB"), including health care and life insurance, to certain retired employees. Accumulated benefits' obligations for the OPEBs, as well as monthly premiums required to fund those benefits, are to be paid by the Wabush CCAA Parties. In addition, amounts are due pursuant to a supplemental retirement arrangement plan for certain salaried employees (see paras [4] to [13] of the judgment).

[9] The Wabush CCAA Parties arranged for interim financing (a debtor-in-possession or "DIP" loan) from Cliffs Mining Company, a related company. The CCAA Judge was of the view that the Wabush CCAA Parties' cash-flow was compromised and that the interim financing was necessary to continue operations during restructuring. The Wabush initial order approved an interim financing term sheet pursuant to which the interim lender would provide US$10M of interim financing, on conditions, for the Wabush CCAA Parties short-term liquidity needs during the CCAA proceedings. These conditions included, as the CCAA Judge recorded in paragraph [16] of his reasons, a requirement that the interim lender have a charge in the principal amount of CDN $15M, with priority over all charges, against Wabush CCAA Parties' property, subject to some exceptions. There is a further condition that Wabush CCAA Parties may not make any special payments in relation to the pension plans or any payments in respect of the OPEBs. The initial order granted the interim lender charge of $15M but did not give priority to that charge over existing secured creditors in order to allow the parties to make representations at a comeback hearing.

Mining Corp., 8568391 Canada Ltd., Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Partnership and Bloom Lake Railway Co. Ltd. (the "Bloom Lake CCAA Parties").

[10] At that comeback hearing, the Wabush CCAA Parties sought, *inter alia*, priority for the interim lender charge ahead of deemed trusts created by pension legislation and a suspension of obligations to pay amortization payments in relation to the pension plans and payments for OPEBs. The Salaried Members and the Union contested these matters. The CCAA Judge issued an order on June 9, 2015 granting priority to the interim lender charge, subject to the rights of, *inter alia*, the Salaried Members, the Union and the federal and provincial pension authorities to be determined at a later hearing.

[11] That hearing on June 22, 2015 gave rise to the judgment a *quo* in which the CCAA Judge granted the Wabush CCAA Parties' comeback motion and dismissed the contestations brought by the Salaried Members and the Union.

II The judgment of the Superior Court

[12] The CCAA Judge made numerous findings and rendered different orders, not all of which concern the motions before me. I will limit my comments to those aspects of the judgment relevant here.

[13] After setting forth the context and the arguments of the parties, the CCAA Judge considered the conflict between the super-priority of the interim lender charge and the deemed trusts created by federal and provincial legislation. (His findings in respect of the provincial rules do not concern us directly at this stage).

[14] As to the impact of CCAA proceedings on the deemed trust created by subsection 8(2) of the *Pension Benefits Standards Act, 1985*,[4] the judge wrote "there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency" (para. [72]). He then considered the effect of subsection 8(2) PBSA on the provisions of the CCAA that deal with pension obligations, including subsections 6(6) and 36(7) CCAA that were added to the Act in 2009. Based on his interpretation of the general rule in subsection 8(2) PBSA and the particular rules in the CCAA, the judge concluded, as an exercise of statutory interpretation, that "Parliament's intent is that federal pension claims are protected in […] restructurings only to the limited extent set out in the […] CCAA, notwithstanding the potentially broader language in the PBSA" (para. [78]). In the alternative, he wrote, "the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Subsection 8(2) PBSA such that there has been no triggering event" (para. [79]). Either way, he observed, the deemed trust in subsection 8(2) PBSA did not prevent him from granting a priority to the interim lending charge if the conditions of section 11.2 CCAA were met.

[15] After considering the relevant factors under the CCAA to the facts of the case, the CCAA Judge decided that the proposed sale was in the interests of the Wabush CCAA Parties and their stakeholders as it should lead to a greater recovery. The sale

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[4] R.S.C. 1985, c. 32 (2nd Supp.).

required new financing and, without that financing, it is likely that the Wabush CCAA Parties would go bankrupt. The judge also expressed his view that the terms and conditions of the interim financing were reasonable, and that the security is limited to the amount of the new financing. He then wrote that "[t]his is sufficient for the Court to conclude that the Interim Financing should be approved and the interim lender charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context" (para. [95]). He also found that the terms of the interim lending sheet, including the requirement that the interim lender be granted super priority, were not unusual and that he was not satisfied that the Superior Court had jurisdiction to order the lender to advance the funds on other terms (para. [100]).

[16] The CCAA Judge then gave reasons for his decision to grant the Wabush CCAA Parties' request that their obligation to make special and OPEB payments be suspended. He held that forcing the Wabush CCAA Parties to make special payments would lead to a default under the interim financing arrangement and a likely bankruptcy (para. [112]). He came to the same conclusion in respect of the OPEBs (para. [122]). In so doing, he rejected the argument that the suspension of the OPEBs amounted to a resiliation of the insurance contract under which the benefits are provided, resiliation which would have required notice under section 32 CCAA (paras [127] to [131]).

[17] The CCAA Judge rejected all other grounds for contestation. He confirmed the priority of the interim lending charge over the deemed trusts as set out in the initial order; he ordered the suspension of payment by the Wabush CCAA Parties of monthly amortization payments, of the annual lump sum catch-up payments, and of other post-retirement benefits.

III **The motions for leave**

[18] The two motions raise some similar issues but are different in scope.

[19] The Salaried Members ask for leave to appeal in respect of conclusions relating to two aspects of the judgment.

[20] First, the Salaried Members seek to reverse the CCAA Judge's approval of what they characterize as the termination of OPEBs and of payment of supplemental pension benefits imposed by the Wabush CCAA Parties without proper notice as required by section 32 CCAA. In this regard, the Salaried Members object to the following paragraph in the judgment *a quo*:

> [146] ORDERS the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[21] In argument, the Salaried Members also contended that the CCAA Judge's finding that the Wabush CCAA Parties did not have the funds to meet the $182,000 monthly payments for the premiums to fund the OPEBs and the supplemental pension benefits was mistaken.

[22] Second, the Salaried Members seek to reverse that portion of the CCAA Judge's reasons bearing on the ineffectiveness of the federal statutory deemed trust in CCAA proceedings. They say that to hold the deemed trust priority under the PBSA to be "of no force and effect in CCAA Proceedings on a wholesale basis" is wrong in law. Specifically they state that the deemed trust priority should continue to apply for the benefit of Salaried Members over the assets of the company in future priority distributions (after the DIP and CCAA-ordered priorities). For this second argument, the Salaried Members target the following paragraphs of the CCAA Judge's reasons as they pertain to the effectiveness of the PBSA deemed trust in CCAA proceedings:

> [78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the PBSA.
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

[23] It may be noted that the Salaried Members had initially contemplated objecting to the non-payment of other amounts owing by the Wabush CCAA Parties in respect of the pension plans. But given limits to the Wabush CCAA Parties' cash-flow and the significant amounts of these payments, the Salaried Members chose not to pursue the objections in these proceedings.

[24] As noted, the Salaried Members also ask to suspend provisional execution notwithstanding appeal of this order.

[25] The Union's proposed appeal is somewhat broader.

[26] In respect of the portion of the judgment regarding the deemed trust provided in the PBSA, the Union is of the view, like the Salaried Members, that the CCAA Judge erred in holding that the subsection 8(2) PBSA deemed trust is ineffective in CCAA proceedings. Moreover, the Union disagrees with the CCAA Judge that the pension amortization payments constitute ordinary, unsecured claims under the CCAA rather than trust claims (paras [103] to [118] of the judgment). The Union also says the CCAA Judge was mistaken in deciding that the financing conditions in respect of the interim financial loan were reasonable insofar as those conditions precluded the payment of OPEBs (paras [119] to [133]). The judge should have set aside the unreasonable conditions in the interim lending sheet. Had he done so, the judge would have found

that the Wabush CCAA Parties had the necessary funds to make the payments owed under the plans.

[27] The Union also seeks a stay of provisional execution of the judgment.

[28] It bears mentioning that the Union's motion was filed late. In keeping with section 14(2) CCAA, the Union obtained permission from the CCAA Judge to bring the late appeal, subject to the determination by a judge in chambers of this Court as to whether the appeal is a serious one.[5] None of the parties objected to this way of proceeding and I find the Union's amended motion to be correctly before me.

IV Criteria for granting leave

[29] The test for leave under the CCAA is well known. Writing for the Court of Appeal for Saskatchewan in *Re Stomp Pork Farm Ltd*.,[6] Jackson, J.A. wrote:

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:
>
> 1. whether the issue on appeal is of significance to the practice;
>
> 2. whether the issue raised is of significance to the action itself;
>
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
>
> 4. whether the appeal will unduly hinder the progress of the action.

[30] Judges sitting in chambers of this Court have consistently applied this four-part test to measure the seriousness of a proposed appeal. As my colleague Hilton, J.A. observed in *Statoil Canada Ltd. (Arrangement relative à)*,[7] the above-mentioned four criteria are understood to be cumulative, with the result that if a petitioner fails to establish any one of them, the motion for leave will be dismissed. Hilton, J.A. alluded to the oft-repeated injunction that a petitioner seeking leave to appeal faces a heavy burden given the role of a CCAA judge, the discretionary character of the decisions he or she must make and the nature of the proceedings. He recalled the longstanding cautionary note that motions for leave should only be granted "sparingly".[8]

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5 2015 QCCS 3584, paras [32] to [34] (*per* Hamilton, J.).
6 2008 SKCA 73 (footnotes omitted).
7 2013 QCCA 851, para. [4] (in chambers).
8 *Ibid.*, para. [4].

[31] The grounds upon which a stay of provisional execution notwithstanding appeal may be granted by a judge in chambers are also well known.[9] Applying the principles developed pursuant to article 550 C.C.P. to this case, I note that the petitioners must show that the judgment suffers from a plain weakness; that failing to grant the stay would result in serious harm (sometimes characterized as irreparable harm) to them; and that the balance of inconvenience favours granting a stay.

IV Analysis

[32] Despite the importance of certain of the questions raised in the motions for leave to the practice and to this action, and notwithstanding the *prima facie* meritorious character of some arguments made by the petitioners, I am of the respectful view that both the Salaried Members and the Union have failed to meet the test for leave. In particular, they have not convinced me that an appeal would not unduly hinder the progress of the action.

[33] I shall make brief comments on each of the four criteria in turn.

IV.1 Importance of the questions to the practice

[34] Some questions raised in both motions, to varying degrees, have importance to the practice as that notion is understood in connection with applications for leave brought under sections 13 and 14 CCAA.

[35] The issue of the effectiveness of the PBSA deemed trust in CCAA proceedings raised in both motions meets this first criterion. This issue is not, as the respondent argued, a settled matter. In pointing to the CCAA Judge's comment in paragraph [61] to the effect that "[t]hese are not new issues", respondent has, it seems to me, quoted the judge out of context. It is of course true, as the CCAA Judge observed, that courts, including the Supreme Court, have been called upon to consider the effect of statutory deemed trusts in insolvency on numerous occasions. But as the CCAA Judge's own reasons make plain, the interpretation of the deemed trust protection in subsection 8(2) PBSA in light of amendments made to the CCAA in 2009, in particular subsections 6(6) and 36(7), involve a different exercise of statutory interpretation. In undertaking that work, the judge did have the benefit of principles set out in *Century Services*[10] relating to the conflict between the deemed trust for the GST and the CCRA, in *Sparrow Electric*[11] dealing with a deemed trust in favour of the Crown in respect of payroll deductions for taxation, as well as *Indalex*[12] in which a conflict between provincial deemed trust and federal insolvency law was in part at issue. But these settings were different from that of the case at bar. Others have observed that difficulties arising out of

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9 Recently summarized by the Court in *Imperial Tobacco Canada Ltd*. v. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, para. [14].

10 *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379.

11 *Royal Bank of Canada v. Sparow Electric Corp.*, [1997] 1 S.C.R. 411.

12 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 272.

the interaction between deemed trust rules for pensions and the CCAA persist, notwithstanding the jurisprudence of the Supreme Court on point.[13] Moreover, the narrow issue would be new to this Court and the practice would have a precise consideration of the interaction between the federal deemed trust in subsection 8(2) and the CCAA by an appellate court.

[36] This is not to say that the CCAA Judge was the first to consider the problem. He had the benefit of *Aveos*[14], decided by Schrager, J., as he then was, as well as a scholarly paper on the topic which he cited with approval in paragraph [77]. And while the CCAA Judge and Schrager, J. agree on central aspects of that interpretation exercise, they are not at ones on all points, including the importance of a Crown exception in this context (as the CCAA Judge himself noted at para. [72]). While I recognize the care with which the CCAA Judge examined the question of statutory interpretation, as well as the alternative argument as to whether "any liquidation" within the meaning of subs. 8(2) PBSA includes CCAA proceedings – a point not given full analysis in *Aveos* – the matter of the effectiveness of the federal deemed trust in CCAA proceedings is not settled law and remains important to CCAA practice.

[37] Is the issue raised by the Salaried Members of the proper scope of section 32 CCAA, and the prior notice rule, also of sufficient importance to the practice?

[38] As I will note below, I am of the respectful view that the merits of this argument are less strong. Nonetheless, the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and termination of OPEBs, is one of importance to the practice.

[39] What about the Union's argument that the judge erred in holding that the terms of the interim financing were reasonable?

[40] This decision was one that called upon the CCAA Judge to make a determination of fact and exercise discretion afforded him under the Act, matters generally viewed as less consequential to the practice. Moreover, it would seem to me that the ability of a lender to determine the basis of risk he or she is willing to tolerate in a restructuring is not a matter widely disputed. I have not been convinced that this point, viewed on its own, is important to the practice.

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[13] Scholars have alluded to the different permutations of the deemed trust problem in CCAA matters as important to the practice: see, *e.g.*, Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at 370 *et seq*. and a useful comment by Jassmine Girgis entitled "*Indalex*: Priority of Provincial Deemed Trusts in CCAA Restructuring" posted by the University of Calgary Faculty of Law on the website http://ablawg.ca in which the author comments on the on-going importance of the issue after *Indalex*.

[14] *Aveos Fleet Performance Inc. (arrangement relatif à)*, 2013 QCCS 5762.

IV.2 Importance of the questions to the present action

[41] The decision not to apply the PBSA deemed trust in CCAA proceedings has meaningful negative consequences for both the Salaried Members and the Union. The importance to the action in this regard seems beyond serious dispute.

[42] I agree with the petitioners that the question relating to the suspension or termination of the OPEBs is also significant to the action. The CCAA Judge recognized at para. [126] and again at para. [133] of his reasons that if the Wabush CCAA Parties fail to pay the premiums on the insurance policy, the policy will be cancelled thereby causing hardship to the Petitioners. I agree too with the position of counsel to the Union who argued that aspects of the pension claims may usefully be compared to alimentary claims, and that the hardship in suspending them gives the question sufficient importance to the action.

IV.3 The proposed appeals are *prima facie* meritorious and not frivolous

[43] The arguments brought in service of the petitioners' view that the deemed trust under the PBSA remains effective in CCAA proceedings are not frivolous. While the exercise of statutory interpretation undertaken by the CCAA Judge – which, it should be noted, is not a discretionary exercise in and of itself – shows no *prima facie* weakness, that is not to say that it precludes an arguable case for the other side.[15] There are, in my view, grounds for framing a statutory interpretation argument for the petitioners' position that have *prima facie* merit when one considers, for example, that the CCAA amendments are the product of a complicated evolution; that the CCAA and the PBSA have different policy objectives which may shape interpretation; that the relevance of principles developed by the Supreme Court in other settings to the deemed trusts problem faced in this case is the matter of fair debate; that comparisons might be made with deemed trust regimes from the provinces or other statutes, and more. All of these factors suggest to me that, notwithstanding the strength of the judgment *a quo*, there are *prima facie* meritorious lines of argument that might be pressed on appeal. The parties debated vigorously the scope of "any liquidation" in subs. 8(2) PBSA before me, for example, as they did the proper scope of amendments to the CCAA and the policy they reflect. On the question of the effectiveness of the PBSA deemed trust as raised by the Salaried Members and in the first three grounds of appeal in the Union's amended motion, I am of the view that this criterion is satisfied.

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[15] The gradation between "*prima facie* meritorious" and "frivolous" is not always clear, and the better view may well be that "meritorious" and "frivolous" do not constitute a *summa division* for proposed appeals: see *Statoil*, *supra*, note 7, para. [11]. It is certainly true that the petitioners may have an arguable case – one with *prima facie* merit – but that the judgment *a quo* may still be said to suffer from no apparent weakness: see the helpful comments, albeit in another context, in *Droit de la famille – 081957*, 2008 QCCA 1541, para. [4] (Morissette, J.A., in chambers).

[44] The issue of the proper scope of section 32 CCAA, and the prior notice rule, strikes me, from my disadvantaged position, to be less compelling, but I would not say it is wholly lacking in merit.

[45] Counsel for the monitor argued, in support of the respondents' position that leave should be refused, that this ground of appeal was frivolous. He contended that the CCAA Judge rightly held that section 32 plainly did not apply to the resiliation of the Wabush CCA Parties' insurance contract. Like the respondents, the monitor said the CCAA Judge rightly relied on *Mine Jeffrey*[16] decided by this Court in 2003, and that his analysis of the "tri-partite relationship" between the employer, the insurer and the beneficiary in paragraphs [129] *et seq*. is free from error.

[46] The question as to the applicability of section 32 here is not frivolous, even if *Mine Jeffrey* presents a formidable obstacle to a successful appeal. While not equal in strength, arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit. While I recognize that the test of the relative merit of the arguments proposed can be construed in some circumstances as requiring more than "a limited prospect of success"[17] given the nature of CCAA proceedings, I would not dismiss the motions on this narrow issue on this basis alone.

[47] The Union says the interim lender's conditions should be set aside as unreasonable. I am not convinced that this argument is *prima facie* meritorious.

[48] Counsel for the Union argues strongly that the interim lender should not be allowed to dictate terms to the CCAA Judge or to the stakeholders as a whole by imposing conditions on financing that have the effect of exploiting the vulnerability of the employees and former employees. He says that if the interim lender's conditions were struck as unreasonable, the Wabush CCAA Parties would have access to those funds and that there would be no need to suspend the various payments due to the petitioners.

[49] With respect, this argument strikes me as flawed in two respects. First, it requires an overturning of the CCAA Judge's view – with all the advantages of perspective he has in so deciding – that as a matter of fact the conditions of the interim financing are reasonable. Secondly, the Union has left unanswered the questions raised by the judge concerning the "harsh commercial realities of interim financing" at paragraph [115]. Why indeed should the interim lender advance funds be used to pay someone else's debt, particularly one that is pre-filing and unsecured? Why should a condition of the financing be ignored, effectively forcing the lender to advance funds on disadvantageous terms to

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16 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey Inc*., [2003] R.J.Q. 420 (C.A.).

17 *Doman Industries Ltd.* v. *Communications, Energy and Paperworkers' Union, Local 514*, 2004 BCCA 253, para. [15] (per Prowse, J.A., in chambers).

which it did not agree? It is not a matter of the CCAA Judge being callous or insensitive to hardship faced by vulnerable parties. In my view, the comment of Deschamps, J. for the majority in *Indalex*, as adapted to the setting of federal deemed trusts, is apposite here: "The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries".[18]

IV.4 The appeal will not hinder the progress of the action

[50] The petitioners argue that the Wabush CCAA Parties are undergoing a court-supervised sales process in accordance with timelines and procedures that are supervised by the CCAA Judge with the oversight of the monitor. In the circumstances, they say, the proposed appeal, especially if it were placed on an accelerated roll, would not hinder the progress of the action. They contend, to differing degrees, that the CCAA Judge erred in his measure of the financial vulnerability of the Wabush CCAA Parties. Mindful no doubt of the difficulty that this aspect of the analysis presents to their leave application, the Salaried Members "part company" (to use the expression of counsel) with the Union in framing their appeal more narrowly, in particular in respect of the recognition that the DIP loan enjoys a wider priority than does the Union, and in limiting their claim in respect of the payments that should escape suspension.

[51] Given the findings of fact concerning the fragility of the Wabush CCAA Parties as observed by the CCAA Judge, I find the positions of both petitioners on this point unconvincing. Even the "strategic" decision of the Salaried Members to contest the judgment on a narrower basis does not satisfy this criterion. In my view, both proposed appeals would unduly hinder the action.

[52] My conclusion is based largely on the findings of fact arrived at by the CCAA Judge regarding the vulnerability of the Wabush CCAA Parties at this stage of the restructuring.

[53] In canvassing the circumstances in which the interim financing was put in place, the CCAA Judge observed that the cash-flow position of the Wabush CCAA Parties was compromised with the result that they needed the interim financing to continue even their limited operations during the CCAA process (para. [16]). The CCAA Judge made the following specific findings, which I consider to be findings of fact: (1) that the sale and investor solicitation process in progress are in the interests of the Wabush CCAA Parties and their stakeholders because they will likely lead to a greater recovery; (2) that without new financing, the Wabush CCAA Parties could not complete the sale; (3) that without new financing allowing them to complete the sale, it is likely that the Wabush CCAA Parties will go bankrupt; (4) that the Wabush CCAA Parties and the monitor have not identified any other source of new financing; and (5) that the terms of the interim financing are reasonable (para. [94]).

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[18] *Indalex*, *supra* note 12, para. [59].

[54] When discussing the suspension of special payments, the CCAA Judge observed, at para. [112]:

> [112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.
>
> [Footnote omitted.]

[55] In respect of the suspension of the OPEBs – including what the Salaried Members characterize as the modest premiums of $182,000 per month and the supplemental retirement arrangement plan amount – the CCAA Judge recalled at para. [122] that "[t]he Wabush CCAA Parties do not have any funding valuable to continue to pay any of the foregoing OPEBs, as the Interim Financing Sheet prohibits such payments". In para. [125], the CCAA Judge explained that it was not enough to say, as did the Salaried Members, that $182,000 and the supplemental amount could be found elsewhere if the interim lending sheet prevents them from making the payments: "Given the cash flow statement filed with the Court and the language of the Interim Lender Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds".

[56] These findings of fact, while not immune from review, are deserving of deference on appeal. It is not enough to say, without more, that the amount is a small one in the grand scheme of things, as do the Salaried Members, or that another interim lender could be found without difficulty as the action proceeds. The CCAA Judge decided specifically otherwise. A reviewable error would have to be shown on this point to overcome the strong impression that comes from reading the judgment that granting leave and suspending provisional execution would hinder the action.

[57] In like circumstances, leave has been denied. Recently in *Bock inc. (arrangement relative à)*,[19] my colleague Bich, J.A. declined to grant leave, notwithstanding the presence of a question she characterized as "interesting" for the purposes of an eventual appeal and one in respect of which, like ours, there was a paucity of appellate court consideration. "Granting leave to appeal", she wrote at para. [12] of her reasons, "would most likely jeopardize the course of the action and cause irreparable harm to the debtor company and, consequently, all other stakeholders (creditors, employees, etc.)". Similarly, in *Re: Consumer Packaging Inc.*,[20] a bench of

[19] 2013 QCCA 851 (in chambers).
[20] 2001 CanLII 6708 (Ont. C.A.).

the Court of Appeal for Ontario declined to grant leave in circumstances where conditions set by the interim lender meant that the time and financial constraints that would have come with an appeal were prohibitive: "Leave to appeal should not be granted", wrote the Court at para. [5], "where, as in the present case, granting leave would be prejudicial to restructuring the business for the benefit of stakeholders as a whole […]".[21]

[58] All told, the risk of default on the interim financing and of bankruptcy to the Wabush CCAA Parties is serious. Granting leave would, in this setting, risk hindering the action. If leave were granted, the petitioners would likely obtain, at best, a Pyrrhic victory if they succeeded on appeal.

***

[59] Given my conclusion that leave should be denied, the motions seeking a stay of the judgment pursuant to article 550 C.C.P. are without further object and should be dismissed as well. In any event, the conditions necessary for a stay were not present. While the petitioners have, to be sure, shown that they have an arguable case, they have not pointed to something I would characterize as a weakness in the judgment *a quo*. They did satisfy the burden of showing that the failure to grant a stay would cause them harm. However, the balance of inconvenience – considering the impact that lifting the stay would have on the Wabush CCAA Parties – would not have favoured granting a stay.

[60] Counsel should be commended for their helpful presentation of the matter in dispute.

[61] **FOR THE AFOREMENTIONED REASONS**: the undersigned:

[62] **DISMISSES** the Salaried Members motion for leave to appeal and for a stay, with costs;

[21] As a final observation on this point, it may be recalled that, prudently, the CCAA Judge offered a further observation that gives weight, I think, to the conclusion that granting leave would be inopportune here. He suggested that even if the PBSA deemed trusts were effective in CCAA proceedings, he would have exercised his discretion under the CCAA to grant priority to the interim lender: see para. [95].

[63] **DISMISSES** the Union's amended motion for leave to appeal and for a stay, with costs.

NICHOLAS KASIRER, J.A.

Mtre Andrew J. Hatnay
Mtre Ari Nathan Kaplan
KOSKIE MINSKY LLP
Mtre Geeta Narang
NARANG & ASSOCIÉS
Mtre Nicholas Scheib (absent)
SCHEIB LEGAL
For Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

Mtre Bernard Boucher
BLAKE CASSELS & GRAYDON S.R.L. (MONTREAL)
For Bloom Lake General Partner

Mtre Steven Weisz
BLAKE CASSELS & GRAYDON S.R.L. (TORONTO)
For Bloom Lake General Partner

Mtre Louis Dumont
DENTONS CANADA LLP
For Cliffs Quebec Iron Mining ULC

Mtre Sylvain Rigaud
NORTON ROSE FULBRIGHT CANADA LLP
For FTI Consulting Canada Inc.

Mtre Douglas Mitchell (absent)
Mtre Leslie-Anne Wood (absent)
IRVING MITCHELL KALICHMAN
For Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions

Mtre Pierre Lecavalier
DEPARTMENT OF JUSTICE – CANADA
For the Attorney General of Canada

Mtre Jean-François Beaudry
PHILION, LEBLAND, BEAUDRY, AVOCATS, S.A.
For the Syndicat des Métallos, Section Locale 6254 and Section Locale 6285

Mtre Gerald N. Apostolatos
LANGLOIS KRONSTRÖM DESJARDINS
For the Creditors Quebec North Shore and Labrador Railway Company Inc. and Iron Ore Company of Canada

Date of hearing: August 5, 2015

TAB 4

Bloom Lake, g.p.l. (Arrangement relatif à),
2015 QCCS 3064

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: June 26, 2015

BY THE HONOURABLE STEPHEN W. HAMILTON

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners

And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUS MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises-en-cause

And
FTI CONSULTING CANADA INC.
Monitor

And

HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS,

THE ATTORNEY GENERAL OF CANADA,

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254,

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285,

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, AS REPRESENTATIVES OF THE SALARIED/NON-UNION EMPLOYEES AND RETIREES

Objecting parties

JUDGMENT ON THE MOTION OF THE WABUSH CCAA PARTIES TO GRANT PRIORITY TO THE INTERIM LENDER CHARGE AND TO SUSPEND THE PAYMENT OF CERTAIN PENSION AMORTIZATION PAYMENTS AND POST-RETIREMENT EMPLOYEE BENEFITS (#144), AND RELATED MATTERS

INTRODUCTION

[1] These proceedings raise essentially three issues:

1. Can and should the Court order that the charge in favour of the interim lender rank ahead of the statutory deemed trusts for payments due by the debtors to the pension plan?

2. Can and should the Court suspend the debtors' obligation to pay the special amortization payments to the pension plan?

3. Can and should the Court suspend the debtors' obligation to pay the other post-employment benefits for the retirees?

BACKGROUND

The parties

[2] On May 20, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway

Company Limited (the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *Companies' Creditors Arrangement Act*[1] (CCAA), which was granted on that date by the Court (the "Wabush Initial Order").

[3] Prior to the filing of the motion, Wabush Mines operated the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and the port facilities and a pellet production facility at Pointe-Noir, Québec. Arnaud and Wabush Lake Railway are both federally regulated railways that are involved in the transportation of iron ore concentrate from the Wabush mine to the Pointe-Noir port.

The pension plans and other post-employment benefits

[4] The Wabush CCAA Parties have two defined benefit pension plans for their employees:

- The pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, called the Contributory Pension Plan for Salaried Employees of Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company; and

- The pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, called the Pension Plan for Bargaining Unit Employees of Wabush Mines JV, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company.

[5] Wabush Mines is the administrator of both plans.

[6] Because some of the employees covered by the plans work in Newfoundland and Labrador and because others work in federally regulated industries, the plans are subject to regulatory oversight by both the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), and the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "N&L Superintendent").

[7] The monthly normal cost payments for the plans for 2015 based on a valuation as at January 1, 2014 are $50,494.83 for the hourly plan and $41,931.25 for the salaried plan, for a total monthly normal cost payment of $92,46.08. All monthly normal cost payments in respect of the plans for January through April, 2015 have been paid in full.

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

[8] The plans are underfunded. Based on estimate received from the Wabush CCAA Parties' pension consultant, the Wabush CCAA Parties believe the estimated wind-up deficiencies for the plans as at January 1, 2015 to be a total of approximately $41.5 million, consisting of approximately $18.2 million for the salaried plan and approximately $23.3 million for the hourly plan.

[9] The Wabush CCAA Parties are required to pay monthly amortization payments based on the 2014 valuation of $393,337.00 for the hourly plan and $273,218.58 for the salaried plan, for a total monthly amortization payment of $666,555.58. All monthly amortization payments in respect of the plans for January through April, 2015 have been paid in full, save for a shortfall of approximately $130,000.

[10] In addition to the monthly amortization payments, the Wabush CCAA Parties are also required to make a lump sum "catch-up" amortization payment for the plans estimated to be approximately $5.5 million due in July 2015.

[11] The Wabush CCAA Parties currently provide other post-employment benefits ("OPEBs"), including life insurance and health care, to former hourly and salaried employees hired before January 1, 2013, which vary based on whether retirees were formerly members of a bargaining unit or were non-unionized salaried employees.

[12] As of December 31, 2014, accumulated benefits obligations for the OPEBs totalled approximately $52.1 million. The premiums required to fund the foregoing OPEBs are approximately $182,000 a month.

[13] In addition to the foregoing, there is a supplemental retirement arrangement plan for certain current and former salaried employees of Wabush Mines JV. The obligations under this plan are approximately $1.01 million.

The Interim Financing

[14] Prior to filing the motion for the issuance of an initial order, the Wabush CCAA Parties entered into the Interim Financing Term Sheet with Cliffs Mining Company (the "Interim Lender"). The Interim Lender is a subsidiary of the ultimate parent of the Wabush CCAA Parties.

[15] The cash flow statement filed with the motion for the issuance of an initial order showed that the Wabush CCAA Parties had run out of cash and and were not anticipating any receipts from operations other than two small rental payments, with the result that they needed the Interim Financing to continue even their limited operations for the duration of the CCAA process.

[16] The Interim Financing Term Sheet provided that the Interim Lender would advance a maximum principal amount of US$10,000,000 to provide for short-term liquidity needs of the Wabush CCAA Parties while they are under CCAA protection. The

Interim Lender's obligation to advance funds is subject to a number of conditions and covenants, including the following:

- The Interim Lender will have a charge in the principal amount of CDN$15,000,000 which will have priority over all charges against the Wabush CCAA Parties' property except for certain specified charges;[2] and

- The Wabush CCAA Parties will not make any special payments in relation to the pension plans or any payments in respect of OPEBs.[3]

CCAA proceedings

[17] As a result of the foregoing, the Wabush CCAA Parties asked the Court as part of the Wabush Initial Order on May 20, 2015 to approve the Interim Financing Term Sheet and to create the Interim Lender Charge, but not to give the Interim Lender Charge priority over the existing secured creditors until they had the chance to be heard.

[18] The Monitor filed its Fifth Report in which it recommended that the Court approve the Interim Financing Term Sheet and the granting of the Interim Lender Charge.

[19] Based on the evidence presented at the hearing on May 20, 2015,[4] the Court granted the Wabush Initial Order, including the approval of the Interim Financing Term Sheet and the create of the Interim Lender Charge ranking after the existing secured creditors.

[20] The Wabush Initial Order provided for a comeback hearing on June 9, 2015.

[21] On May 29, 2015, the Wabush CCAA Parties filed their ''Motion for the issuance of an order in respect of the Wabush CCAA parties (1) granting priority to certain CCAA charges, (2) approving a Sale and Investor Solicitation Process *nunc pro tunc*, (3) authorizing the engagement of a Sale Advisor *nunc pro tunc*, (4) granting a Sale Advisor Charge, (5) amending the Sale and Investor Solicitation Process, (6) suspending the payment of certain pension amortization payments and post-retirement employee benefits, (7) extending the stay of proceedings, (8) amending the Wabush Initial Order accordingly", in which they sought various conclusions including (1) an order granting priority to the Interim Lender Charge over all charges against the Wabush CCAA

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2 Sections 7(1) and 8(2) of the Interim Financing Term Sheet

3 Section 25(h), which does specify that the Wabush CCAA Parties shall be entitled to make normal cost payments under defined benefit plans.

4 The Court heard the evidence of Clifford Smith, an officer of the Wabush CCAA Parties, and Nigel Meakin, a representative of the Monitor.

Parties' property, subject to certain exceptions not relevant here, and (2) an order suspending the payment of the special payments and the OPEBs.

[22] In addition, the Wabush CCAA Parties sent a letter on May 29, 2015 to 2,092 retirees and to the union representatives to advise them of the hearing on June 9, 2015 and to advise them that they would present on June 9, 2015 requests that the Interim Lender Charge be given priority over the deemed trusts relating to pension payments and that the special payments and the payment of the OPEBs be suspended.

[23] Prior to the comeback hearing, the Wabush CCAA Parties and the Monitor received various notices of objection, which can be classified into two categories as follows:

(a) the first category of notices of objection were filed on behalf of (1) the Administration Portuaire de Sept-Îles/Sept-Iles Port authority ("SIPA"), (2) the Iron Ore Company of Canada ("IOC"), and (3) MFC Industrial Ltd., and pertained to the reservation of certain contractual rights;

(b) the second category of notices of objection were filed on behalf of (1) the N&L Superintendent, (2) OSFI, (3) United Steelworkers Locals 6254 and 6285 (the "Union"), and (4) Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson in their personal capacity and as the proposed representatives of all non-union employees and retirees of the Wabush CCAA Parties. These notices of objection will be described more fully below.

[24] On June 9, 2015, the Court granted the Wabush comeback motion in part and issued an order, which reserved the rights of SIPA, IOC and MFC as follows:

> [10] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if 'any, of the Administration Portuaire de Sept-Îles/Sept-Iles Port Authority (hereinafter the "SIPA"), vis à vis the Wabush CCAA Parties, including: (i) the rights of the SIPA, acting as successor in the rights of the National Harbours Board, pursuant to the agreement referred to and communicated as Exhibit O-1 in support of SIPA's Notice of objection dated April 13, 2015; and (ii) the rights of SIPA, acting as successor in the rights of the Canada Ports Corporation, pursuant to the agreement referred to and communicated as Exhibit O-7 in support of SIPA's Notice of objection already filed in the Court record and dated April 13, 2015;
>
> [11] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any of the Iron Ore Company of Canada or its related companies (hereinafter the "IOC"), vis-à-vis the Wabush CCAA Parties, including, but not limited to, the rights pursuant to the Subscription Agreement dates August 3, 1959 referred to

in IOC's Notice of objection already filed in the Court record and dated April 13, 2015;

[12] **DECLARES** that this Order approving the SISP as it relates to the Wabush CCAA Parties *nunc pro tunc* is without prejudice to the rights, if any, of MFC Industrial Ltd. ("MFC") if any, vis-à-vis the Wabush CCAA Parties, including pursuant to an Amendment and Consolidation of Mining Leases dated September 2, 1959 and related sub-leases (as amended from time to time) as it relates to the property of Wabush CCAA Parties.

[13] **RESERVES** the right of IOC, SIPA and of MFC to raise any such rights at a later stage if need be;

[25] The Court scheduled a hearing on June 22, 2015 to deal with the remaining requests of the Wabush CCAA Parties in relation to the priority of the Interim Lender Charge and the suspension of the special payments and the OPEBs:

[6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendent of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of those parties in response to the Motion, which shall be heard and determined at the hearing schedules on June 22, 2015;

[...]

[21] **ORDERS** the request by the Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

[22] **ORDERS t**he request by Wabush CCAA Parties for an order for the suspension of payment by the Wabush CCAA parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

[23] **ORDERS** the Wabush CCAA Parties' request for an order for the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries

hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date is adjourned to June 22, 2015;

THE POSITION OF THE OBJECTING PARTIES

[26] Prior to the hearing on June 22, 2015, the parties exchanged outlines of their respective arguments. The four retirees also filed the "Motion for an order appointing the Petitioners-Mises-en-cause as representative of salaried/non-union and retired employees of the Wabush CCAA Parties" seeking to be appointed as representatives of salaried/non-union and retired employees of the Wabush CCAA Parties and to seek funding for their counsel. This motion was granted by consent on June 22, 2015.

[27] The positions taken by the objecting parties can be summarized as follows:

Objection Raised/Objecting Parties	**N&L S.**	**OSFI**	**Union**	**Non-union retirees**
Suspension of Amortization Payments	Objects	Objects*	Objects	Object**
Suspension of OPEBs	—	—	Objects	Object
Superpriority of Interim Lender Charge	Objects*	Objects	Objects	—

* Not in the notice of objection, but in the written argument

** In the notice of objection and the written argument, but partly withdrawn at hearing

[28] Moreover, in its notice of objection and written argument, the Union requests that that one officer from each of the two locals be designated by the Court as the persons responsible for responding to questions from unionized retirees of the Wabush CCAA Parties and providing them with information about their rights and recourses, and that those persons be funded by the Wabush CCAA Parties.

N&L Superintendent

[29] The N&L Superintendent objects to the Wabush CCAA Parties' request for a suspension of the special payments. He argues that the suspension of the special payments sought by the Wabush CCAA Parties contravenes Sections 32 and 61(2) of the Newfoundland and Labrador *Pension Benefits Act, 1997*[5] (the "N&L Act").

[30] He does not raise any objection with respect to the suspension of the OPEBs.

[31] In his notice of objection, the N&L Superintendent also reserved his right to raise additional objections. In his written argument, he adds an argument with respect to the

5 SNL 1996, c. P-4.01, as amended.

priority of the Interim Lender Charge, which he also claims would contravene Sections 32 and 61(2) of the N&L Act.

[32] In addition to the foregoing, the N&L Superintendent also claims in its written argument that the Wabush CCAA Parties are in a conflict of interest when it comes to the administration of the pension plans, and suggests that other, less stringent financing alternatives would have been available.

[33] Finally, the N&L Superintendent further claims that additional information with regards to paragraphs 83 to 91 of the Wabush Comeback Motion needs to be divulged in order for it to be able to properly carry out its statutory duties under the N&L Act, including to assess the financial status of the plans. However, at the hearing, representations were made that information had been provided and no specific order was sought. The Court reserves the N&L Superintendent's rights in this regard.

OSFI

[34] In its notice of objection, OSFI objects solely to the granting of the priority of the Interim Lender Charge, and only inasmuch as this would result of a priming rank over the normal cost payments owing to the pension plans which benefirt from priority under Sections 8 and 36(2) of the *Pension Benefits Standards Act, 1985*[6] ("PBSA").

[35] In its written argument, OSFI instead invokes the statutory deemed trust in connection with outstanding special payments.

[36] OSFI now also challenges the suspension of the special payments on the basis that the Wabush CCAA Proceedings would not constitute a restructuring, but rather a liquidation.

[37] According to OSFI, the impact of the deemed trust is to render any and all amount owing to the pension plans inalienable and exempt from seizure, such that, as a result, the Interim Lender Charge could not obtain a security on those assets.

The Union

[38] In its notice of objection, the Union opposes the suspension of both the special payments and the OPEBs, and seeks an order that the Wabush CCAA parties be forced to make such payments notwithstanding the terms of the Interim Financing Term Sheet.

6 R.S.C. 1985, c. 32 (2nd Supp.), as amended.

[39] In doing so, the Union insists on the hardship such a suspension would cause for the retirees, whose claims are alimentary in nature.

[40] The Union also asks the Court to preserve the rank of the deemed trust for amounts owing to the pension plans, and seeks to have this deemed trust rank ahead of or equal with the Interim Lender Charge.

[41] The notice of objection and the written argument also argue for the appointment of a representative to handle the numerous queries of union members.

Non-union retirees

[42] In their notice of objection, the non-union retirees object to the suspension of the OPEBs and the special payments sought by the Wabush CCAA Parties on the basis of the significant prejudice such relief would cause to the retirees.

[43] In their written argument, they argue that such a suspension would in fact amount to a disclaimer or resiliation of agreements, subject to the provisions of Section 32 CCAA, which it is argued were not respected in the case at hand.

[44] They add that the conditions of the Interim Lender Term Sheet should not allow the Wabush CCAA Parties to circumvent the requirements of said Section 32 CCAA.

[45] At the hearing, they indicated that they objected most strenuously to the suspension of the OPEBs, because of the impact on the retirees. They indicated that they would not object to a short-term suspension of the special payments, until the Wabush CCAA Parties collected the tax refunds they were expecting and therefore had funds other than the Interim Financing with which to make the special payments.

POSITION OF THE WABUSH CCAA PARTIES

[46] The Wabush CCAA Parties argue that they do not have any funds or any source of funds and therefore that they need the Interim Financing.

[47] They also argue that even with the Interim Financing, they do not have any funds available to continue to pay the special payments or any of the OPEBs, as the Interim Financing Term Sheet prohibits such payments.

[48] On the law, they argue that the deemed trusts created under the PBSA and the N&L Act are not effective to protect the special payments or the OPEBs in the CCAA context. As a consequence, the Interim Lender Charge requested by the Wabush CCAA Parties does not prime any security under the PBSA or the N&L Act. Further, since those payments are unsecured and relate to pre-filing services, there is no reason for the Wabush CCAA Parties to make those payments.

[49] They therefore argue that the Court should exercise its discretion to give the Interim Lender Charge priority over the deemed trusts and to suspend the obligation to pay the special payments and the OPEBs.

POSITION OF THE MONITOR

[50] The Monitor filed its Seventh Report for purposes of the comeback hearing.

[51] In its report, it supports the position taken by the Wabush CCAA Parties.

[52] Its legal argument supports the legal argument put forward by the Wabush CCAA Parties.

ISSUES IN DISPUTE

[53] The issues in dispute can be outlined as follows;

(a) Can and should the Court order that the Interim Lender Charge rank ahead of all encumbrances, including statutory deemed trusts?

(b) Can and should the Court suspend the Wabush CCAA Parties' obligation to pay the special payments?

(c) Can and should the Court suspend the Wabush CCAA Parties' obligation to pay the OPEBs?

ANALYSIS

[54] The three issues have significant overlaps. The Court will nevertheless analyze them sequentially, and will adopt its previous reasoning to the extent it is relevant.

1. Super-priority of the Interim Lender Charge

General

[55] What is at issue is the conflict between the super-priority of the interim lender charge under Section 11.2 CCAA and the statutory deemed trusts created by Section 8 PBSA and Section 32 of the N&L Act.

[56] Section 11.2 CCAA allows the Court, after considering the factors set out in Section 11.2(4) CCAA, to create an interim lender charge and to give that charge priority over the claim of any secured creditor of the debtor:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (*c*) whether the company's management has the confidence of its major creditors;
> >
> > (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (*e*) the nature and value of the company's property;
> >
> > (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.
>
> (Emphasis added)

[57] OSFI and the N&L Superintendent, supported by the Union, argue that Section 11.2 CCAA does not allow the Court to give the interim lender charge priority over the deemed trusts in pension matters created by their respective legislations.

[58] The argument put forward by OSFI and the N&L Superintendent is essentially that the employer is deemed to hold the amounts in trust, and therefore they are not "part of the company's property" and cannot be charged under Section 11.2 CCAA.

[59] The Wabush CCAA Parties argue that there is a conflict between the legislation creating the deemed trusts and the CCAA and that the CCAA must prevail:

- The CCAA prevails over the PBSA as a matter of statutory interpretation of two pieces of federal legislation, and
- The CCAA prevails over the N&L Act because of the constitutional doctrine of federal paramountcy.

[60] Because the arguments are different with respect to the PBSA and the N&L Act, the Court will deal with them separately.

[61] These are not new issues. The courts, including the Supreme Court, have been called upon to deal with the effect of federal and provincial deemed trusts in the insolvency context on numerous occasions. There have also been a number of statutory amendments, some designed to overturn the results of judgments.

[62] Because of the urgency of rendering judgment in this matter, the Court will not embark on an exhaustive analysis of all of these judgments and amendments.

Effectiveness of the PBSA deemed trust in CCAA proceedings

[63] OSFI relies on Sections 8(1) and (2) and 36(2) of the PBSA, which provide as follows:

> **8.** (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> (*a*) the moneys in the pension fund,
>
> (*b*) an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and

> (*c*) all of the following amounts that have not been remitted to the pension fund:
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).
>
> (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.
>
> **36.** (2) Any agreement or arrangement to assign, charge, anticipate or give as security
>
> (*a*) any benefit provided under a pension plan, or
>
> (*b*) any money withdrawn from a pension fund pursuant to section 26
>
> is void or, in Quebec, null.
>
> (Emphasis added)

[64] The deemed trust created by Section 8 PBSA is intended to cover all amounts due by the employer to the pension fund. These would include the normal payments, as well as the special payments.

[65] Section 8(1) PBSA requires the employer to keep the required amounts separate and apart from its own moneys, and deems the employer to hold them in trust. In the present matter, the required amounts have not been kept separate and apart and the assets subject to the trust have been comingled with other assets. Pursuant to the decision of the Supreme Court in *Sparrow Electric*, the consequence is that the trust created by Section 8(1) PBSA does not exist because the subject-matter of the trust cannot be and never was identifiable.[7]

[66] As a result, the relevant provision is Section 8(2) PBSA which provides that the amount shall be deemed to be separate and apart, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

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[7] *Royal Bank of Canada* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, par. 28.

[67] However, Section 8(2) PBSA only applies "[i]n the event of any liquidation, assignment or bankruptcy of an employer". It attaches to any property which lawfully belongs to the employer when the triggering event occurred.[8]

[68] The issue of the triggering event could be determinative in the present case. If the triggering event has not occurred, then there is no deemed trust and no obstacle to the Court granting the priority required by the Interim Lender.

[69] It is clear that there has been no assignment or bankruptcy in the present matter. Further, there is no liquidation under Part XVIII of the *Canada Business Corporations Act*[9] or equivalent provincial legislation. A CCAA proceeding does not appear to trigger the application of Section 8(2) PBSA. However, OSFI argues that these CCAA proceedings are really a liquidation, because it is very likely that the ongoing sale process will result in the sale of all of the assets of the Wabush CCAA Parties.

[70] In interpreting the word "liquidation" in Section 8(2) PBSA, and in particular whether it includes a liquidation under the CCAA,[10] the Court will consider more generally how the deemed trust under Section 8(2) PBSA is dealt with under the CCAA.

[71] It must be emphasized at the outset that the deemed trust under Section 8(2) PBSA is not a deemed trust in favour of the Crown. This is a fundamental distinction. Section 37(1) CCAA, which renders all deemed trusts in favour of the Crown ineffective in the CCAA context, subject to certain exceptions, has no application to the deemed trust under Section 8(2) PBSA. As a result, many of the cases cited to the Court, which deal with the effectiveness of deemed trusts in favour of the Crown, must be applied with caution in the present circumstances.

[72] In particular, the Wabush CCAA Parties rely on language in the Supreme Court's judgment in *Century Services*[11] that must be read carefully. Justice Deschamps refers in paragraph 45 to "the general rule that deemed trusts are ineffective in insolvency". There is no such general rule, other than Section 37(1) CCAA (and Section 67(2) of the *Bankruptcy and Insolvency Act*[12]) which applies only to deemed trusts in favour of the Crown. She begins the paragraph with a reference to the predecessor of Section 37(1) CCAA and she refers throughout the paragraph to Crown claims and Crown priorities. She must be referring to Crown deemed trusts in that sentence as well. Justice Fish's comments in paragraph 95 must be similarly limited. The Court respectfully disagrees

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8 *Ibid*, par. 38.

9 R.S.C. 1985, c. C-44, as amended.

10 In *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762, par. 66, Justice Schrager (then of this Court) leaves open the possibility that the liquidation of Aveos under the CCAA may have triggered Section 8(2) PBSA.

11 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379.

12 R.S.C. 1985, c. B-3, as amended.

with Justice Schrager in *Aveos*[13] on this issue and concludes that there is no general rule that deemed trusts in favour of anyone other than the Crown are ineffective in insolvency. Deemed trusts will be interpreted restrictively as exceptions to the general principle that the assets of the debtor are available for all of the creditors,[14] but there is no general rule that they are ineffective.

[73] However, other provisions of the CCAA deal expressly with pension obligations. Sections 6(6) and 36(7) CCAA were added to the CCAA in 2009. They provide that an arrangement can only be sanctioned or an asset sale approved by the Court, if provision is made for the payment of certain enumerated pension obligations, including deductions from employee salaries and normal cost contributions of the employer, but not including special payments.

[74] It is difficult to reconcile Sections 6(6) and 36(7) CCAA with a broad interpretation of Section 8(2) PBSA. Why would the legislator give specific protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the special payments under Sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust for the special payments if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator's intent.

[75] In *Century Services*, the Supreme Court was faced with a conflict between the deemed trust for GST and the CCAA. Justice Deschamps adopted "a purposive and contextual analysis to determine Paliament's true intent".[15] She concluded that the deemed trust for GST did not apply in a CCAA proceeding, even though the language in the *Excise Tax Act*[16] provided that the deemed trust was effective notwithstanding any law of Canada other than the BIA. She attached importance to the "internal logic of the *CCAA*".[17]

[76] Moreover, in *Indalex*, Justice Deschamps referred to the conclusions of a Parliamentary committee which had considered extending the protection afforded the beneficiaries of pension plans. The committee made the policy decision not to extend that protection. Justice Deschamps concluded that "courts should not use equity to do what they wish Parliament had done through legislation."[18]

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13 *Aveos*, *supra* note 10, par. 74-75.
14 *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, par. 141-142.
15 *Century Services*, *supra* note 11, par. 44.
16 R.S.C. 1985, c. E-15, as amended.
17 *Century Services*, *supra* note 11, par. 46.
18 *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 272, par. 81-82. See also *Aveos*, *supra* note 10, par. 77.

[77] The Court therefore adopts the following reasoning to resolve the conflict in the present case:

> Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since those provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and the *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 37(6), while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*.[19]
>
> (Emphasis added)

[78] For all of these reasons, the Court concludes that Parliament's intent is that federal pension claims are protected in insolvency and restructurings only to the limited extent set out in the *BIA* and the *CCAA*, notwithstanding the potentially broader language in the PBSA.

[79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

[80] Either way, the Court concludes that the deemed trust under Section 8(2) PBSA does not prevent the Court from granting priority to the Interim Lender Charge, if the conditions of Section 11.2 CCAA are met.

Effectiveness of the N&L Act deemed trust in CCAA proceedings

[81] The N&L Superintendent relies on the combined effect of Sections 32 and 61(2) of the N&L Act:

> **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;

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[19] Sam Babe, "What About Federal Pension Claims? The Status of *Pension Benefits Standards Act, 1985* and *Pooled Registered Pension Plans Act* Deemed Trust Claims in Insolvency" (2013), 28 N.C.D.Rev. 25, p. 30.

(b) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) any special payments prescribed by the regulations, that have accrued to date; and

(c) all

(i) amounts deducted by the employer from the member's remuneration, and

(ii) other amounts due under the plan from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

61. (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) special payments prescribed by the regulations,

that have accrued to the date of termination; and

(b) all

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.

(2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

(Emphasis added)

[82] The key provision, Section 32(2) of the N&L Act, is virtually identical to Section 8(2) PBSA. As a result, much of the analysis set out above applies here as well.

[83] However, the analysis takes a different turn once one reaches the conclusion that it is difficult to reconcile the broad deemed trust under Section 32(2) of the N&L Act with the more limited protection under Section 6(6) and 36(7) CCAA.

[84] This is a conflict between provincial legislation and federal legislation. Constitutional doctrine instructs the courts to try to interpret the federal and provincial legislation in such a way as to avoid the conflict, but this is not the same exercise as trying to find the intent of a single legislator who adopted conflicting pieces of legislation.

[85] For the purposes of this analysis, the Court will assume that the N&L Act is valid and is intended to be effective in an insolvency context. This means that the province granted greater protection to pension obligations than the federal legislator recognized in the CCAA. The principles of interpretation set out above do not apply to resolve a conflict between a federal statute and a provincial statute. There is no basis for interpreting the statutes in such a way as to make them consistent.

[86] There is also a potential conflict with respect to the priority of the interim Lender Charge: under Section 11.2 CCAA, the Court can create an interim lender charge over all of the debtor's property and give it priority over all other charges, except that the province has created a deemed trust which, if it is effective, subtracts assets from the debtor's property and makes them unavailable to be charged in favour of the interim lender.

[87] The question is therefore whether the province can create such a charge that could prevent the Court from granting priority to an interim lender charge.

[88] The Supreme Court in *Indalex* held in the circumstances of that case, that the interim lender charge had priority over the provincial deemed trust by reason of the application of the doctrine of federal paramountcy, because the CCAA's purpose would be frustrated without the interim lender charge.[20] The trial judge in *Indalex* had rejected the deemed trust and therefore had not considered the doctrine of paramountcy. However, in granting the interim lender charge, he had considered the factors in Section 11.2(4) CCAA and had concluded that the interim lender charge was necessary and in the best interest of *Indalex* and its stakeholders. The Supreme Court held that these findings were sufficient for paramountcy to apply.

[89] As a result, the Court can give priority to the Interim Lender Charge over the deemed trust under the N&L Act if the test for federal paramountcy is met. The Court will consider the paramountcy issue as part of its analysis of the factors under Section 11.2(4) CCAA.

Factors under Section 11.2(4) CCAA

[90] Section 11.2(4) CCAA sets out a non-exhaustive list of the factors the Court should consider before it creates an interim lender charge:

> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

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[20] *Indalex*, *supra* note 18, par. 60. See also *White Birch*, *supra* note 14, par. 217; *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174, par. 85.

[91] The Court already considered those factors when it decided to create the Interim Lender Charge on May 20, 2015.

[92] In his Fifth Report dated May 19, 2015, the Monitor provided the following comments on the factors listed in Section 11.2(4) CCAA:

> *The period during which the company is expected to be subject to proceedings under the CCAA*
>
> (a) While the deadline for the submission of binding offers pursuant to the SISP has yet to be set, based the Wabush May 18 Forecast and preliminary discussions regarding the potential timeline for the completion of the SISP, it is believed that the Interim Financing Term Sheet provides sufficient liquidity to enable the Wabush CCAA Parties to complete the SISP;
>
> *How the company's business and affairs are to be managed during the proceedings*
>
> (b) The Wabush CCAA Parties' senior personnel and Boards of Directors remain in place to manage the business and affairs of the Wabush CCAA Parties. The Wabush CCAA Parties and their management will also have the benefit of the expertise and experience of their legal counsel and the Monitor;
>
> *Whether the company's management has the confidence of its major creditors*
>
> (c) The largest creditors of the Wabush CCAA Parties are affiliated companies who the Monitor understands to have confidence in the Wabush CCAA Parties' management. Other major creditors include the pension plans described in the May 19 Motion, employee groups in respect of other post-retirement benefits and various contract counterparties. None of the major creditors has to date expressed any concern to the Monitor in respect of the Wabush CCAA Parties' management;
>
> *Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company*
>
> (d) Based on the Wabush May 18 Forecast, without the Interim Facility the Wabush CCAA Parties would be unable to pay their obligations, maintain their assets or complete the SISP. The Wabush CCAA Parties and the Monitor are of the view that approval of the Interim Facility would likely enhance the prospects of generating recoveries for stakeholders, whether through a sale or a restructuring plan;
>
> *The nature and value of the company's property*
>
> (e) The Wabush CCAA Parties' assets are described in the May 19 Motion, and consist primarily of real estate, equipment, inventory and income tax receivables. The value of the Wabush CCAA Parties' property will be determined through the

> SISP. Nothing has come to the attention of the Monitor in respect of the nature of the Wabush CCAA Parties' property that, in the Monitor's view, ought to be given particular consideration in connection with the Interim Lender Charge;
>
> *Whether any creditor would be materially prejudiced as a result of the proposed Charge*
>
> (f) The proposed Interim Facility will provide the Wabush CCAA Parties the opportunity to complete the SISP and to maximize recoveries for stakeholders. Borrowings under the Interim Financing Term Sheet are limited to a maximum of US$10 million. The Interim Lender Charge secures only the Interim Financing Obligations and is limited to $15 million. The Monitor is of the view that any potential detriment caused to the Wabush CCAA Parties' creditors by the Interim Lender Charge should be outweighed by the benefits that it creates; and
>
> *Other potential considerations*
>
> (g) The Monitor has researched the terms of recent interim financings based on information publicly available, a summary of which is attached hereto as Appendix C. Based on this research and Monitor's experience, the Monitor believes that the terms of the Interim Financing Term Sheet are in line with or better than market. The Monitor is of the view that the Interim Financing Term Sheet represents the best alternative available in the circumstances that would provide access to financing within the necessary timeframe.

[93] In his testimony before the Court on May 20, 2015, Clifford Smith testified that the Wabush CCAA Parties had attempted to obtain financing elsewhere, but that only a related party was willing to provide financing.

[94] The Court makes the following findings:

- The Sale and Investor Solicitation Process (SISP) is in the interests of the Wabush CCAA Parties and their stakeholders because it should lead to greater recovery;
- Without new financing, the Wabush CCAA Parties do not have enough cash to complete the SISP. The cash flow projection attached to the Fifth Report shows the Wabush CCAA Parties running out of cash in the week ending May 22, 2015;
- Without new financing, it is therefore likely that the Wabush CCAA Parties will go bankrupt;
- The Wabush CCAA Parties and the Monitor have not identified any other sources of new financing;

- The terms and conditions of the Interim Financing are reasonable, and the security is limited to the amount of the new financing.

[95] This is sufficient for the Court to conclude that the Interim Financing should be approved and the Interim Lender Charge should be granted with priority over the deemed trust under the PBSA, if it is effective in the CCAA context.

[96] With respect to the deemed trust under the N&L Act, there is the added issue of whether giving effect to the deemed trust would frustrate the federal purpose under the CCAA. Under the Interim Lender Term Sheet, the super-priority is a condition precedent to the Interim Lender's obligation to advance the funds. That condition will not be met if the Court gives effect to the deemed trust under the N&L Act, which puts the financing at risk.

[97] The objecting parties argue that the Court's jurisdiction to make appropriate orders should not be ousted by the terms of the Interim Lender Term Sheet. However, there is nothing peculiar about this provision in the Interim Lender Term Sheet. The importance of the super-priority to interim lenders has consistently been recognized by the courts. As stated by the Supreme Court in *Indalex*:

> … case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[21]
>
> (Emphasis added)

[98] Similarly, Justice Morawetz stated in *Timminco*:

> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.[22]
>
> (Emphasis added)

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[21] *Indalex*, *supra* note 18, par. 59

[22] *Timminco Limited (Re)*, 2012 ONSC 948, par. 49. This passage was quoted with approval in *White Birch*, *supra* note 14, par. 215.

[99] The objecting parties also plead that the Interim Lender is related to the Wabush CCAA Parties and therefore has interests which might be different than those of an arm's length lender.

[100] However, there is no evidence that gives credence to the suggestion that the Interim Lender will advance funds without the super-priority. To the contrary, the attorney representing the Interim Lender made it clear at the hearing that there would be no advance of funds if the super-priority was not confirmed. Further, the Court is not satisfied that it has the jurisdiction to order the Interim Lender to advance the funds on terms other than those that it has accepted.

[101] In all of these circumstances, the Court concludes that giving effect to the deemed trust under the N&L Act carries a serious risk of frustrating the CCAA process. The Court therefore concludes that the doctrine of federal paramountcy is engaged, and it concludes that the N&L Act is not effective to that extent.

[102] The Court will therefore order that the Interim Lender Charge shall have priority over the deemed trusts under the PBSA and the N&L Act.

2. Suspension of special payments

[103] Further, the Wabush CCAA Parties asked that their obligation to make the special payments to the pension plans be suspended.

[104] The Courts have consistently recognized a jurisdiction to suspend the obligation to make special payments and OPEB payments "when necessary to enhance liquidity to promote the survival of a company in financial distress."[23]

[105] Several reasons underlie the existence of this jurisdiction.

[106] First, the normal pension payments that the employer is required to make relate to the current services rendered by the current employees and the Court's jurisdiction to affect those payments is limited by the principle that the debtor must pay for current services. However, the special payments relate to a deficit that has accumulated in the pension plan. Pension benefits are deferred compensation for services that were provided by the retiree while he or she was an employee.[24] As a result, the special

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[23] *Aveos*, *supra* note 10, par. 88. See also *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764, par. 94-100; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 2028, par. 27, 31-32; *Papiers Gaspésia Inc., Re*, 2004 CanLII 40296 (QC CS), par. 87-92; *Collins & Aikman Automotive Canada Inc. (Re)*, 2007 CanLII 45908 (ON SC), par. 90-92; *Fraser Papers Inc. (Re)*, 2009 CanLII 39776 (ON SC), par. 20; *Timminco Limited (Re)*, 2012 ONSC 506, par. 61-63.

[24] *IBM Canada Limited* v. *Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, par. 4.

payments relate to services provided to the employer before the filing, and as such, they can be qualified as pre-filing obligations.[25]

[107] Second, the special payments are unsecured in the CCAA context. Sections 6(6) and 36(7) create a priority in the CCAA context for the normal payments but not for the special payments. As discussed above, the deemed trust under Section 8(2) PBSA has no effect in a CCAA proceeding, and the deemed trust under Section 32(2) of the N&L Act, in purporting to create a security interest not recognized under the CCAA, is not effective to the extent that it conflicts with the CCAA.[26]

[108] As a result, the payment of the special payments would constitute payments to an unsecured pre-filing creditor, which could be qualified as preferential in the sense that no other unsecured pre-filing creditor is being paid.

[109] In any event, even without this characterization, the courts have a broad discretion under the CCAA to render orders that are necessary to allow the debtor to make a proposal to its creditors.

[110] In the exercise of this discretion, it is important to consider the facts.

[111] The special payments for the two plans are made up of monthly amortization payments in the amount of $666,555.58 per month and a lump sum "catch-up" amortization payment of approximately $5.5 million due in July 2015.

[112] The Wabush CCAA Parties do not have the funds available to make these payments. The cash flow statements filed with the Court show that the Wabush CCAA Parties need the funds from the Interim Financing to meet their current obligations other than the special payments. The Interim Lender Term Sheet expressly requires the Wabush CCAA Parties not to make any special payments. As a result, forcing the Wabush CCAA Parties to make the special payments would lead to a default under the Interim Financing and a likely bankruptcy.[27]

[113] The objecting parties criticize the position taken by the Interim Lender in prohibiting the payment of the special payments.

[114] However, the position taken by the Interim Lender in this file is consistent with the position taken by other interim lenders in other files:

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[25] *White Birch*, *supra* note 23, par. 97; *Fraser Papers*, *supra* note 23, par. 20; *Sproule* v. *Nortel Networks Corporation*, 2009 ONCA 833, par. 20-21. In *Aveos*, *supra* note 10, par. 86-88, Justice Schrager concluded that this characterization was not necessary for the court to have jurisdiction to suspend the payments.

[26] *Indalex*, *supra* note 18, par. 56.

[27] See a similar argument in *Collins & Aikman*, *supra* note 23, par. 91-92; *Fraser Papers*, *supra* note 23, par. 21;

> [55] *Fairfax* [the interim lender] a indiqué au Tribunal que ce financement avait été octroyé pour financer les activités courantes de *Bowater* et ne pouvait ainsi être utilisé pour payer les cotisations d'équilibre aux régimes de retraite. Le financement est aussi sujet au respect de différents ratios de solvabilité.[28]

[115] Moreover, the Interim Lender's position makes sense as a commercial matter. Why should the Interim Lender advance funds that will be used to pay someone else's debt, particularly one which is pre-filing and unsecured? It is the Interim Lender's intention to fund the Wabush CCAA Parties with the amount required to get them through the SISP so that they can repay the loan. It is not in the Interim Lender's interest to fund preferential payments to unsecured pre-filing creditors. The language cited above about the harsh commercial realities of interim financing applies here as well.

[116] Moreover, the Court is being asked to suspend the obligation to make the special payments, and is not being asked to alter the collective agreement or extinguish the obligation to pay these amounts.[29]

[117] As a result, the beneficiaries of the pension plans would not be prejudiced by this suspension. The wind-up deficiencies for the two pension plans as at January 1, 2015 are estimated to be a total of approximately $41.5 million. The purpose of the special payments is to reduce that deficiency and to improve the situation over time such that the beneficiaries will receive the full amounts to which they are entitled. The suspension of the special payments means that their position is not improved, but it is not worsened. Their debt remains and benefits from whatever priority it is entitled to at law.

[118] For all of these reasons, the Court will order the suspension of the special payments to the pension funds.

3. Suspension of the OPEBs

[119] The Wabush CCAA Parties currently provide OPEBs, including life insurance and health care, to former hourly and salaried employees.

[120] As of December 31, 2014, accumulated benefits obligations for the OPEBs totalled approximately $52.1 million. The premiums required to fund the foregoing OPEBs are approximately $182,000 a month.

[121] In addition to the foregoing, there is a supplemental retirement arrangement plan for certain current and former salaried employees of Wabush Mines JV. The obligations under this plan are approximately $1.01 million.

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[28] *AbitibiBowater*, *supra* note 23, par. 55. See also *Ivaco Inc. (Re)*, 2006 CanLII 34551 (Ont.C.A.), par. 17; *Fraser Paper*, *supra* note 23, par. 23.

[29] Section 33 CCAA; *Syndicat national de l'amiante d'Asbestos inc.* c. *Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.), par. 57-58.

[122] The Wabush CCAA Parties do not have any funding available to continue to pay any of the foregoing OPEBs, as the Interim Financing Term Sheet prohibits such payments. They seek an order from the Court suspending the payment of the OPEBs *nunc pro tunc* to the Wabush Filing Date.

[123] The reasoning as to the existence and the exercise of the discretion to suspend these payments is much the same as for the special payments. The Wabush CCAA Parties do not have the funds to make the payments, and the Interim Lender Term Sheet does not allow them to make these payments. These amounts relate to services provided pre-filing and they are unsecured. They are in a sense even less secured than the special payments because the deemed trusts created by the PBSA and the N&L Act do not purport to cover these payments.

[124] The retirees plead that there are two important differences.

[125] First, the amount at issue is only $182,000 per month. The retirees suggest that the Wabush CCAA Parties should be able to find this amount somewhere. The Wabush CCAA Parties continue to argue that they do not have the funds with which to make these payments, and the Interim Lender Term Sheet in any event prevents them from making these payments. Given the cash flow statement filed with the Court and the language of the Interim Lender Term Sheet, the Court accepts that the Wabush CCAA Parties do not have the funds.

[126] The second difference pleaded by the retirees is that they suffer a clear prejudice. The OPEBs are provided through an insurance policy, and if the Wabush CCAA Parties fail to pay the premium, the policy will be cancelled, leaving the retirees with no health insurance and only a claim against the insolvent Wabush CCAA Parties. The Court assumes this to be correct and accepts that this will cause hardship to the retirees.

[127] The retirees argue that this is equivalent to a disclaimer or resiliation of the insurance contract by the Wabush CCAA Parties, which is invalid because the formalities under Section 32(1) CCAA were not followed, and the test under Section 32(4) CCAA for the Court to authorize the disclaimer or resiliation was not met. Section 32(4)(c) provides that one of the factors to be considered is “whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.”

[128] This argument does not withstand scrutiny.

[129] There is a tri-partite relationship. The employer has obligations to the beneficiaries, and has entered into an insurance policy with the insurer so that the insurer provides those benefits to the beneficiaries. If the employer stops paying the premiums, the insurer will terminate the insurance policy. This does not affect the

employer's obligations to the beneficiaries,[30] but the beneficiaries will be left with an insolvent debtor instead of the insurer.

[130] However, the contract that is being terminated is the contract between the Wabush CCAA Parties and the insurer for the benefit of the beneficiaries. The counter-party is the insurer. It is not suggested that the insurer will suffer any significant financial hardship as a result of the termination of the contract. The contract between the Wabush CCAA Parties and the beneficiaries is not being terminated.

[131] Moreover, the Wabush CCAA Parties are not disclaiming or resiliating the contract. The Wabush CCAA Parties are seeking authorization to stop paying under a contract, just as they have undoubtedly stopped paying under a number of other contracts. When the debtor defaults, the counter-party has a number of options, including terminating the contract. Even if termination by the counter-party is the likely result, as in this case, it does not mean that the debtor has disclaimed or resiliated the contract. Otherwise, the debtor would have to follow the formalities and pass the test in Section 32 CCAA every time it defaulted under a contract.

[132] At the end of the day, the answer is the same as for the special payments, and the payment of the OPEBs should also be suspended.[31]

[133] The Court is very mindful of the hardship that the suspension of the OPEB payments and the termination of the insurance policy will cause to the beneficiaries. Unfortunately, that hardship appears to be inevitable. Even if the Court ordered the Wabush CCAA Parties to keep paying the premium during the SISP, that would be only a temporary solution and it is very likely if not inevitable that following the conclusion of the SISP, the Wabush CCAA Parties will cease their operations and the insurance policy will be terminated.

4. Breach of fiduciary duties

[134] The objecting parties also pleaded that Wabush Mines is in a situation of conflict of interest because it is both the administrator of the pension plans and one of the Wabush CCAA Parties seeking relief with respect to the pension plans.

[135] The PBSA and the N&L Act allow the employer to act as administrator, and the insolvency of the employer inevitably leads to the type of potential conflict in which Wabush Mines finds itself.

[136] Consistent with the views expressed by the Supreme Court in *Indalex*, the Court concludes that the giving of notice to the regulators, the Union and the retirees, the postponement of the hearing from June 9, 2015 to June 22, 2015 to allow the objecting

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30 *Ibid*, par. 58.

31 See also *White Birch*, *supra* note 23, par 40.

parties to present their arguments, and the consent to the motion presented by the four retirees for a representation order allowing them to represent all salaried/non-union employees and retirees and related beneficiaries at the expense of the Wabush CCAA Parties, all show that the employer acted in good faith in a way consistent with its fiduciary duties to the beneficiaries of the pension plans.[32]

5. Representation order sought by the Union

[137] The Union requests that one officer from each of the two locals be designated by the Court as the persons responsible for responding to questions from unionized retirees of the Wabush CCAA Parties and providing them with information about their rights and recourses. Further, the Union asks that those persons be funded by the Wabush CCAA Parties.

[138] The individuals that the Union proposes are officers of the two locals. The Union is essentially asking the Court to designate these individuals and to order that a portion of their salary be paid by the Wabush CCAA Parties. At the present time, the Union estimates that the two individuals spend one half of their time responding to calls, although that time seems to be decreasing. The admissions filed in lieu of the testimony of Frank Beaudin refer to the volume of calls received by the Union since the May 29, 2015 letter was sent to the retirees.

[139] The Monitor is a Court officer whose duties include providing information of this nature. However, the Court also recognizes that the Union has received and will continue to receive calls from the unionized retirees. It is appropriate for the Union to provide information to its retired members and to designate specific individuals to provide the information in order to ensure that there is consistency in the information provided.

[140] However, this is not a matter that requires the intervention of the Court. The Union can handle matters of communications with its former members without a Court order. The Union does not seek an order that it be authorized to represent these unionized retirees. If the Union were to make such a motion, the Court would have to consider whether there is a potential conflict between the current employees and the retirees.

[141] Further, the Court does not consider it appropriate that the Wabush CCAA Parties be ordered to pay part of the salary of the two individuals. They are salaried union officers. Providing information of this nature is within their functions.

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[32] *Indalex*, *supra* note 18, par. 73.

[142] For these reasons, the Union's motion will be dismissed.

FOR THESE REASONS, THE COURT:

[143] **DISMISSES** the contestations by Her Majesty in right of Newfoundland and Labrador, represented by the Superintendent of Pensions, the Attorney General of Canada and the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285 to the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015, and **CONFIRMS** the priority of the Interim Lender Charge over deemed trusts, as set out in paragraph 47 of the Wabush Initial Order, as amended on June 9, 2015;

[144] **ORDERS** the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;

[145] **ORDERS** the suspension of payment by the Wabush CCAA parties of the annual lump sum "catch-up" payments coming due pursuant to the Contributory Pension Plan for Salaried Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company and the Pension Plan for Bargaining Unit Employees of Wabush Mines, CMC, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company, *nunc pro tunc* to the Wabush Filing Date;

[146] **ORDERS** the suspension of payment by the Wabush CCAA Parties of other post-retirement benefits to former hourly and salaried employees of their Canadian subsidiaries hired before January 1, 2013, including without limitation payments for life insurance, health care and a supplemental retirement arrangement plan, *nunc pro tunc* to the Wabush Filing Date.

[147] **DISMISSES** the Motion to Modify the Initial Order presented by the Syndicat des Métallos, Section Locale 6254 and the Syndicat des Métallos, Section Locale 6285;

[148] **WITHOUT COSTS**.

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Mtre Louis Dumont
DENTON
For the Interim Lender Cliffs Quebec Iron Mining ULC

Hearing date: June 22, 2015

TAB 5

Canada (Attorney General) v. Bedford,
2013 SCC 72

Attorney General of Canada *Appellant/ Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

- and -

Attorney General of Ontario *Appellant/ Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

and

Attorney General of Quebec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secretariat of the Joint United Nations Programme on HIV/AIDS, British Columbia Civil Liberties Association, Evangelical Fellowship of Canada, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère

Procureur général du Canada *Appelant/ Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

- et -

Procureur général de l'Ontario *Appelant/ Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

et

Procureur général du Québec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secrétariat du Programme commun des Nations Unies sur le VIH/sida, Association des libertés civiles de la Colombie-Britannique, Alliance évangélique du Canada, Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Association canadienne des centres contre les agressions à caractère sexuel, Association des femmes autochtones du Canada, Association canadienne des Sociétés Elizabeth Fry, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle,

sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc. *Interveners*

Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Alliance des chrétiens en droit, Ligue catholique des droits de l'homme, REAL Women of Canada, David Asper Centre for Constitutional Rights, Institut Simone de Beauvoir, AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution et Aboriginal Legal Services of Toronto Inc. *Intervenants*

Indexed as: Canada (Attorney General) *v.* Bedford

2013 SCC 72

File No.: 34788.

2013: June 13; 2013: December 20.*

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to security of person — Freedom of expression — Criminal law — Prostitution — Common bawdy-house — Living on avails of prostitution — Communicating in public for purposes of prostitution — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Prostitutes alleging impugned provisions violate s. 7 security of the person rights by preventing implementation of safety measures that could protect them from violent clients — Prostitutes also alleging prohibition on communicating in public for purposes of prostitution infringes freedom of expression guarantee — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1), 210, 212(1)(j), 213(1)(c).

* A judgment was issued on January 17, 2014, amending para. 164 of both versions of the reasons. The amendments are included in these reasons.

Répertorié : Canada (Procureur général) *c.* Bedford

2013 CSC 72

N° du greffe : 34788.

2013 : 13 juin; 2013 : 20 décembre*.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

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

Droit constitutionnel — Charte des droits — Droit à la sécurité de la personne — Liberté d'expression — Droit criminel — Prostitution — Maisons de débauche — Proxénétisme — Communiquer en public à des fins de prostitution — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — Allégation selon laquelle ces dispositions portent atteinte au droit à la sécurité de la personne garanti à l'art. 7 en empêchant les prostituées de prendre des mesures susceptibles de les protéger contre la violence de certains clients — Allégation supplémentaire suivant laquelle l'interdiction de communiquer en public à des fins de prostitution porte atteinte à la liberté d'expression garantie aux prostituées — Charte canadienne des droits et libertés, art. 1, 2b), 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 197(1), 210, 212(1)j), 213(1)c).

* Un jugement a été rendu le 17 janvier 2014, modifiant le par. 164 des deux versions des motifs. Les modifications ont été incorporées dans les présents motifs.

Courts — Decisions — Stare decisis — Standard of review — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Under what circumstances application judge could revisit conclusions of Supreme Court of Canada in Prostitution Reference which upheld bawdy-house and communicating prohibitions — Degree of deference owed to application judge's findings on social and legislative facts.

B, L and S, current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which criminalize various activities related to prostitution, infringe their rights under s. 7 of the *Charter*: s. 210 makes it an offence to keep or be in a bawdy-house; s. 212(1)(*j*) prohibits living on the avails of prostitution; and, s. 213(1)(*c*) prohibits communicating in public for the purposes of prostitution. They argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, by preventing them from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violence. B, L and S also alleged that s. 213(1)(*c*) infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

The Ontario Superior Court of Justice granted the application, declaring, without suspension, that each of the impugned *Criminal Code* provisions violated the *Charter* and could not be saved by s. 1. The Ontario Court of Appeal agreed s. 210 was unconstitutional and struck the word "prostitution" from the definition of "common bawdy-house" as it applies to s. 210, however it suspended the declaration of invalidity for 12 months. The court declared that s. 212(1)(*j*) was an unjustifiable violation of s. 7, ordering the reading in of words to clarify that the prohibition on living on the avails of prostitution applies only to those who do so "in circumstances of exploitation". It further held the communicating prohibition under s. 213(1)(*c*) did not violate either s. 2(*b*) or s. 7. The Attorneys General appeal from the declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. B, L and S cross-appeal on the constitutionality of s. 213(1)(*c*) and in respect of the s. 210 remedy.

Tribunaux — Décisions — Stare decisis — Norme de contrôle — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — À quelles conditions un juge de première instance peut-il réexaminer les conclusions de la Cour suprême du Canada dans le Renvoi sur la prostitution selon lesquelles les interdictions visant les maisons de débauche et la communication sont valides? — Degré de déférence que commandent les conclusions du juge de première instance sur des faits sociaux ou législatifs.

B, L et S — trois prostituées ou ex-prostituées — ont sollicité un jugement déclarant que trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, qui criminalisent diverses activités liées à la prostitution, portent atteinte au droit que leur garantit l'art. 7 de la *Charte* : l'art. 210 crée l'acte criminel de tenir une maison de débauche ou de s'y trouver; l'al. 212(1)*j*) interdit de vivre des produits de la prostitution d'autrui; l'al. 213(1)*c*) interdit la communication en public à des fins de prostitution. Elles font valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées en ce qu'elles les empêchent de prendre certaines mesures de protection contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

La Cour supérieure de justice de l'Ontario a fait droit à la demande et déclaré, sans effet suspensif, que chacune des dispositions contestées du *Code criminel* porte atteinte à un droit ou à une liberté garantis par la *Charte* et ne peut être sauvegardée par application de l'article premier. La Cour d'appel de l'Ontario a convenu de l'inconstitutionnalité de l'art. 210 et radié le mot « prostitution » de la définition de « maison de débauche » applicable à cette disposition, mais elle a suspendu l'effet de la déclaration d'invalidité pendant 12 mois. Elle a statué que l'al. 212(1)*j*) constitue une atteinte injustifiable au droit garanti à l'art. 7 et ordonné d'interpréter la disposition de manière que l'interdiction vise seulement les personnes qui vivent de la prostitution d'autrui « dans des situations d'exploitation », comme si ces mots y étaient employés. Elle a par ailleurs estimé que l'interdiction de communiquer prévue à l'al. 213(1)*c*) n'est attentatoire ni à la liberté garantie par l'al. 2*b*), ni au droit que consacre l'art. 7. Les procureurs généraux se pourvoient contre la déclaration d'inconstitutionnalité de l'art. 210 et de l'al. 212(1)*j*) du *Code*. B, L et S se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise pour remédier à l'inconstitutionnalité de l'art. 210.

Held: The appeals should be dismissed and the cross-appeal allowed. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* are declared to be inconsistent with the *Charter*. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only. The declaration of invalidity should be suspended for one year.

The three impugned provisions, primarily concerned with preventing public nuisance as well as the exploitation of prostitutes, do not pass *Charter* muster: they infringe the s. 7 rights of prostitutes by depriving them of security of the person in a manner that is not in accordance with the principles of fundamental justice. It is not necessary to determine whether this Court should depart from or revisit its conclusion in the *Prostitution Reference* that s. 213(1)(*c*) does not violate s. 2(*b*) since it is possible to resolve this case entirely on s. 7 grounds.

The common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. However, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. The threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. In this case, the application judge was entitled to rule on the new legal issues of whether the laws in question violated the security of the person interests under s. 7, as the majority decision of this Court in the *Prostitution Reference* was based on the s. 7 physical liberty interest alone. Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years. The application judge was not, however, entitled to decide the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference* and was binding on her.

The application judge's findings on social and legislative facts are entitled to deference. The standard of review for findings of fact — whether adjudicative,

Arrêt : Les pourvois sont rejetés, et le pourvoi incident est accueilli. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) du *Code criminel* sont déclarés incompatibles avec la *Charte*. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement. L'effet de la déclaration d'invalidité est suspendu pendant un an.

Les trois dispositions contestées, qui visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées, ne résistent pas au contrôle constitutionnel. Elles portent atteinte au droit à la sécurité de la personne que l'art. 7 garantit aux prostituées, et ce, d'une manière non conforme aux principes de justice fondamentale. Point n'est besoin de déterminer si notre Cour devrait rompre avec la conclusion qu'elle a tirée dans le *Renvoi sur la prostitution*, à savoir que l'al. 213(1)*c*) ne porte pas atteinte à la liberté garantie à l'al. 2*b*), ou la réexaminer, puisqu'il est possible de trancher en l'espèce sur le fondement du seul art. 7.

La règle du *stare decisis* issue de la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. Une juridiction inférieure ne peut toutefois pas faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit d'en justifier le réexamen. Les conditions sont réunies lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. En l'espèce, la juge de première instance pouvait trancher la question nouvelle de savoir si les dispositions en cause portent atteinte ou non au droit à la sécurité de la personne garanti à l'art. 7 car, dans le *Renvoi sur la prostitution*, les juges majoritaires de la Cour statuent uniquement en fonction du droit à la liberté physique de la personne garanti par l'art. 7. Qui plus est, dans le *Renvoi sur la prostitution*, les principes de justice fondamentale sont examinés sous l'angle de l'imprécision de la criminalisation indirecte et de l'acceptabilité de celle-ci. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années. La juge de première instance n'était cependant pas admise à trancher la question de savoir si la disposition sur la communication constitue une limitation justifiée de la liberté d'expression. Notre Cour s'était prononcée sur ce point dans le *Renvoi sur la prostitution*, et la juge était liée par cette décision.

Les conclusions tirées en première instance sur des faits sociaux ou législatifs commandent la déférence. La norme de contrôle applicable aux conclusions de fait —

social, or legislative — remains palpable and overriding error.

The impugned laws negatively impact security of the person rights of prostitutes and thus engage s. 7. The proper standard of causation is a flexible "sufficient causal connection" standard, as correctly adopted by the application judge. The prohibitions all heighten the risks the applicants face in prostitution — itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes' so-called choice to engage in prostitution. While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Moreover, it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

The applicants have also established that the deprivation of their security of the person is not in accordance with the principles of fundamental justice: principles that attempt to capture basic values underpinning our constitutional order. This case concerns the basic values against arbitrariness (where there is *no connection* between the effect and the object of the law), overbreadth (where the law goes too far and interferes with *some* conduct that bears no connection to its objective), and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective). These are three distinct principles, but overbreadth is related to arbitrariness, in that the question for both is whether there is no connection between the law's effect and its objective. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently

qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

Les dispositions contestées ont un effet préjudiciable sur la sécurité des prostituées et mettent donc en jeu le droit garanti à l'art. 7. La norme qui convient est celle du « lien de causalité suffisant », appliquée avec souplesse, celle retenue à juste titre par la juge de première instance. Les interdictions augmentent tous les risques auxquels s'exposent les demanderesses lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. Elles ne font pas qu'encadrer la pratique de la prostitution. Elles franchissent un pas supplémentaire déterminant par l'imposition de conditions *dangereuses* à la pratique de la prostitution : elles empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection. Le lien de causalité n'est pas rendu inexistant par les actes de tiers (clients et proxénètes) ou le prétendu choix des intéressées de se prostituer. Bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution (ou qui a un jour fait ce choix), de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. De plus, le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées ne change rien. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

Les demanderesses ont également établi que l'atteinte à leur droit à la sécurité n'est pas conforme aux principes de justice fondamentale, lesquels sont censés intégrer les valeurs fondamentales qui sous-tendent notre ordre constitutionnel. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire (*absence de lien* entre l'effet de la loi et son objet), à la portée excessive (la disposition va trop loin et empiète sur *quelque* comportement sans lien avec son objectif) et à la disproportion totale (l'effet de la disposition est totalement disproportionné à l'objectif de l'État). Il s'agit de trois notions distinctes, mais la portée excessive est liée au caractère arbitraire en ce que l'absence de lien entre l'effet de la disposition et son objectif est commune aux deux. Les trois notions supposent de comparer l'atteinte aux droits qui découle de la loi avec l'objectif de la loi, et non avec son efficacité; elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi ou qui en pâtit. L'analyse se veut qualitative, et non quantitative. La question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement

bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Applying these principles to the impugned provisions, the negative impact of the bawdy-house prohibition (s. 210) on the applicants' security of the person is grossly disproportionate to its objective of preventing public nuisance. The harms to prostitutes identified by the courts below, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, are grossly disproportionate to the deterrence of community disruption. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. Second, the purpose of the living on the avails of prostitution prohibition in s. 212(1)(*j*) is to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes *some* conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is consequently overbroad. Third, the purpose of the communicating prohibition in s. 213(1)(*c*) is not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1, some of their arguments under s. 7 are properly addressed at this stage of the analysis. In particular, they attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work

mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

Si l'on applique ces notions aux dispositions contestées, l'effet préjudiciable de l'interdiction des maisons de débauche (art. 210) sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif de prévenir les nuisances publiques. Les préjudices subis par les prostituées selon les juridictions inférieures (p. ex. le fait de ne pouvoir travailler dans un lieu fixe, sûr et situé à l'intérieur, ni avoir recours à un refuge sûr) sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer les nuisances, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. L'interdiction faite à l'al. 212(1)*j*) de vivre des produits de la prostitution d'autrui vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés. Or, la disposition vise toute personne qui vit des produits de la prostitution d'autrui sans établir de distinction entre celui qui exploite une prostituée et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. *Certains* actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent ainsi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive. L'alinéa 213(1)*c*), qui interdit la communication, vise non pas à éliminer la prostitution dans la rue comme telle, mais bien à sortir la prostitution de la rue et à la soustraire au regard du public afin d'empêcher les nuisances susceptibles d'en découler. Son effet préjudiciable sur le droit à la sécurité et à la vie des prostituées de la rue, du fait que ces dernières sont empêchées de communiquer avec leurs clients éventuels afin de déterminer s'ils sont intoxiqués ou enclins à la violence, est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

Même si les procureurs généraux ne prétendent pas sérieusement que, si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier, certaines des thèses qu'ils défendent en fonction de l'art. 7 sont reprises à juste titre à cette étape de l'analyse. En particulier, ils tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation. Or, la disposition vise non seulement

with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships. The impugned laws are not saved by s. 1.

Concluding that each of the challenged provisions violates the *Charter* does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the declaration of invalidity should be suspended for one year.

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Referred to: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Pierce* (1982), 37 O.R. (2d) 721; *R. v. Worthington* (1972), 10 C.C.C. (2d) 311; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Grilo* (1991), 2 O.R. (3d) 514; *R. v. Barrow* (2001), 54 O.R. (3d) 417; *R. v. Head* (1987), 59 C.R. (3d) 80; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R.

le chauffeur ou le garde du corps, qui peut en réalité être un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur son effet qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie. Les dispositions contestées ne sont pas sauvegardées par application de l'article premier.

La conclusion que les dispositions contestées portent atteinte à des droits garantis par la *Charte* ne dépouille pas le législateur du pouvoir de décider des lieux et des modalités de la prostitution, à condition qu'il exerce ce pouvoir sans porter atteinte aux droits constitutionnels des prostituées. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel. Au vu de l'ensemble des intérêts en jeu, il convient de suspendre l'effet de la déclaration d'invalidité pendant un an.

Jurisprudence

Arrêts mentionnés : *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458; *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *R. c. Pierce* (1982), 37 O.R. (2d) 721; *R. c. Worthington* (1972), 10 C.C.C. (2d) 311; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Grilo* (1991), 2 O.R. (3d) 514; *R. c. Barrow* (2001), 54 O.R. (3d) 417; *R. c. Head* (1987), 59 C.R. (3d) 80; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Nouveau-Brunswick (Ministre de la Santé et des Services*

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communautaires) c. G. (J.), [1999] 3 R.C.S. 46; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486; *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791; *R. c. Heywood*, [1994] 3 R.C.S. 761; *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489; *R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555; *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57; *R. c. Clay*, 2003 CSC 75, [2003] 3 R.C.S. 735; *Rockert c. La Reine*, [1978] 2 R.C.S. 704; *R. c. Zundel*, [1992] 2 R.C.S. 731; *Shaw c. Director of Public Prosecutions*, [1962] A.C. 220; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

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(3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Appeals dismissed and cross-appeal allowed.

Michael H. Morris, *Nancy Dennison* and *Gail Sinclair*, for the appellant/respondent on cross-appeal the Attorney General of Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* and *Megan Stephens*, for the appellant/respondent on cross-appeal the Attorney General of Ontario.

Alan N. Young, *Marlys A. Edwardh* and *Daniel Sheppard*, for the respondents/appellants on cross-appeal.

Sylvain Leboeuf and *Julie Dassylva*, for the intervener the Attorney General of Quebec.

Katrina E. Pacey, *Joseph J. Arvay*, *Q.C.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* and *M. Kathleen Kinch*, for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society.

Written submissions only by *Michael A. Feder* and *Tammy Shoranick*, for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS.

Brent B. Olthuis, *Megan Vis-Dunbar* and *Michael Sobkin*, for the intervener the British Columbia Civil Liberties Association.

Georgialee A. Lang and *Donald Hutchinson*, for the intervener the Evangelical Fellowship of Canada.

Jonathan A. Shime, *Megan Schwartzentruber* and *Renée Lang*, for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario.

Janine Benedet and *Fay Faraday*, for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of

2010 ONSC 4264, 102 O.R. (3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Pourvois rejetés et pourvoi incident accueilli.

Michael H. Morris, *Nancy Dennison* et *Gail Sinclair*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* et *Megan Stephens*, pour l'appelant/intimé au pourvoi incident le procureur général de l'Ontario.

Alan N. Young, *Marlys A. Edwardh* et *Daniel Sheppard*, pour les intimées/appelantes au pourvoi incident.

Sylvain Leboeuf et *Julie Dassylva*, pour l'intervenant le procureur général du Québec.

Katrina E. Pacey, *Joseph J. Arvay*, *c.r.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* et *M. Kathleen Kinch*, pour les intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society.

Argumentation écrite seulement par *Michael A. Feder* et *Tammy Shoranick*, pour l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida.

Brent B. Olthuis, *Megan Vis-Dunbar* et *Michael Sobkin*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Georgialee A. Lang et *Donald Hutchinson*, pour l'intervenante l'Alliance évangélique du Canada.

Jonathan A. Shime, *Megan Schwartzentruber* et *Renée Lang*, pour les intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario.

Janine Benedet et *Fay Faraday*, pour les intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association

Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* and *Amanda C. McLachlan*, for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada.

Joseph J. Arvay, *Q.C.*, and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Walid Hijazi, for the intervener the Simone de Beauvoir Institute.

Gwendoline Allison, for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution.

Christa Big Canoe and *Emily R. Hill*, for the intervener Aboriginal Legal Services of Toronto Inc.

des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* et *Amanda C. McLachlan*, pour les intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada.

Joseph J. Arvay, *c.r.*, et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Walid Hijazi, pour l'intervenant l'Institut Simone de Beauvoir.

Gwendoline Allison, pour l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution.

Christa Big Canoe et *Emily R. Hill*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

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The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.

[2] These appeals and the cross-appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster. I conclude that they do not. I would therefore make a suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament.

I. The Case

[3] Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are unconstitutional.

[4] The three impugned provisions criminalize various activities related to prostitution. They are primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. Section 212(1)(*j*) makes it an offence to live on the avails of another's prostitution. Section 213(1)(*c*) makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Au Canada, offrir ses services sexuels contre de l'argent n'est pas un crime. Par contre, tenir une maison de débauche, vivre des produits de la prostitution d'autrui ou communiquer avec quelqu'un en public en vue d'un acte de prostitution constituent des actes criminels. On fait valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées et qu'elles sont de ce fait inconstitutionnelles.

[2] Les pourvois et le pourvoi incident ne visent pas à déterminer si la prostitution doit être légale ou non, mais bien si les dispositions adoptées par le législateur fédéral pour encadrer sa pratique résistent au contrôle constitutionnel. Je conclus qu'elles n'y résistent pas. Je suis donc d'avis de les invalider avec effet suspensif et de renvoyer la question au législateur afin qu'il redéfinisse les modalités de cet encadrement.

I. Le dossier

[3] Les demanderesses — trois prostituées ou ex-prostituées — ont sollicité un jugement qui déclare inconstitutionnelles trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46.

[4] Les trois dispositions contestées criminalisent diverses activités liées à la prostitution. Elles visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées. Suivant l'art. 210, est coupable d'une infraction quiconque, selon le cas, habite une maison de débauche, est trouvé, sans excuse légitime, dans une maison de débauche ou, en qualité de propriétaire, locateur, occupant ou locataire d'un local, en permet sciemment l'utilisation comme maison de débauche. L'alinéa 212(1)*j*) dispose qu'est coupable d'un acte criminel quiconque vit des produits de la prostitution d'autrui. L'alinéa 213(1)*c*) crée l'infraction d'arrêter ou de tenter d'arrêter une personne ou de communiquer ou de tenter de communiquer avec elle dans un endroit public dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre.

of applying different standards of review when the evidence is intertwined would be daunting.

[55] It is suggested that no deference is required on social and legislative facts because appellate courts are in as good a position to evaluate such evidence as trial judges. If this were so, adjudicative facts presented only in affidavit form would similarly be owed less deference. Yet this Court has been clear that, absent express statutory instruction, there is no middling standard of review for findings of fact (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401). Furthermore, this view does not meet the concerns of duplication of effort and the intertwining of such evidence with other kinds of evidence. Nor does it address the point that the appellate task is not to review evidence globally, but rather to review the conclusions the first instance judge has drawn from the evidence.

[56] For these reasons, I am of the view that a no-deference standard of appellate review for social and legislative facts should be rejected. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error.

B. *Section 7 Analysis*

[57] In the discussion that follows, I first consider whether the applicants have established that the impugned laws impose limits on security of the person, thus engaging s. 7. I then examine the argument of the appellant Attorneys General that the laws do not cause the alleged harms. I go on to consider whether any limits on security of the person are in accordance with the principles of fundamental justice.

et des experts, mais elle refuse de faire preuve de déférence à l'endroit de ses conclusions sur des faits sociaux ou législatifs. Appliquer des normes de contrôle différentes à des éléments de preuve entremêlés représenterait une tâche colossale.

[55] On laisse entendre qu'il n'y a pas lieu de déférer aux conclusions sur des faits sociaux ou législatifs, car une juridiction d'appel est aussi bien placée qu'un juge de première instance pour les apprécier. Si tel était le cas, un fait en litige établi uniquement au moyen d'un affidavit aurait donc droit à un degré de déférence moindre. Or, notre Cour précise qu'à défaut d'un libellé exprès en ce sens, aucune norme de contrôle intermédiaire ne s'applique aux conclusions de fait (*H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401). De plus, ce n'est pas de nature à apaiser la crainte d'un dédoublement de l'examen et d'un entremêlement de tels éléments de preuve avec d'autres. C'est méconnaître également la fonction d'une juridiction d'appel, qui ne consiste pas à examiner la preuve globalement, mais à s'en tenir aux conclusions que le juge de première instance a tirées à partir de la preuve.

[56] Pour ces motifs, je suis d'avis qu'il ne convient pas d'appliquer aux faits sociaux ou législatifs une norme de contrôle non déférente. La norme de contrôle applicable aux conclusions de fait — qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

B. *Analyse fondée sur l'art. 7*

[57] Dans l'analyse qui suit, j'examine d'abord si les demanderesses ont démontré que les dispositions en cause restreignent le droit à la sécurité de la personne et mettent ainsi en jeu l'art. 7. Je me penche ensuite sur la thèse des procureurs généraux appelants selon laquelle les dispositions n'ont pas l'effet attentatoire allégué. Je poursuis en me demandant si la limite apportée le cas échéant au droit à la sécurité de la personne est conforme aux principes de justice fondamentale.

(1) Is Security of the Person Engaged?

[58] Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*.[1]

[59] Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

[60] For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

1 The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.

(1) Le droit à la sécurité de la personne est-il en jeu?

[58] L'article 7 dispose que l'État ne peut porter atteinte au droit de quiconque à la vie, à la liberté et à la sécurité de sa personne qu'en conformité avec les principes de justice fondamentale. Il faut dès lors se demander si les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des demanderesses ou limitent ce droit, de sorte qu'elles tombent sous le coup de l'art. 7 de la *Charte* ou mettent celui-ci en jeu[1].

[59] En l'espèce, les demanderesses soutiennent que l'interdiction des maisons de débauche, du proxénétisme et de la communication en public à des fins de prostitution augmente les risques auxquels elles s'exposent lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. La juge de première instance conclut que la preuve va dans ce sens, et la Cour d'appel lui donne raison.

[60] Pour les motifs qui suivent, je suis du même avis. Le législateur ne se contente pas d'encadrer la pratique de la prostitution. Il franchit un pas supplémentaire déterminant qui l'amène à imposer des conditions *dangereuses* à la pratique de la prostitution : les interdictions empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus.

1 L'accent est mis sur la sécurité de la personne, non sur la liberté, pour trois raisons. Premièrement, le *Renvoi sur la prostitution* établit que les dispositions relatives à la communication et aux maisons de débauche mettent en jeu le droit à la liberté et il fait autorité sur ce point. Le moyen fondé sur le droit à la sécurité de la personne est nouveau et justifie amplement le réexamen du renvoi par la juge de première instance. Deuxièmement, on ne saurait dire avec certitude que le droit à la liberté des demanderesses est mis en jeu par la disposition relative au proxénétisme; les demanderesses disent en fait craindre l'application de la disposition à leurs employés ou à leurs proches. Enfin, il me semble que les demanderesses prétendent essentiellement dans les faits non pas que l'*inobservation* de la loi porte atteinte à leur droit à la liberté, mais plutôt que son *respect* porte atteinte à leur droit à la sécurité.

then show that the deprivation of security is not in accordance with the principles of fundamental justice.

[92] For all these reasons, I reject the arguments of the Attorneys General that the cause of the harm is not the impugned laws, but rather the actions of third parties and the prostitutes' choice to engage in prostitution. As I concluded above, the laws engage s. 7 of the *Charter*. That conclusion remains undisturbed.

(3) Principles of Fundamental Justice

(a) *The Applicable Norms*

[93] I have concluded that the impugned laws deprive prostitutes of security of the person, engaging s. 7. The remaining step in the s. 7 analysis is to determine whether this deprivation is in accordance with the principles of fundamental justice. If so, s. 7 is not breached.

[94] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 512).

[95] The principles of fundamental justice have significantly evolved since the birth of the *Charter*. Initially, the principles of fundamental justice were thought to refer narrowly to principles of natural justice that define procedural fairness. In the *Motor Vehicle Reference*, this Court held otherwise:

> . . . it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice . . . . To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated

l'art. 7 s'applique, le demandeur doit démontrer que l'atteinte à sa sécurité n'est pas conforme aux principes de justice fondamentale.

[92] Pour tous ces motifs, je rejette la prétention des procureurs généraux selon laquelle le préjudice allégué n'est pas attribuable aux dispositions contestées, mais bien aux actes de tiers et au choix de se prostituer. J'estime toujours que les dispositions en cause font intervenir l'art. 7 de la *Charte*.

(3) Principes de justice fondamentale

a) *Normes applicables*

[93] J'arrive à la conclusion que les dispositions contestées portent atteinte au droit à la sécurité de la personne des prostituées et qu'elles mettent ainsi en jeu l'art. 7. Reste donc à savoir si, au regard de l'art. 7, cette atteinte est conforme ou non aux principes de justice fondamentale. Dans l'affirmative, il n'y a pas d'atteinte au droit garanti à l'art. 7.

[94] Les principes de justice fondamentale définissent les conditions minimales auxquelles doit satisfaire la loi qui a un effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne. Selon le juge Lamer, « [l]'expression "principes de justice fondamentale" constitue non pas un droit, mais un modificatif du droit de ne pas se voir porter atteinte à sa vie, à sa liberté et à la sécurité de sa personne; son rôle est d'établir les paramètres de ce droit » (*Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486 (« *Renvoi sur la MVA* »), p. 512).

[95] Les « principes de justice fondamentale » ont beaucoup évolué depuis l'adoption de la *Charte*. Au départ, on les réduisait aux principes de justice naturelle qui définissent l'équité procédurale. Dans le *Renvoi sur la MVA*, notre Cour en a jugé autrement :

> . . . il serait erroné d'interpréter l'expression « justice fondamentale » comme synonyme de justice naturelle [. . .] Ce faire aurait pour conséquence de dépouiller les intérêts protégés de tout leur sens ou presque et de laisser le « droit » à la vie, à la liberté et à la sécurité de la

state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*. [pp. 501-2]

[96] The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[97] The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel *Charter* claims.

[98] Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law. In *Morgentaler*, the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law. Beetz J. called this "manifest unfairness" (*Morgentaler*, at p. 120), but later cases interpreted this as an "arbitrariness" analysis (see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 133, *per* McLachlin C.J. and Major J.).

personne dans un état d'atrophie déplorable. Un tel résultat serait incompatible avec le style affirmatif et général dans lequel ces droits sont énoncés et également incompatible avec le point de vue que cette Cour a adopté, en ce qui concerne l'interprétation des droits garantis par la *Charte*, dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357 (le juge Estey), et dans l'arrêt *Hunter c. Southam Inc.*, précité. [p. 501-502]

[96] Dans le *Renvoi sur la MVA*, la Cour reconnaît que les principes de justice fondamentale s'entendent des valeurs fondamentales qui sous-tendent notre ordre constitutionnel. L'analyse fondée sur l'art. 7 s'attache à débusquer les dispositions législatives intrinsèquement mauvaises, celles qui privent du droit à la vie, à la liberté ou à la sécurité de la personne au mépris des valeurs fondamentales que sont censés intégrer les principes de justice fondamentale et dont la jurisprudence a défini la teneur au fil des ans. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire, à la portée excessive et à la disproportion totale.

[97] Les notions d'arbitraire, de portée excessive et de disproportion totale ont connu une évolution endogène au fur et à mesure que les tribunaux ont été saisis d'allégations nouvelles fondées sur la *Charte*.

[98] On a qualifié d'« arbitraire » la disposition dont l'effet n'avait aucun lien avec son objet. Dans l'affaire *Morgentaler*, l'accusé contestait les dispositions du *Code criminel* qui exigeaient qu'un avortement soit approuvé par le comité de l'avortement thérapeutique d'un hôpital agréé. L'objet des dispositions était de protéger la santé des femmes. Or, selon les juges majoritaires de la Cour, l'exigence que tout avortement thérapeutique soit pratiqué dans un hôpital agréé ne contribuait pas à la réalisation de cet objectif et causait en fait des délais nuisibles à la santé des femmes. Par conséquent, les dispositions portaient atteinte aux valeurs fondamentales en ce que leur effet allait en fait à l'encontre de leur objectif. Le juge Beetz a alors parlé d'« iniquité manifeste » (*Morgentaler*, p. 120), et la Cour y a vu ensuite un « caractère arbitraire » (voir *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, par. 133, la juge en chef McLachlin et le juge Major).

[99] In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.

[100] Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.

[101] Another way in which laws may violate our basic values is through what the cases have called "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective. In *R. v. Heywood*, [1994] 3 S.C.R. 761, the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Court found that the law, which aimed to protect children from sexual predators, was overbroad; insofar as the law applied to offenders who did not constitute a danger to children, and insofar as it applied to parks where children were unlikely to be present, it was unrelated to its objective.

[102] In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, the challenged provisions of the

[99] Dans *Chaoulli*, le demandeur contestait des dispositions québécoises qui interdisaient de souscrire une assurance maladie privée pour l'obtention de services offerts dans le réseau public. Les dispositions en cause avaient pour objet la protection du système de santé public et le maintien de ses ressources. Sur la foi de la preuve concernant la situation dans d'autres pays, les juges majoritaires concluent qu'assurance maladie privée et système de santé public peuvent coexister. Trois d'entre eux jugent l'interdiction « arbitraire » vu l'absence, selon les faits mis en preuve, d'un lien réel entre l'effet de la loi et son objectif.

[100] Plus récemment, dans *PHS*, notre Cour a jugé arbitraire le refus du ministre de prolonger l'exemption dont bénéficiait un centre d'injection supervisée relativement à l'application des dispositions sur la possession de drogue. Ces dispositions avaient pour objet la protection de la santé et de la sécurité publiques, et les services fournis par le centre d'injection supervisée contribuaient en fait à l'atteinte de cet objectif. L'effet du refus de prolonger l'exemption — à savoir empêcher le fonctionnement du centre d'injection supervisée — allait à l'encontre des objectifs des dispositions relatives à la possession de drogue.

[101] Une disposition peut aussi violer nos valeurs fondamentales du fait de ce que les tribunaux appellent la « portée excessive », c'est-à-dire lorsqu'elle va trop loin et empiète sur un comportement sans lien avec son objectif. Dans *R. c. Heywood*, [1994] 3 R.C.S. 761, l'accusé contestait une disposition sur le vagabondage qui interdisait aux délinquants reconnus coupables de l'une des infractions énumérées de « flâner » dans les parcs publics. Les juges majoritaires de la Cour concluent que la portée de la disposition, dont l'objet était de protéger les enfants contre les prédateurs sexuels, est trop grande; la disposition n'a pas de lien avec son objectif dans la mesure où elle s'applique à des délinquants qui ne présentent pas un danger pour les enfants et à des parcs qui ne sont pas susceptibles d'être fréquentés par des enfants.

[102] Dans *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489, les dispositions contestées du *Code*

Criminal Code prevented an accused who was found unfit to stand trial from receiving an absolute discharge, and subjected the accused to indefinite appearances before a review board. The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (para. 41). The Court found that insofar as the law applied to permanently unfit accused, who would never become fit to stand trial, the objective did "not apply" and therefore the law was overbroad (paras. 42-43).

[103] Laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state's objective. In *Malmo-Levine*, the accused challenged the prohibition on the possession of marijuana on the basis that its effects were grossly disproportionate to its objective. Although the Court agreed that a law with grossly disproportionate effects would violate our basic norms, the Court found that this was not such a case: ". . . the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action" (para. 175).

[104] In *PHS*, this Court found that the Minister's refusal to exempt the safe injection site from drug possession laws was not in accordance with the principles of fundamental justice because the effect of denying health services and increasing the risk of death and disease of injection drug users was grossly disproportionate to the objectives of the drug possession laws, namely public health and safety.

[105] The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these

criminel empêchaient l'accusé jugé inapte à subir son procès de bénéficier d'une libération inconditionnelle et l'obligeaient à comparaître périodiquement devant une commission d'examen pendant une période indéfinie. Les dispositions avaient pour objet « de fournir à l'accusé un traitement ou une évaluation continus afin de le rendre éventuellement apte à subir son procès » (par. 41). Selon la Cour, dans la mesure où les dispositions s'appliquaient malgré l'inaptitude permanente de l'accusé — qui ne deviendrait jamais apte à subir son procès —, leur objectif « ne s'appliqu[ait] pas » et leur portée était donc excessive (par. 42-43).

[103] La disposition dont l'effet est totalement disproportionné à l'objectif de l'État viole aussi nos valeurs fondamentales. Dans *Malmo-Levine*, l'accusé contestait l'interdiction de posséder de la marihuana au motif que ses effets étaient totalement disproportionnés à son objectif. La Cour reconnaît qu'une disposition aux effets totalement disproportionnés viole nos normes fondamentales, mais elle conclut que tel n'est pas le cas en l'espèce : « . . . les effets sur les accusés des dispositions actuelles, y compris la possibilité d'emprisonnement, n'excèdent pas la vaste latitude que la Constitution accorde au Parlement » (par. 175).

[104] Dans l'arrêt *PHS*, notre Cour conclut que le refus du ministre de soustraire le centre d'injection supervisée à l'application des dispositions sur la possession de drogue n'est pas conforme aux principes de justice fondamentale parce que le refus de services de santé et l'augmentation du risque de décès et de maladie chez les consommateurs de drogues injectables sont totalement disproportionnés aux objectifs des dispositions sur la possession de drogue, à savoir la santé et la sécurité publiques.

[105] L'enseignement primordial de la jurisprudence veut qu'une disposition aille à l'encontre de nos valeurs fondamentales lorsque les moyens mis en œuvre par l'État pour atteindre son objectif comportent une faille fondamentale en ce qu'ils sont arbitraires ou ont une portée trop générale, ou encore, ont des effets totalement disproportionnés à l'objectif législatif. Il n'est pas conforme

norms is not in accordance with the principles of fundamental justice.

[106] As these principles have developed in the jurisprudence, they have not always been applied consistently. The Court of Appeal below pointed to the confusion that has been caused by the "commingling" of arbitrariness, overbreadth, and gross disproportionality (paras. 143-51). This Court itself recently noted the conflation of the principles of overbreadth and gross disproportionality (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 38-40; see also *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, at para. 72). In short, courts have explored different ways in which laws run afoul of our basic values, using the same words — arbitrariness, overbreadth, and gross disproportionality — in slightly different ways.

[107] Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:

> The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.

("The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209 (citation omitted))

aux principes de justice fondamentale de priver un citoyen du droit à la vie, à la liberté ou à la sécurité de sa personne au moyen d'une disposition ainsi irrégulière.

[106] Au fil de l'évolution jurisprudentielle, ces principes n'ont pas toujours été appliqués uniformément. En l'espèce, la Cour d'appel signale la confusion créée par l'[TRADUCTION] « amalgame » du caractère arbitraire, de la portée excessive et de la disproportion totale (par. 143-151). Notre Cour relevait elle-même récemment que l'on confond portée excessive et disproportion totale (*R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555, par. 38-40; voir également *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, par. 72). Ainsi, les tribunaux ont employé les mêmes mots — caractère arbitraire, portée excessive et disproportion totale — avec quelques variantes pour explorer les différentes manières dont une disposition législative peut aller à l'encontre de nos valeurs fondamentales.

[107] Bien qu'il y ait un chevauchement important entre le caractère arbitraire, la portée excessive et la disproportion totale, et que plus d'une de ces trois notions puissent bel et bien s'appliquer à une disposition, il demeure que les trois correspondent à des principes distincts qui découlent de ce que Hamish Stewart appelle un [TRADUCTION] « manque de logique fonctionnelle », à savoir que la disposition « n'est pas suffisamment liée à son objectif ou, dans un certain sens, qu'elle va trop loin pour l'atteindre » (*Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 151). Peter Hogg explique :

> [TRADUCTION] Les principes liés à la portée excessive, à la disproportion et au caractère arbitraire visent tous au fond à pallier ce que Hamish Stewart appelle un « manque de logique fonctionnelle », en ce sens que le tribunal reconnaît l'objectif législatif, mais examine le moyen choisi pour l'atteindre. Si ce moyen ne permet pas logiquement d'atteindre l'objectif, la disposition est dysfonctionnelle eu égard à son propre objectif.

(« The Brilliant Career of Section 7 of the Charter » (2012), 58 *S.C.L.R.* (2d) 195, p. 209 (renvoi omis))

[108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

[109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

[110] Against this background, it may be useful to elaborate on arbitrariness, overbreadth and gross disproportionality.

[111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

[112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to

[108] La jurisprudence relative au caractère arbitraire, à la portée excessive et à la disproportion totale s'attache à deux failles. La première est l'absence de lien entre l'atteinte aux droits et l'objectif de la disposition — lorsque l'atteinte au droit à la vie, à la liberté ou à la sécurité de la personne n'a aucun lien avec l'objet de la loi. Ce sont alors les principes liés au caractère arbitraire et à la portée excessive (l'absence de lien entre l'objet de la disposition et l'atteinte au droit garanti par l'art. 7) qui sont en cause.

[109] La seconde faille se présente lorsqu'une disposition prive une personne du droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière totalement disproportionnée à son objectif. L'incidence sur le droit garanti à l'art. 7 a un lien avec l'objet, mais elle est si importante qu'elle viole nos normes fondamentales.

[110] Dans ce contexte, il peut être utile de développer les notions de caractère arbitraire, de portée excessive et de disproportion totale.

[111] Déterminer qu'une disposition est arbitraire ou non exige qu'on se demande s'il existe un lien direct entre son objet et l'effet allégué sur l'intéressé, s'il y a un certain rapport entre les deux. Il doit exister un lien rationnel entre l'objet de la mesure qui cause l'atteinte au droit garanti à l'art. 7 et la limite apportée au droit à la vie, à la liberté ou à la sécurité de la personne (Stewart, p. 136). La disposition qui limite ce droit selon des modalités qui n'ont *aucun lien* avec son objet empiète arbitrairement sur ce droit. Ainsi, dans *Chaoulli*, la Cour juge les dispositions arbitraires parce qu'interdire l'assurance maladie privée n'a aucun rapport avec l'objectif de protéger le système de santé public.

[112] Il y a portée excessive lorsqu'une disposition s'applique si largement qu'elle vise *certains* actes qui n'ont aucun lien avec son objet. La disposition est alors *en partie* arbitraire. Essentiellement, la situation en cause est celle où il n'existe aucun lien rationnel entre les objets de la disposition et *certains* de ses effets, mais pas tous. Par exemple, dans *Demers*, le texte législatif en cause exigeait

TAB 6

Canada (Justice) v. Khadr, 2008 SCC 28

Minister of Justice, Attorney General of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police *Appellants*

v.

Omar Ahmed Khadr *Respondent*

and

British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch *Interveners*

Indexed as: Canada (Justice) *v.* Khadr

Neutral citation: 2008 SCC 28.

File No.: 32147.

2008: March 26; 2008: May 23.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Fundamental justice — Duty to disclose — Canadian officials interviewing detainee in Guantanamo Bay and sharing contents of interviews with U.S. authorities — Whether principles of international law and comity of nations precluded application of Charter — Whether process in place at Guantanamo Bay at that time violated Canada's binding obligations under international law — If so, whether detainee entitled to disclosure of records of interviews and of information given to U.S. authorities as a direct consequence of conducting interviews — Canadian Charter of Rights and Freedoms, s. 7.

Ministre de la Justice, procureur général du Canada, ministre des Affaires étrangères, directeur du Service canadien du renseignement de sécurité et commissaire de la Gendarmerie royale du Canada *Appelants*

c.

Omar Ahmed Khadr *Intimé*

et

Association des libertés civiles de la Colombie-Britannique, Criminal Lawyers' Association (Ontario), University of Toronto, Faculty of Law — International Human Rights Clinic et Human Rights Watch *Intervenantes*

Répertorié : Canada (Justice) *c.* Khadr

Référence neutre : 2008 CSC 28.

N^{o} du greffe : 32147.

2008 : 26 mars; 2008 : 23 mai.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Application — Justice fondamentale — Obligation de communiquer — Responsables canadiens ayant interrogé un détenu à Guantanamo puis partagé le résultat obtenu avec les autorités américaines — Les principes du droit international et de la courtoisie entre les nations faisaient-ils obstacle à l'application de la Charte? — La procédure alors en cours à Guantanamo était-elle contraire aux obligations internationales du Canada? — Dans l'affirmative, le détenu a-t-il droit à la communication des documents relatifs aux entretiens et de tout renseignement dont la transmission aux autorités américaines découle directement des entretiens? — Charte canadienne des droits et libertés, art. 7.

Evidence — Fresh evidence — Admissibility — Fresh evidence admissible to clarify record — No unfairness to other parties in admitting evidence.

K, a Canadian, has been detained by U.S. Forces since 2002 at Guantanamo Bay, Cuba, where he is currently facing murder and other terrorism-related charges. He was taken prisoner in Afghanistan when he was 15 years old. In 2003, Canadian officials, including agents of the Canadian Security Intelligence Service, questioned K at Guantanamo Bay with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities. After formal charges were laid against him, K, invoking *Stinchcombe*, sought disclosure in Canada of all documents relevant to these charges in the possession of the Canadian Crown, including the records of the interviews. The Federal Court refused the request, but the Federal Court of Appeal set aside the decision and ordered that unredacted copies of all relevant documents in the possession of the Crown be produced before the Federal Court for review under ss. 38 ff. of the *Canada Evidence Act*.

Held: The appeal should be dismissed. The Federal Court of Appeal's order should be varied as it relates to the scope of disclosure to which K is entitled as a remedy under s. 7 of the *Canadian Charter of Rights and Freedoms*.

K is entitled to disclosure from the appellants of the records of the interviews, and of information given to U.S. authorities as a direct consequence of conducting the interviews. The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law and which might otherwise preclude application of the *Charter* to Canadian officials acting abroad, do not extend to participation in processes that violate Canada's binding international human rights obligations. The process in place at Guantanamo Bay at the time Canadian officials interviewed K and passed on the fruits of the interviews to U.S. officials has been found by the U.S. Supreme Court, with the benefit of a full factual record, to violate U.S. domestic law and international human rights obligations to which Canada subscribes. The comity concerns that would normally justify deference to foreign law do not apply in this case. Consequently, the *Charter* applies. [2-3] [21] [25-26]

With K's present and future liberty at stake, Canada is bound by the principles of fundamental justice

Preuve — Nouvelle preuve — Admissibilité — Éléments de preuve nouveaux admissibles pour clarifier certains points du dossier — Aucun préjudice infligé aux autres parties par l'admission de la preuve nouvelle.

Citoyen canadien, K est détenu depuis 2002 par les forces armées américaines à Guantanamo (Cuba), où il est actuellement accusé de meurtre et d'autres actes liés au terrorisme. Il a été fait prisonnier en Afghanistan à l'âge de 15 ans. En 2003, des responsables canadiens, y compris des agents du Service canadien du renseignement de sécurité, l'ont interrogé à Guantanamo sur des sujets liés aux accusations qui pèsent aujourd'hui contre lui et ils ont relayé l'information recueillie aux autorités américaines. Après que des accusations formelles eurent été portées contre lui, K a invoqué l'arrêt *Stinchcombe* pour obtenir la communication au Canada de tous les documents intéressant ces accusations que possédait l'État canadien, dont les documents relatifs aux entretiens. La Cour fédérale a rejeté sa demande, mais la Cour d'appel fédérale a annulé la décision et ordonné que des copies non expurgées de tous les documents pertinents en la possession de l'État soient remises à la Cour fédérale en vue d'un examen suivant les art. 38 et suiv. de la *Loi sur la preuve au Canada*.

Arrêt : Le pourvoi est rejeté. L'ordonnance de la Cour d'appel fédérale est modifiée quant à la portée de la communication à laquelle a droit K à titre de réparation fondée sur l'art. 7 de la *Charte canadienne des droits et libertés*.

K a droit à la communication par les appelants des documents relatifs aux entretiens et de tout renseignement dont la transmission aux autorités américaines découle directement de ces entretiens. Les principes du droit international et de la courtoisie entre les nations, qui exigent normalement d'un représentant du Canada en mission à l'étranger qu'il accepte les lois de l'État d'accueil et qui, dans d'autres circonstances, peuvent le soustraire à l'application de la *Charte*, ne valent pas lorsqu'il participe à une procédure contraire aux obligations internationales du Canada en matière de droits de la personne. La procédure en cours à Guantanamo lorsque les responsables canadiens ont interrogé K puis relayé l'information aux autorités américaines a été jugée par la Cour suprême des États-Unis, à partir d'un dossier factuel complet, contraire au droit interne étatsunien et à des conventions internationales sur les droits de la personne dont le Canada est signataire. Le souci de courtoisie qui justifie normalement le respect de la loi étrangère ne s'applique pas en l'espèce. Il y a donc assujettissement à la *Charte*. [2-3] [21] [25-26]

La liberté actuelle et future de K étant en jeu, le Canada est tenu d'observer les principes de justice fondamentale,

and is under a duty of disclosure pursuant to s. 7 of the *Charter*. The content of this duty is defined by the nature of Canada's participation in the process that violated its international human rights obligations. [3] [29-31]

In the present circumstances, this duty requires Canada to disclose to K records of the interviews conducted by Canadian officials with him, and information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity. Since unredacted copies of all documents, records and other materials in the appellants' possession which might be relevant to the charges against K have already been produced to a designated judge of the Federal Court, the judge will now review the material, receive submissions from the parties and decide which documents fall within the scope of the disclosure obligation. [3] [39-40]

Cases Cited

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Khadr v. Canada*, [2006] 2 F.C.R. 505, 2005 FC 1076; *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7.

Statutes and Regulations Cited

10 U.S.C. § 836.
Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 38, 38.06.
Canadian Charter of Rights and Freedoms, s. 7.
Geneva Conventions Act, R.S.C. 1985, c. G-3.

Treaties and Other International Instruments

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20, p. 25.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20, p. 55.
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20, p. 163.
Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20, p. 84.

et l'art. 7 de la *Charte* lui impose une obligation de communication, dont la teneur est déterminée par la nature de la participation canadienne à une procédure attentatoire aux obligations internationales du Canada en matière de droits de la personne. [3] [29-31]

Vu les faits de l'espèce, le Canada est tenu de communiquer à K les documents relatifs aux entretiens que les responsables canadiens ont eus avec lui, ainsi que tout renseignement dont la transmission aux autorités américaines découle directement de ces entretiens, sous réserve de la revendication d'un privilège ou d'une exception d'intérêt public. Étant donné que des copies non expurgées de tous les documents, dossiers et autres pièces en possession des appelants et susceptibles d'intéresser les accusations portées contre K lui ont déjà été remises, le juge désigné de la Cour fédérale, après examen des documents et audition des parties, décidera de ceux qui devront être communiqués. [3] [39-40]

Jurisprudence

Arrêts mentionnés : *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *Khadr c. Canada*, [2006] 2 R.C.F. 505, 2005 CF 1076; *R. c. Hape*, [2007] 2 R.C.S. 292, 2007 CSC 26; *Rasul c. Bush*, 542 U.S. 466 (2004); *Hamdan c. Rumsfeld*, 126 S. Ct. 2749 (2006); *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1; *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7.

Lois et règlements cités

10 U.S.C. § 836.
Charte canadienne des droits et libertés, art. 7.
Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 38, 38.06.
Loi sur les conventions de Genève, L.R.C. 1985, ch. G-3.

Traités et autres instruments internationaux

Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, 75 R.T.N.U. 85, R.T. Can. 1965 nº 20, p. 55.
Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 75 R.T.N.U. 31, R.T. Can. 1965 nº 20, p. 25.
Convention de Genève relative à la protection des personnes civiles en temps de guerre, 75 R.T.N.U. 287, R.T. Can. 1965 nº 20, p. 163.
Convention de Genève relative au traitement des prisonniers de guerre, 75 R.T.N.U. 135, R.T. Can. 1965 nº 20, p. 84.

APPEAL from a judgment of the Federal Court of Appeal (Desjardins, Létourneau and Ryer JJ.A.), [2008] 1 F.C.R. 270, 280 D.L.R. (4th) 469, 362 N.R. 378, 220 C.C.C. (3d) 20, 47 C.R. (6th) 399, 156 C.R.R. (2d) 220, [2007] F.C.J. No. 672 (QL), 2007 CarswellNat 1132, 2007 FCA 182, amended June 19, 2007, reversing a decision of von Finckenstein J. (2006), 290 F.T.R. 313, [2006] F.C.J. No. 640 (QL), 2006 CarswellNat 1090, 2006 FC 509. Appeal dismissed.

Robert J. Frater, *Sharlene Telles-Langdon* and *Doreen Mueller*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Joseph J. Arvay, *Q.C.*, *Sujit Choudhry* and *Paul Champ*, for the intervener the British Columbia Civil Liberties Association.

John Norris and *Brydie C. M. Bethell*, for the intervener the Criminal Lawyers' Association (Ontario).

Audrey Macklin, *Tom A. Friedland* and *Gerald Chan*, for the interveners the University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch.

The following is the judgment delivered by

[1] THE COURT — This appeal raises the issue of the relationship between Canada's domestic and international human rights commitments. Omar Khadr currently faces prosecution on murder and other charges before a U.S. Military Commission in Guantanamo Bay, Cuba. Mr. Khadr asks for an order under s. 7 of the *Canadian Charter of Rights and Freedoms* that the appellants be required to disclose to him all documents relevant to these charges in the possession of the Canadian Crown, including interviews conducted by Canadian officials with him in 2003 at Guantanamo Bay. The Minister of Justice opposes the request, arguing that the *Charter* does not apply outside Canada and hence did not govern the actions of Canadian officials at Guantanamo Bay.

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Desjardins, Létourneau et Ryer), [2008] 1 R.C.F. 270, 280 D.L.R. (4th) 469, 362 N.R. 378, 220 C.C.C. (3d) 20, 47 C.R. (6th) 399, 156 C.R.R. (2d) 220, [2007] A.C.F. nº 672 (QL), 2007 CarswellNat 3452, 2007 CAF 182, modifié le 19 juin 2007, qui a infirmé une décision du juge von Finckenstein (2006), 290 F.T.R. 313, [2006] A.C.F. nº 640 (QL), 2006 CarswellNat 4470, 2006 CF 509. Pourvoi rejeté.

Robert J. Frater, *Sharlene Telles-Langdon* et *Doreen Mueller*, pour les appelants.

Nathan J. Whitling et *Dennis Edney*, pour l'intimé.

Joseph J. Arvay, *c.r.*, *Sujit Choudhry* et *Paul Champ*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

John Norris et *Brydie C. M. Bethell*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Audrey Macklin, *Tom A. Friedland* et *Gerald Chan*, pour les intervenantes University of Toronto, Faculty of Law — International Human Rights Clinic et Human Rights Watch.

Version française du jugement rendu par

[1] LA COUR — Le présent pourvoi soulève la question de l'interaction entre les obligations nationales et internationales du Canada en matière de droits de la personne. Omar Khadr est actuellement accusé de meurtre et d'autres crimes devant une commission militaire des États-Unis à Guantanamo (Cuba). Sur le fondement de l'art. 7 de la *Charte canadienne des droits et libertés*, il demande une ordonnance enjoignant aux appelants de lui communiquer tous les documents qui intéressent ces accusations et qui sont en la possession de l'État canadien, notamment les entretiens que des responsables canadiens ont eus avec lui en 2003 à Guantanamo. Le ministre de la Justice s'oppose à la demande, soutenant que la *Charte* ne s'applique pas à l'étranger et que, de ce fait, elle ne régissait pas les actes des responsables canadiens à Guantanamo.

[2] We conclude that Mr. Khadr is entitled to disclosure from the appellants of the records of the interviews and of information given to U.S. authorities as a direct consequence of conducting the interviews. The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations.

[3] The process in place at the time Canadian officials interviewed Mr. Khadr and passed the fruits of the interviews on to U.S. officials has been found by the United States Supreme Court to violate U.S. domestic law and international human rights obligations to which Canada is party. In light of these decisions by the United States Supreme Court that the process at Guantanamo Bay did not comply with either U.S. domestic or international law, the comity concerns that would normally justify deference to foreign law do not apply in this case. Consequently, the *Charter* applies, and Canada is under a s. 7 duty of disclosure. The content of this duty is defined by the nature of Canada's participation in the process that violated Canada's international human rights obligations. In the present circumstances, this duty requires Canada to disclose to Mr. Khadr records of the interviews conducted by Canadian officials with him, and information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity.

[4] We thus uphold the Federal Court of Appeal's conclusion that Mr. Khadr is entitled to a remedy under s. 7 of the *Charter.* However, because we reach this conclusion on different grounds than those relied on by the Court of Appeal, we vary the Court of Appeal's order as it relates to the scope of disclosure to which Mr. Khadr is entitled as remedy. Like the Court of Appeal, we make this order subject to the balancing of national security and other considerations as required by ss. 38 ff. of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[2] Nous concluons que M. Khadr a droit à la communication par les appelants des documents relatifs aux entretiens et de tout renseignement dont la transmission aux autorités américaines découle directement de ces entretiens. Les principes du droit international et de la courtoisie entre les nations, qui exigent normalement qu'un représentant du Canada en mission à l'étranger accepte les lois de l'État d'accueil, ne valent pas lorsqu'il s'agit de participer à une procédure contraire aux obligations internationales du Canada en matière de droits de la personne.

[3] La procédure en cours à Guantanamo au moment où les responsables canadiens ont interrogé M. Khadr puis transmis l'information recueillie aux autorités américaines a été jugée par la Cour suprême des États-Unis contraire au droit interne états-unien et à des conventions internationales sur les droits de la personne dont le Canada est signataire. Au vu de cette conclusion, la courtoisie, qui commanderait normalement la déférence vis-à-vis du droit étranger, ne s'applique pas en l'espèce. La *Charte* s'applique donc, et son art. 7 impose au Canada une obligation de communication. La teneur de cette obligation est déterminée par la nature de la participation canadienne à une procédure attentatoire aux obligations internationales du Canada en matière de droits de la personne. Ainsi, dans la présente affaire, le Canada est tenu de communiquer à M. Khadr les documents relatifs aux entretiens et tout renseignement dont la transmission aux autorités américaines découle directement de ces entretiens, sous réserve de la revendication d'un privilège ou d'une exception d'intérêt public.

[4] Nous confirmons donc la conclusion de la Cour d'appel fédérale selon laquelle M. Khadr a droit à une réparation suivant l'art. 7 de la *Charte*. Cependant, comme nos motifs diffèrent, nous modifions l'ordonnance rendue quant à l'étendue de la communication à laquelle a droit M. Khadr à titre de réparation. Comme celle de la Cour d'appel fédérale, notre ordonnance est rendue sous réserve de la prise en compte de l'intérêt national et d'autres considérations conformément aux art. 38 et suiv. de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5.

1. Factual Background

[5] Omar Khadr is a Canadian citizen who has been detained by U.S. forces at Guantanamo Bay, Cuba, for almost six years. Mr. Khadr was taken prisoner on July 27, 2002 in Afghanistan, as part of military action taken against Taliban and Al Qaeda forces after the September 11, 2001 attacks in New York City and Washington. He was 15 years old at the time. The United States alleges that near the end of the battle at which he was taken prisoner, Mr. Khadr threw a grenade which killed an American soldier. The United States also alleges that Mr. Khadr conspired with members of Al Qaeda to commit acts of murder and terrorism against U.S. and coalition forces. Mr. Khadr is currently facing charges relating to these allegations, which are being tried by a U.S. Military Commission at Guantanamo Bay.

[6] The Guantanamo Bay detention camp was established by Presidential Military Order in 2001 (66 FR 57833) for the detention and prosecution of non-U.S. citizens believed to be members of Al Qaeda or otherwise involved in international terrorism. The Order conferred exclusive jurisdiction upon military commissions for the trial of "any and all offences triable by military commission", and stipulated pursuant to 10 U.S.C. § 836 that applying normal rules of criminal procedure to such trials "is not practicable". The Order further provided that an individual subject to the order "shall not be privileged to seek any remedy or maintain any proceeding . . . or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal". Subsequent orders purported to remove protections of the *Geneva Conventions* of 1949 (75 U.N.T.S. 31, 85, 135 and 287) and established procedural rules for the military commissions that departed from normal rules of criminal procedure as to the type of evidence that may be admitted, the right to counsel and disclosure of the case to meet, and judicial independence.

1. Le contexte factuel

[5] Omar Khadr est un citoyen canadien détenu par les forces armées des États-Unis à Guantanamo (Cuba) depuis presque six ans. Il a été fait prisonnier le 27 juillet 2002 en Afghanistan lors d'une opération militaire menée contre les talibans et les forces d'Al-Qaïda dans la foulée des attentats perpétrés le 11 septembre 2001 à New York et à Washington. Il avait alors 15 ans. Les États-Unis soutiennent que vers la fin du combat au cours duquel il a été fait prisonnier, M. Khadr a lancé une grenade qui a causé la mort d'un militaire américain. Ils lui reprochent en outre d'avoir comploté avec des membres d'Al-Qaïda en vue de la perpétration d'actes meurtriers et d'actes terroristes contre les forces américaines et celles de la coalition. En liaison avec ces allégations, M. Khadr fait actuellement l'objet d'accusations devant une commission militaire des États-Unis à Guantanamo.

[6] Le camp de détention de Guantanamo a été établi par décret militaire présidentiel en 2001 (66 FR 57833) pour la détention et la poursuite de citoyens non américains soupçonnés d'appartenir à Al-Qaïda ou de se livrer par ailleurs au terrorisme international. Le décret confère à des commissions militaires le pouvoir exclusif d'instruire des procès pour [TRADUCTION] « toute infraction relevant d'une commission militaire » et précise, conformément au code uniforme de justice militaire (10 U.S.C. § 836), qu'il [TRADUCTION] « n'est pas possible », lors de ces procès, d'appliquer les règles de procédure pénale habituelles. Il prévoit en outre que l'individu qui y est assujetti [TRADUCTION] « ne peut ni directement ni par l'entremise d'un tiers demander une réparation ou engager une procédure en saisissant (i) une cour de justice des États-Unis ou d'un État américain, (ii) une cour de justice d'un pays étranger ou (iii) un tribunal international ». Des décrets subséquents ont eu pour objet de supprimer les garanties des *Conventions de Genève* de 1949 (75 R.T.N.U. 31, 85, 135 et 287) et ont établi des règles de procédure différentes de celles qui s'appliquent normalement en matière pénale quant au type de preuve recevable devant une commission militaire, au droit d'obtenir l'assistance d'un avocat et la communication de la preuve du poursuivant, ainsi qu'à l'indépendance judiciaire.

[7] On several occasions, including in February and September of 2003, Canadian officials, including agents of the Canadian Security Intelligence Service (CSIS), attended at Guantanamo Bay and interviewed Mr. Khadr for intelligence and law enforcement purposes. The CSIS agents questioned Mr. Khadr with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities.

[8] After formal charges were laid against Mr. Khadr in November 2005, he sought disclosure of all documents relevant to these charges in the possession of the Canadian Crown, including the records of the interviews, invoking *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The appellants formally refused Mr. Khadr's request in January 2006. Mr. Khadr then applied for an order of mandamus in the Federal Court, which was dismissed, *per* von Finckenstein J. ((2006), 290 F.T.R. 313, 2006 FC 509). The Federal Court of Appeal allowed Mr. Khadr's appeal ([2008] 1 F.C.R. 270, 2007 FCA 182), and ordered that unredacted copies of all relevant documents in the possession of the Crown be produced before the Federal Court for review under ss. 38 ff. of the *Canada Evidence Act*. The Minister of Justice now appeals to this Court, asking that the order of the Federal Court of Appeal be set aside.

2. The Fresh Evidence Applications

[9] Mr. Khadr has filed two applications to admit fresh evidence before this Court. We deal with the applications to admit fresh evidence at the outset.

[10] The first application concerns primarily evidence that is part of a related proceeding brought by Mr. Khadr in the Federal Court (file T-536-04), in which Mr. Khadr is seeking a remedy for alleged violations of his *Charter* rights at Guantanamo Bay. This evidence relates primarily to the general situation at Guantanamo Bay, Mr. Khadr's particular

[7] À plusieurs occasions, notamment en février et en septembre 2003, des responsables canadiens, y compris des agents du Service canadien du renseignement de sécurité (« SCRS »), se sont rendus à Guantanamo et y ont interrogé M. Khadr à des fins de renseignement et d'application de la loi. Les agents du SCRS ont interrogé M. Khadr sur des sujets liés aux accusations qui pèsent aujourd'hui contre lui et ils ont relayé l'information aux autorités américaines.

[8] Après que des accusations formelles eurent été portées contre lui en novembre 2005, M. Khadr a demandé, sur le fondement de l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, la communication de tous les documents intéressant ces accusations et se trouvant en la possession de l'État canadien, notamment les documents relatifs aux entretiens. En janvier 2006, les appelants se sont formellement opposés à la demande. M. Khadr a alors saisi la Cour fédérale d'une demande de *mandamus*, que le juge von Finckenstein a rejetée ([2006] A.C.F. n^{o} 640 (QL), 2006 CF 509). La Cour d'appel fédérale a accueilli l'appel de M. Khadr ([2008] 1 R.C.F. 270, 2007 CAF 182) et ordonné la remise à la Cour fédérale de copies non expurgées de tous les documents pertinents se trouvant en la possession de l'État canadien en vue d'un examen suivant les art. 38 et suiv. de la *Loi sur la preuve au Canada*. Le ministre de la Justice se pourvoit aujourd'hui devant notre Cour et demande l'annulation de l'ordonnance de la Cour d'appel fédérale.

2. Les demandes d'autorisation de présenter des éléments de preuve nouveaux

[9] M. Khadr a saisi notre Cour de deux demandes d'autorisation de présenter des éléments de preuve nouveaux, et nous les examinons d'entrée de jeu.

[10] La première vise essentiellement des éléments de preuve présentés dans le cadre d'une instance connexe dont M. Khadr a saisi la Cour fédérale (dossier T-536-04) afin d'obtenir une réparation pour des atteintes aux droits que lui garantit la *Charte* qui seraient survenues à Guantanamo. Ces éléments de preuve portent principalement sur la

circumstances, and Canadian participation in interviewing Mr. Khadr at Guantanamo Bay. It includes affidavits filed as part of that proceeding from Canadian officials at CSIS and the Department of Foreign Affairs and International Trade, and from Muneer Ahmad, who was counsel for Mr. Khadr in *habeas corpus* proceedings taking place in the United States. The record includes the exhibits that were attached to these affidavits.

[11] Also included in the first application is an affidavit from Lt. Cdr. William Kuebler, Mr. Khadr's defence counsel in the military commission proceedings, updating the Court on developments in relevant U.S. law.

[12] The second application relates to an additional affidavit from Lt. Cdr. Kuebler, as well as exhibits filed under seal with the consent of the U.S. Deputy Assistant Secretary of Defense for Detainee Affairs.

[13] The appellants' primary argument against admitting the fresh evidence is that the evidence from the related proceeding was filed as part of an interlocutory motion in which the appellants chose not to lead certain evidence in response: *Khadr v. Canada*, [2006] 2 F.C.R. 505, 2005 FC 1076. The appellants maintain that the nature of the evidence they led was tailored to the specific context of that motion and that this evidence should not be imported into the different context of this proceeding. Furthermore, the T-536-04 proceeding has not yet gone to trial, and so the appellants have not yet had an opportunity to present a complete evidentiary record. The appellants argue that it would be unfair to admit the fresh evidence, because, the appellants allege, they were not given an adequate opportunity to respond to it.

[14] We find that the fresh evidence is admissible. The fresh evidence amplifies and significantly clarifies the record as it relates to Canadian officials' interviews with Mr. Khadr and Canada's participation in handing over the products of these interviews to U.S. authorities. As the basic facts are not

situation générale à Guantanamo, la situation particulière de M. Khadr et son interrogatoire par des Canadiens à Guantanamo. Il s'agit notamment d'affidavits déposés dans le cadre de cette instance par des responsables canadiens du SCRS et du ministère des Affaires étrangères et du Commerce international, et par M. Muneer Ahmad, l'avocat de M. Khadr dans le cadre du recours en *habeas corpus* intenté aux États-Unis. Le dossier renferme les pièces jointes à ces affidavits.

[11] Est également visé par la première demande l'affidavit de l'avocat qui défend M. Khadr devant la commission militaire, le lieutenant-commandant William Kuebler, qui fait le point sur l'évolution du droit américain applicable.

[12] La deuxième demande vise un autre affidavit du lieutenant-commandant Kuebler, de même que des pièces déposées sous scellés avec le consentement du sous-secrétaire d'État adjoint à la Défense des États-Unis chargé des questions relatives aux détenus.

[13] Les appelants s'opposent à l'admission des éléments de preuve nouveaux principalement parce qu'ils ont été déposés pour les besoins d'une instance interlocutoire dans le cadre de laquelle ils se sont abstenus de présenter certains éléments de preuve : *Khadr c. Canada*, [2006] 2 R.C.F. 505, 2005 CF 1076. Ils soutiennent que la preuve convenait intrinsèquement au contexte particulier de la requête et qu'elle ne devrait pas être introduite dans un autre contexte, à savoir celui de la présente instance. En outre, l'instruction n'ayant pas encore débuté dans le dossier T-536-04, ils n'ont pas eu la possibilité de présenter une preuve complète. Ils font valoir qu'il serait injuste d'admettre la preuve nouvelle parce qu'ils n'ont pas eu la possibilité réelle d'y répondre.

[14] Nous concluons que la preuve nouvelle est admissible. Elle clarifie certains points du dossier concernant les entretiens que les responsables canadiens ont eus avec M. Khadr et la participation canadienne ayant consisté à transmettre le fruit de ces entretiens aux autorités américaines. Les faits

contested, the appellants are not disadvantaged by the admission of the material.

3. The Application for Disclosure

(i) *Does the Charter Apply?*

[15] As discussed, CSIS, a Canadian government organization, interviewed Mr. Khadr at his prison in Guantanamo Bay and shared the contents of these interviews with U.S. authorities. Mr. Khadr seeks an order that the appellants be required to disclose to him all documents in the possession of the Canadian Crown relevant to the charges he is facing, for the purpose of his defence.

[16] Had the interviews and process been in Canada, Mr. Khadr would have been entitled to full disclosure under the principles in *Stinchcombe*, which held that persons whose liberty is at risk as a result of being charged with a criminal offence are entitled to disclosure of the information in the hands of the Crown under s. 7 of the *Charter*. The Federal Court of Appeal applied *Stinchcombe* to Mr. Khadr's situation and ordered disclosure.

[17] The government argues that this constituted an error, because the *Charter* does not apply to the conduct of Canadian agents operating outside Canada. It relies on *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26, where a majority of this Court held that Canadian agents participating in an investigation into money laundering in the Carribean were not bound by *Charter* constraints in the manner in which the investigation was conducted. This conclusion was based on international law principles against extraterritorial enforcement of domestic laws and the principle of comity which implies acceptance of foreign laws and procedures when Canadian officials are operating abroad.

principaux ne sont pas contestés, de sorte que l'admission des éléments n'inflige aucun préjudice aux appelants.

3. La demande de communication

(i) *La Charte s'applique-t-elle?*

[15] Rappelons que des agents du SCRS, un organisme de l'appareil gouvernemental canadien, ont interrogé M. Khadr à la prison de Guantanamo, puis communiqué aux autorités américaines le résultat des entretiens. M. Khadr demande qu'il soit ordonné aux appelants de lui communiquer tous les documents qui intéressent les accusations portées contre lui et qui sont en la possession de l'État canadien, afin qu'il puisse présenter une défense.

[16] Si les entretiens et la procédure s'étaient déroulés au Canada, M. Khadr aurait eu droit à une communication complète suivant les principes dégagés dans l'arrêt *Stinchcombe*. Dans cet arrêt, notre Cour a statué que la personne dont la liberté est mise en jeu par une accusation criminelle peut, sur le fondement de l'art. 7 de la *Charte*, obtenir la communication des renseignements se trouvant en la possession du ministère public. La Cour d'appel fédérale a appliqué l'arrêt *Stinchcombe* à la situation de M. Khadr et fait droit à la demande de communication.

[17] L'État canadien soutient que la Cour d'appel fédérale a eu tort d'ordonner la communication, car la *Charte* ne s'applique pas aux actes de ses représentants en mission à l'étranger. Il invoque à l'appui l'arrêt *R. c. Hape*, [2007] 2 R.C.S. 292, 2007 CSC 26, dans lequel les juges majoritaires de notre Cour ont décidé que des policiers canadiens ayant participé à une enquête dans les Caraïbes relativement à une affaire de blanchiment d'argent n'étaient pas assujettis à la *Charte* quant au déroulement de l'enquête. Leur conclusion se fondait sur des principes du droit international écartant l'application extraterritoriale des lois internes et sur le principe de courtoisie selon lequel un responsable canadien en mission à l'étranger se plie aux règles de droit et de procédure étrangères.

[18] In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape*, at para. 52, *per* LeBel J.; see also paras. 51 and 101). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).

[19] If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.

[20] At this point, the question becomes whether the process at Guantanamo Bay at the time that CSIS handed the products of its interviews over to U.S. officials was a process that violated Canada's binding obligations under international law.

[21] Issues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process. We need not resolve those issues in this case. The United States Supreme Court has considered the legality of the conditions under which the Guantanamo detainees were detained and liable to prosecution during the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities, between 2002 and 2004. With the benefit of a full factual record, the United States Supreme Court held that the detainees had illegally been denied access to

[18] Or, dans l'arrêt *Hape*, notre Cour a établi une exception importante au principe de la courtoisie. Bien que les juges n'aient pas tous convenu des principes régissant l'application extraterritoriale de la *Charte*, ils ont estimé à l'unanimité que la courtoisie ne pouvait justifier la participation du Canada aux activités d'un État étranger ou de ses représentants qui vont à l'encontre des obligations internationales du Canada. Ainsi, le respect que commande la courtoisie « cesse dès la violation manifeste du droit international et des droits fondamentaux de la personne » (*Hape*, par. 52, le juge LeBel; voir aussi par. 51 et 101). Notre Cour a ajouté que le tribunal appelé à déterminer la portée de la *Charte* et à se prononcer sur son application doit tendre à assurer le respect des obligations du Canada en droit international (par. 56, le juge LeBel).

[19] Si M. Khadr est détenu à Guantanamo en application d'une procédure conforme aux obligations internationales du Canada, la *Charte* ne s'applique pas et sa demande de communication ne peut être accueillie : *Hape*. Cependant, si le Canada a participé à une procédure contraire à ses obligations en droit international, la *Charte* s'applique dans la mesure de cette participation.

[20] Dès lors, la question est de savoir si la procédure en cours à Guantanamo lorsque le SCRS a transmis le résultat de ses entretiens aux autorités américaines contrevenait aux obligations du Canada en droit international.

[21] On peut se demander si un tribunal canadien devrait se prononcer sur la légalité de la procédure en vertu de laquelle M. Khadr était détenu à Guantanamo au moment de la participation canadienne. Or, nous n'avons pas à trancher la question en l'espèce. La Cour suprême des États-Unis s'est penchée sur la légalité des conditions de détention et de mise en accusation qui avaient cours à Guantanamo lorsque les responsables canadiens ont interrogé M. Khadr puis relayé l'information aux autorités américaines, entre 2002 et 2004. Disposant d'un dossier factuel complet, elle a statué que les détenus avaient été illégalement privés du recours à l'*habeas corpus* et que la procédure en

habeas corpus and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*. Those holdings are based on principles consistent with the *Charter* and Canada's international law obligations. In the present appeal, this is sufficient to establish violations of these international law obligations, to which Canada subscribes.

[22] In *Rasul v. Bush*, 542 U.S. 466 (2004), the United States Supreme Court held that detainees at Guantanamo Bay who, like Mr. Khadr, were not U.S. citizens, could challenge the legality of their detention by way of the statutory right of *habeas corpus* provided for in 28 U.S.C. § 2241. This holding necessarily implies that the order under which the detainees had previously been denied the right to challenge their detention was illegal. In his concurring reasons, Kennedy J. noted that "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status" (pp. 487-88). Mr. Khadr was detained at Guantanamo Bay during the time covered by the *Rasul* decision, and Canadian officials interviewed him and passed on information to U.S. authorities during that time.

[23] At the time he was interviewed by CSIS officials, Mr. Khadr also faced the possibility of trial by military commission pursuant to Military Commission Order No. 1. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the United States Supreme Court considered the legality of this Order. The court held that by significantly departing from established military justice procedure without a showing of military exigency, the procedural rules for military commissions violated both the Uniform Code of Military Justice (10 U.S.C. § 836) and Common Article 3 of the *Geneva Conventions*. Different members of the majority of the United States Supreme Court focused on different deviations from the *Geneva Conventions* and the Uniform Code of Military Justice. But the majority was unanimous in holding that, in the circumstances, the deviations were sufficiently significant to deprive the military commissions of the status of "a regularly constituted court, affording all the judicial guarantees which are recognized as

vertu de laquelle ils étaient poursuivis contrevenait aux *Conventions de Genève*. Ces conclusions se fondent sur des principes compatibles avec la *Charte* et les obligations du Canada en droit international, ce qui permet en l'espèce d'établir le manquement à ces dernières obligations.

[22] Dans l'arrêt *Rasul c. Bush*, 542 U.S. 466 (2004), la Cour suprême des États-Unis a conclu que les détenus de Guantanamo qui, comme M. Khadr, n'étaient pas citoyens américains, pouvaient contester la légalité de leur détention en exerçant le recours en *habeas corpus* que leur conférait la loi (28 U.S.C. § 2241). Partant, le décret qui avait fait obstacle à la contestation de la détention était illégal. Dans ses motifs concordants, le juge Kennedy a relevé que [TRADUCTION] « les personnes sont détenues pour une période indéterminée et aucune procédure n'est engagée en vue de la détermination de leur statut » (p. 487-488). M. Khadr était détenu à Guantanamo au cours de la période visée par l'arrêt *Rasul* et, pendant la même période, des responsables canadiens l'ont interrogé, puis ont relayé l'information aux autorités américaines.

[23] Au moment où il a été interrogé par les agents du SCRS, M. Khadr risquait également un procès devant une commission militaire suivant le décret nº 1 sur les commissions militaires. Dans l'affaire *Hamdan c. Rumsfeld*, 126 S. Ct. 2749 (2006), la Cour suprême des États-Unis a examiné la légalité de ce décret. Elle a conclu que parce qu'elles tranchaient avec la procédure judiciaire militaire établie et que l'existence d'une urgence militaire n'avait pas été démontrée, les règles de procédure des commissions militaires contrevenaient au code uniforme de justice militaire (*Uniform Code of Military Justice*, 10 U.S.C § 836) et à l'art. 3 des dispositions générales des *Conventions de Genève*. Les différents juges majoritaires se sont attachés à des entorses différentes au code et aux *Conventions de Genève*, mais tous ont convenu que, dans les circonstances, les écarts étaient suffisamment importants pour qu'une commission militaire ne soit plus « un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme

indispensable by civilized peoples", as required by Common Article 3 of the *Geneva Conventions*.

[24] The violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law.

[25] Canada is a signatory of the four *Geneva Conventions* of 1949, which it ratified in 1965 (Can. T.S. 1965 No. 20) and has incorporated into Canadian law with the *Geneva Conventions Act*, R.S.C. 1985, c. G-3. The right to challenge the legality of detention by *habeas corpus* is a fundamental right protected both by the *Charter* and by international treaties. It follows that participation in the Guantanamo Bay process which violates these international instruments would be contrary to Canada's binding international obligations.

[26] We conclude that the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay. Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations.

indispensables par les peuples civilisés » au sens de l'art. 3 des dispositions générales des *Conventions de Genève*.

[24] Les violations des droits de la personne relevées par la Cour suprême des États-Unis sont de nature à nous permettre de conclure que les règles relatives à la détention et à la tenue d'un procès qui s'appliquaient à M. Khadr lorsque le SCRS l'a interrogé constituaient une atteinte manifeste aux droits fondamentaux de la personne reconnus en droit international.

[25] Le Canada est signataire des quatre *Conventions de Genève* de 1949, qu'il a ratifiées en 1965 (R.T. Can. 1965 nº 20) et intégrées à sa législation par la *Loi sur les conventions de Genève*, L.R.C. 1985, ch. G-3. Le droit de contester la légalité d'une détention par voie d'*habeas corpus* est un droit fondamental garanti à la fois par la *Charte* et par des traités internationaux. La participation du Canada à la procédure engagée à Guantanamo, qui viole ces instruments internationaux, contrevient donc à ses obligations internationales.

[26] Nous concluons que les principes du droit international et de la courtoisie entre les nations qui, dans d'autres circonstances, pourraient soustraire à l'application de la *Charte* les actes des responsables canadiens en mission à l'étranger ne s'appliquent pas à l'assistance fournie en l'espèce aux autorités américaines à Guantanamo. Vu les conclusions de la Cour suprême des États-Unis, le souci de courtoisie manifesté dans l'arrêt *Hape* et qui justifie normalement le respect de la loi étrangère ne s'applique aucunement en l'espèce. La Cour suprême des États-Unis a statué que les conditions de détention et de mise en accusation de M. Khadr étaient illégales tant en droit américain qu'en droit international lorsque les responsables canadiens l'ont interrogé puis ont relayé l'information aux autorités américaines. Par conséquent, la question du respect de la loi étrangère ne se pose pas. La *Charte* s'appliquait dans la mesure où les actes des responsables canadiens ont emporté la participation du Canada à une procédure qui contrevenait à ses obligations internationales.

(ii) *Participation in the Process*

[27] By making the product of its interviews of Mr. Khadr available to U.S. authorities, Canada participated in a process that was contrary to Canada's international human rights obligations. Merely conducting interviews with a Canadian citizen held abroad under a violative process may not constitute participation in that process. Indeed, it may often be essential that Canadian officials interview citizens being held by violative regimes to provide assistance to them. Nor is it necessary to conclude that handing over the fruits of the interviews in this case to U.S. officials constituted a breach of Mr. Khadr's s. 7 rights. It suffices to note that at the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the *Charter*, because at that point it became a participant in a process that violated Canada's international obligations.

(iii) *Implications of Participation in the Process*

[28] Having concluded that the *Charter* applied to Canadian officials when they participated in the Guantanamo Bay process by handing over the fruits of its interviews with Mr. Khadr, the next question concerns what obligations, if any, this entails.

[29] With Mr. Khadr's present and future liberty at stake, s. 7 of the *Charter* required that CSIS conduct itself in conformity with the principles of fundamental justice. The principles of fundamental justice are informed by Canada's international human rights obligations: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 60; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at paras. 82-92; *Hape*, at paras. 55-56.

[30] In the domestic context, the principles of fundamental justice impose a duty on the prosecuting Crown to provide disclosure of relevant information in its possession to the accused whose liberty is in jeopardy: *Stinchcombe*. In a domestic

(ii) *Participation à la procédure*

[27] En mettant à la disposition des autorités américaines le fruit de ses entretiens avec M. Khadr, le Canada a participé à une procédure contraire à ses obligations internationales en matière de droits de la personne. Le simple fait d'avoir des entretiens avec un citoyen canadien détenu à l'étranger en application d'une procédure attentatoire n'emporte pas nécessairement la participation à cette procédure. En effet, il peut arriver fréquemment que des responsables canadiens doivent s'entretenir avec des citoyens détenus en vertu de règles attentatoires afin de leur venir en aide. La conclusion que le Canada a porté atteinte aux droits de M. Khadr garantis à l'art. 7 en relayant l'information aux autorités américaines ne s'impose pas non plus. Il suffit de relever qu'au moment où il a transmis l'information aux Américains, le Canada était soumis à la *Charte*, car il participait dès lors à une procédure contraire à ses obligations internationales.

(iii) *Conséquences de la participation à la procédure*

[28] Vu notre conclusion que la *Charte* s'appliquait aux responsables canadiens lorsqu'ils ont participé à la procédure en cours à Guantanamo par la transmission du fruit de leurs entretiens avec M. Khadr, il faut maintenant déterminer les obligations qui en découlent, le cas échéant.

[29] La liberté actuelle et future de M. Khadr étant en jeu, l'art. 7 de la *Charte* obligeait le SCRS à observer les principes de justice fondamentale, et les obligations internationales du Canada en matière de droits de la personne permettent de dégager la portée de ces principes : *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 60; *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, par. 82-92; *Hape*, par. 55-56.

[30] Sur le plan interne, les principes de justice fondamentale obligent le poursuivant à communiquer à l'accusé dont la liberté est en jeu les renseignements pertinents qu'il possède : *Stinchcombe*. Dans le cadre d'une poursuite interne, le poursuivant

prosecution, the Crown has put the accused's liberty at risk, which engages s. 7 of the *Charter* and the attendant duty of disclosure.

[31] To the extent that Canadian officials operating abroad are bound by s. 7 of the *Charter*, as we have earlier concluded was the case in this appeal, they are bound by the principles of fundamental justice in an analogous way. Where, as in this case, an individual's s. 7 right to liberty is engaged by Canada's participation in a foreign process that is contrary to Canada's international human rights obligations, s. 7 of the *Charter* imposes a duty on Canada to provide disclosure to the individual. Thus, s. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen.

[32] It is not necessary to define for all fact situations the scope of the duty of disclosure, when the *Charter* is engaged by the actions of Canadian officials abroad, but it may differ from the scope of the duty of disclosure in a domestic criminal prosecution. In this case, although Canada participated in the U.S. process by giving the product of its interviews with Mr. Khadr to U.S. authorities, it did not by virtue of that action step into the shoes of the U.S. prosecutors. The scope of the disclosure obligation in this context is defined by the nature of Canada's participation in the foreign process. The crux of that participation was providing information to U.S. authorities in relation to a process which is contrary to Canada's international human rights obligations. Thus, the scope of the disclosure obligation must be related to the information provided to U.S. authorities.

[33] As noted at the outset, the appellants formally refused Mr. Khadr's request for disclosure in January 2006. This refusal of disclosure has put the appellants in breach of s. 7 of the *Charter* and entitles Mr. Khadr to a remedy.

met en jeu la liberté de l'accusé, ce qui emporte l'application de l'art. 7 de la *Charte* et fait naître l'obligation de communiquer la preuve.

[31] Dans la mesure où il est assujetti à l'art. 7 de la *Charte*, comme nous avons conclu précédemment que c'était le cas en l'espèce, le responsable canadien en mission à l'étranger est soumis aux principes de justice fondamentale de manière analogue. Lorsque, comme en l'espèce, le droit à la liberté que garantit l'art. 7 à une personne est en jeu du fait de la participation du Canada à une procédure étrangère qui va à l'encontre de ses obligations internationales en matière de droits de la personne, l'art. 7 exige de l'État canadien qu'il communique à l'intéressé les renseignements qu'il possède. L'article 7 contraint donc le Canada à cette communication à cause de sa participation à une procédure étrangère qui est contraire au droit international et qui compromet la liberté d'un Canadien.

[32] Lorsque l'application de la *Charte* découle d'actes accomplis par des responsables canadiens à l'étranger, la portée de l'obligation n'a pas à être précisée pour toutes les situations factuelles, mais elle peut différer de celle imposée dans le cadre d'une poursuite pénale interne. Dans la présente affaire, même s'il a pris part à une procédure états-unienne en transmettant aux autorités américaines le fruit de ses entretiens avec M. Khadr, le Canada ne s'est pas pour autant substitué au poursuivant américain. La portée de l'obligation de communication est déterminée, dans ce contexte, par la nature de la participation canadienne à la procédure étrangère. Cette participation a essentiellement consisté à relayer l'information aux autorités américaines en liaison avec une procédure qui allait à l'encontre des obligations internationales du Canada en matière de droits de la personne. Partant, la portée de l'obligation de communication doit être rattachée aux renseignements transmis aux Américains.

[33] Comme nous l'avons déjà signalé, en janvier 2006, les appelants se sont formellement opposés à la demande de communication de M. Khadr. De ce fait, ils ont contrevenu à l'art. 7 de la *Charte*, de sorte que M. Khadr a droit à une réparation.

[34] Canada has an obligation under s. 7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada's participation by passing on the product of the interviews to U.S. authorities. It is not clear from the record before this Court if all portions of all of the interviews were given to U.S. authorities. If Mr. Khadr is given only partial disclosure of the interviews on the ground that only parts of the interviews were shared with U.S. authorities, it may be impossible for him to evaluate the significance of the parts of the interviews that are disclosed to him. For example, by analogy with *Stinchcombe*, disclosure of an inculpatory statement shared with the U.S. authorities might require disclosure of an exculpatory statement not shared to permit Mr. Khadr to know his jeopardy and prepare his defence. It would seem to follow that fairness requires disclosure of all records in any form of the interviews themselves — whether or not passed on to U.S. authorities — including any transcripts, recordings or summaries in Canada's possession. For similar reasons, it would seem to follow that Mr. Khadr is entitled to disclosure of information given to U.S. authorities as a direct consequence of Canada's having interviewed him.

[35] In making these observations, we are acutely aware that the record before us is incomplete. As this Court does not have the information given to U.S. authorities before it, we are unable to assess precisely what information is so connected to the shared information that it in fairness must be disclosed to Mr. Khadr. The designated judge of the Federal Court who hears the application under s. 38 of the *Canada Evidence Act* may be expected to have a fuller picture of what was shared with the U.S. authorities and what other material, if any, should be disclosed, bearing in mind the reasons of this Court and the principles enunciated in *Stinchcombe*. The ultimate process against Mr. Khadr may be beyond Canada's jurisdiction and control. However, to the extent that Canada has participated in that process, it has a constitutional duty to disclose information obtained by that participation to a Canadian citizen whose liberty is at stake.

[34] Le Canada a une obligation de communication suivant l'art. 7 afin d'atténuer les conséquences de la participation canadienne ayant consisté à relayer l'information obtenue aux autorités américaines. Le dossier de la Cour n'est pas clair quant à savoir si l'intégralité des entretiens a été transmise aux Américains. Si M. Khadr n'obtient que la communication d'une partie des entretiens au motif que seules certaines parties de ceux-ci ont été partagées avec les autorités américaines, il pourrait ne pas être en mesure d'évaluer l'importance des parties qui lui sont communiquées. Par exemple, par analogie avec l'affaire *Stinchcombe*, une déclaration inculpatoire relayée aux Américains pourrait nécessiter la communication d'une déclaration exculpatoire non relayée afin que M. Khadr connaisse le risque qu'il court et puisse préparer sa défense. Dès lors, l'équité exigerait du Canada qu'il communique tout document relatif aux entretiens comme tels qu'il a en sa possession, quelle que soit sa forme et qu'il ait ou non été transmis aux autorités américaines, tels les transcriptions, les enregistrements ou les résumés. Pour des raisons apparentées, M. Khadr aurait donc droit à la communication de tout renseignement dont la transmission aux autorités américaines découle directement des entretiens.

[35] Néanmoins, nous demeurons parfaitement conscients des lacunes du dossier dont nous disposons. Étant donné que l'information relayée aux Américains n'y figure pas, nous ne pouvons déterminer avec précision quels éléments sont si étroitement liés à l'information transmise que l'équité commande leur communication à M. Khadr. Le juge désigné de la Cour fédérale qui entendra la demande en application de l'art. 38 de la *Loi sur la preuve au Canada* pourra être plus à même de déterminer quels éléments ont été partagés avec les Américains et quels autres documents, s'il en est, devraient être communiqués, compte tenu des présents motifs et des principes dégagés dans l'arrêt *Stinchcombe*. L'issue de la procédure engagée contre M. Khadr peut échapper à la compétence et à la volonté du Canada, mais dans la mesure où il y a participé, il a l'obligation constitutionnelle de communiquer au citoyen canadien dont la liberté est en jeu les renseignements obtenus à la faveur de cette participation.

[36] The Minister of Justice has argued that Mr. Khadr's right to disclosure is confined to disclosure from the U.S. authorities who are prosecuting him. We disagree. The remedy of disclosure being granted to Mr. Khadr is for breach of a constitutional duty that arose when Canadian agents became participants in a process that violates Canada's international obligations. Whether or not he is given similar disclosure by U.S. officials, he is entitled to a remedy for the Canadian government's failure to provide disclosure to him after having given U.S. authorities access to the product of the interviews, in circumstances that engaged s. 7 of the *Charter.*

4. Conclusion

[37] In reaching its conclusions on disclosure, the Federal Court of Appeal held that the *Stinchcombe* disclosure regime should apply, and consequently held that the scope of disclosure extended to all materials in the Crown's possession which might be relevant to the charges against the appellant, subject to ss. 38 ff. of the *Canada Evidence Act*. Our holding is not based on applying *Stinchcombe* directly to these facts. Rather, as described above, the s. 7 duty of disclosure to Mr. Khadr is triggered on the facts of this case by Canadian officials' giving U.S. authorities access to interviews conducted at Guantanamo Bay with Mr. Khadr. As a result, the disclosure order we make is different in scope than the order of the Federal Court of Appeal. The appellants must disclose (i) all records in any form of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of any information given to U.S. authorities as a direct consequence of Canada's having interviewed him. This disclosure is subject to the balancing of national security and other considerations as required by ss. 38 ff. of the *Canada Evidence Act.*

[38] As noted above, it is not possible on the record before this Court to determine what specific records should be disclosed to Mr. Khadr. In order to assess what specific documents must be disclosed

[36] Le ministre de la Justice fait valoir que M. Khadr a droit à la communication de renseignements seulement de la part du poursuivant américain. Nous ne sommes pas de cet avis. La réparation accordée à M. Khadr résulte du manquement à l'obligation constitutionnelle qu'a fait naître la participation de responsables canadiens à une procédure qui contrevient aux obligations internationales du Canada. Qu'il ait droit ou non à la même mesure aux États-Unis, une réparation doit lui être accordée en raison de l'omission de l'État canadien de lui communiquer l'information relayée aux autorités américaines après les entretiens, dans des circonstances emportant l'application de l'art. 7 de la *Charte*.

4. Conclusion

[37] Pour statuer sur la demande, la Cour d'appel fédérale a conclu que le régime de communication établi dans l'arrêt *Stinchcombe* devait s'appliquer, de sorte qu'il y avait obligation de communiquer tous les documents en la possession de l'État canadien susceptibles d'intéresser les accusations portées contre M. Khadr, sous réserve des art. 38 et suiv. de la *Loi sur la preuve au Canada*. Or, notre conclusion selon laquelle l'art. 7 commande la communication ne résulte pas de l'application directe de l'arrêt *Stinchcombe* à la présente affaire, mais du fait que les responsables canadiens ont permis aux autorités américaines de prendre connaissance de la teneur de leurs entretiens avec M. Khadr à Guantanamo. Par conséquent, la portée de notre ordonnance diffère de celle de la Cour d'appel fédérale. Les appelants doivent communiquer (i) tous les documents, sous quelque forme, relatifs aux entretiens des responsables canadiens avec M. Khadr, ainsi que (ii) tout renseignement dont la communication aux autorités américaines découle directement du fait que le Canada a interrogé M. Khadr. La communication demeure conditionnée par la prise en compte de la sécurité nationale et d'autres considérations conformément aux art. 38 et suiv. de la *Loi sur la preuve au Canada*.

[38] Rappelons que le dossier ne permet pas à la Cour de déterminer quels documents précis doivent être communiqués à M. Khadr. Pour décider des documents visés au par. 37 des présents motifs et

as falling within the group of documents described in para. 37, a designated judge of the Federal Court must review the documents. The designated judge will also consider any privilege or public interest immunity claim that is raised, including any claim under ss. 38 ff. of the *Canada Evidence Act*.

[39] The Federal Court of Appeal ordered that the appellants produce unredacted copies of all documents, records and other materials in their possession which might be relevant to the charges against Mr. Khadr to a designated judge of the Federal Court. In view of the fact that production has already been made pursuant to the Court of Appeal's order and this Court's order of January 23, 2008, we see no reason to interfere with this order.

[40] The designated judge will review the material and receive submissions from the parties, and decide which documents fall within the categories set out in para. 37 above. In particular, the designated judge will determine which records fall within the scope of the disclosure obligation as being (i) records of the interviews conducted by Canadian officials with Mr. Khadr, or (ii) records of information given to U.S. authorities as a direct consequence of Canada's having interviewed Mr. Khadr.

[41] Pursuant to s. 38.06 of the *Canada Evidence Act*, the designated judge will then consider whether disclosure of the records described in (i) and (ii) to Mr. Khadr would be injurious to international relations or national defence or national security, and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The designated judge will decide whether to authorize the disclosure of all the information, a part or summary of the information, or a written admission of facts relating to the information, subject to any conditions that the judge considers appropriate. We note that this review is currently ongoing pursuant to this Court's order of January 23, 2008.

[42] Subject to these variations, we would dismiss the appeal with costs in this Court, and issue an order directing that:

par l'ordonnance de communication, le juge désigné de la Cour fédérale devra examiner les documents en cause. Il statuera également sur tout privilège ou exception d'intérêt public revendiqué, notamment sur le fondement des art. 38 et suiv. de la *Loi sur la preuve au Canada*.

[39] La Cour d'appel fédérale a ordonné aux appelants de remettre à un juge désigné de la Cour fédérale des copies non expurgées de tous les documents, dossiers et autres pièces en leur possession susceptibles d'intéresser les accusations portées contre M. Khadr. La remise ayant déjà eu lieu suivant cette ordonnance et celle de notre Cour datée du 23 janvier 2008, il n'y a pas lieu de revenir sur la mesure.

[40] Le juge désigné examinera les documents et entendra les parties, puis il déterminera quels documents sont visés au par. 37 des présents motifs. Plus spécialement, il décidera des documents devant être communiqués du fait (i) qu'ils se rapportent aux entretiens des responsables canadiens avec M. Khadr ou (ii) qu'ils constituent des renseignements dont la communication aux autorités américaines découle directement du fait que le Canada a interrogé M. Khadr.

[41] Conformément à l'art. 38.06 de la *Loi sur la preuve au Canada*, le juge désigné déterminera ensuite si la communication à M. Khadr des documents visés aux points (i) et (ii) susmentionnés porterait préjudice aux relations internationales ou à la défense ou sécurité nationales et si les raisons d'intérêt public qui la justifient l'emportent sur les raisons d'intérêt public qui s'y opposent. Il autorisera ou non la communication de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés, aux conditions qu'il estimera indiquées. Signalons que cet examen est actuellement en cours par suite de notre ordonnance du 23 janvier 2008.

[42] Sous réserve de ces nuances, nous sommes d'avis de rejeter le pourvoi avec dépens devant notre Cour et de rendre l'ordonnance suivante :

(a) the Minister of Justice and Attorney General of Canada, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police produce to a "judge" as defined in s. 38 of the *Canada Evidence Act* unredacted copies of all documents, records and other materials in their possession which might be relevant to the charges against Mr. Khadr;

and

(b) the "judge" as defined in s. 38 of the *Canada Evidence Act* shall consider any privilege or public interest immunity claim that is raised, including any claim under ss. 38 ff. of the Act, and make an order for disclosure in accordance with these reasons.

Appeal dismissed with costs.

Solicitor for the appellants: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Parlee McLaws, Edmonton.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Ruby & Edwardh, Toronto.

Solicitors for the interveners the University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch: Goodmans, Toronto.

a) le ministre de la Justice et procureur général du Canada, le ministre des Affaires étrangères, le directeur du Service canadien du renseignement de sécurité et le commissaire de la Gendarmerie royale du Canada remettront à un « juge » au sens de l'art. 38 de la *Loi sur la preuve au Canada* des copies non expurgées de tous les dossiers, documents et autres pièces en leur possession susceptibles d'intéresser les accusations portées contre M. Khadr;

et

b) le « juge » au sens de l'art. 38 de la *Loi sur la preuve au Canada* statuera sur tout privilège ou exception d'intérêt public revendiqué, notamment sur le fondement des art. 38 et suiv. de la même loi, et rendra une ordonnance de communication conformément aux présents motifs.

Pourvoi rejeté avec dépens.

Procureur des appelants : Procureur général du Canada, Ottawa.

Procureurs de l'intimé : Parlee McLaws, Edmonton.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Arvay Finlay, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Ruby & Edwardh, Toronto.

Procureurs des intervenantes University of Toronto, Faculty of Law — International Human Rights Clinic et Human Rights Watch : Goodmans, Toronto.

TAB 7

Canada (Prime Minister) v. Khadr, 2010 SCC 3

Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police *Appellants*

v.

Omar Ahmed Khadr *Respondent*

and

Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program, David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children, Justice for Children and Youth, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and National Council for the Protection of Canadians Abroad *Interveners*

Premier ministre du Canada, ministre des Affaires étrangères, directeur du Service canadien du renseignement de sécurité et commissaire de la Gendarmerie royale du Canada *Appelants*

c.

Omar Ahmed Khadr *Intimé*

et

Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program, David Asper Centre for Constitutional Rights, Coalition canadienne pour les droits des enfants, Justice for Children and Youth, Association des libertés civiles de la Colombie-Britannique, Criminal Lawyers' Association (Ontario), Association du Barreau canadien, Avocats sans frontières Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Association canadienne des libertés civiles et National Council for the Protection of Canadians Abroad *Intervenants*

INDEXED AS: CANADA (PRIME MINISTER) *v.* KHADR

RÉPERTORIÉ : CANADA (PREMIER MINISTRE) *c.* KHADR

2010 SCC 3

2010 CSC 3

File No.: 33289.

2009: November 13; 2010: January 29.

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

N° du greffe : 33289.

2009 : 13 novembre; 2010 : 29 janvier.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Constitutional law — Charter of Rights — Application — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing

Droit constitutionnel — Charte des droits — Application — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu

detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether process in place at Guantanamo Bay at that time violated Canada's international human rights obligations — Whether Canadian Charter of Rights and Freedoms applies to conduct of Canadian state officials alleged to have breached detainee's constitutional rights.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether conduct of Canadian officials deprived detainee of his right to liberty and security of person — If so, whether deprivation of detainee's right is in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Request for repatriation — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Violation of detainee's right to liberty and security of person guaranteed by Canadian Charter of Rights and Freedoms — Detainee seeking order that Canada request his repatriation from Guantanamo Bay — Whether remedy sought is just and appropriate in circumstances — Canadian Charter of Rights and Freedoms, s. 24(1).

Courts — Jurisdiction — Crown prerogative over foreign relations — Courts' power to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services, CSIS and DFAIT, questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation

par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — Le processus en place à Guantanamo à l'époque violait-il les obligations internationales du Canada en matière de droits de la personne? — La Charte canadienne des droits et libertés s'applique-t-elle à la conduite de responsables canadiens qui auraient violé les droits constitutionnels du détenu?

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Justice fondamentale — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — La conduite des responsables canadiens a-t-elle porté atteinte aux droits du détenu à la liberté et à la sécurité de sa personne? — Si oui, l'atteinte était-elle compatible avec les principes de justice fondamentale?— Charte canadienne des droits et libertés, art. 7.

Droit constitutionnel — Charte des droits — Réparation — Demande de rapatriement — Citoyen canadien détenu par les autorités américaines à Guantanamo — Interrogatoire d'un détenu par des responsables canadiens qui savaient qu'il avait été privé de sommeil et communication du contenu des interrogatoires aux autorités américaines — Violation des droits du détenu à la liberté et à la sécurité de sa personne garantis par la Charte canadienne des droits et libertés — Sollicitation par le détenu d'une ordonnance intimant au Canada de demander son rapatriement — La réparation demandée est-elle juste et convenable eu égard aux circonstances? — Charte canadienne des droits et libertés, art. 24(1).

Tribunaux — Compétence — Prérogative royale en matière de relations internationales — Pouvoir des tribunaux d'examiner les questions relatives aux affaires étrangères et d'intervenir à leur égard pour s'assurer de la constitutionnalité de l'action de l'exécutif.

K, un Canadien, est détenu à Guantanamo par les autorités militaires américaines depuis 2002. Il était alors mineur. En 2004, il a été accusé de crimes de guerre, mais le procès qu'il doit subir aux États-Unis est toujours pendant. En 2003, des agents des services de renseignements du SCRS et du MAECI ont interrogé K sur des sujets liés aux accusations portées contre lui et ont relayé l'information recueillie aux autorités américaines. En 2004, un responsable du MAECI a interrogé K une nouvelle fois, en sachant que les autorités

technique, known as the "frequent flyer program", to make him less resistant to interrogation. In 2008, in *Canada (Justice) v. Khadr* ("*Khadr 2008*"), this Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to CSIS and DFAIT, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the Federal Court for judicial review, alleging that the decision violated his rights under s. 7 of the *Charter*. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under s. 7 of the *Charter* and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

Held: The appeal should be allowed in part.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice. Though the process to which K is subject has changed, his claim is based upon the same underlying series of events considered in *Khadr 2008*. As held in that case, the *Charter* applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the

américaines l'avaient soumis à une technique de privation de sommeil connue sous le nom de « programme grand voyageur », dans le but d'amoindrir sa résistance lors des interrogatoires. En 2008, dans *Canada (Justice) c. Khadr* (« *Khadr 2008* »), la Cour a conclu que le régime en place à Guantanamo constituait une violation manifeste des obligations internationales du Canada en matière de droits de la personne et, se fondant sur l'art. 7 de la *Charte canadienne des droits et libertés*, a ordonné au gouvernement canadien de communiquer à K les transcriptions des interrogatoires auxquels il avait été soumis par des agents du SCRS et du MAECI, ce qui fut fait. Après que K eut demandé à plusieurs reprises que le gouvernement canadien sollicite son rapatriement, le premier ministre a annoncé sa décision de ne pas le faire. K a alors présenté, à la Cour fédérale, une demande de contrôle judiciaire faisant valoir que la décision violait les droits qui lui sont garantis par l'art. 7 de la *Charte*. La Cour fédérale a conclu que, dans les circonstances particulières de l'espèce, le Canada avait l'obligation de protéger K en application de l'art. 7 de la *Charte* et a ordonné au gouvernement de demander son rapatriement. La Cour d'appel fédérale a confirmé l'ordonnance, mais a affirmé que l'atteinte à l'art. 7 découlait de l'interrogatoire mené en 2004 auquel on avait procédé en sachant que K avait été soumis au « programme grand voyageur ».

Arrêt : Le pourvoi est accueilli en partie.

Le Canada a activement participé à un processus contraire aux obligations internationales qui lui incombent en matière de droits de la personne et a contribué à la détention continue de K, de telle sorte qu'il a porté atteinte aux droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte*, et ce, de manière incompatible avec les principes de justice fondamentale. S'il est vrai que la procédure à laquelle est soumis K a changé, la demande qu'il formule repose sur la série de faits déjà examinée dans *Khadr 2008*. Comme la Cour l'a conclu dans cet arrêt, la *Charte* s'applique à la participation de responsables canadiens à un régime jugé ultérieurement en violation de droits fondamentaux protégés par le droit international. Il existe un lien suffisant entre la participation du gouvernement au processus illégal et l'atteinte à la liberté et à la sécurité de K. Même si les États-Unis sont la source première de l'atteinte, il est raisonnable de déduire de la preuve non contredite portée à notre connaissance que les déclarations recueillies par des responsables canadiens contribuent à la détention continue de K. L'atteinte aux droits de K à la liberté et à la sécurité de sa personne n'est pas compatible avec les principes de justice fondamentale. Interroger un adolescent détenu sans qu'il ait pu consulter un avocat pour lui soutirer des déclarations

fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

K is entitled to a remedy under s. 24(1) of the *Charter*. The remedy sought by K — an order that Canada request his repatriation — is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.

Cases Cited

Applied: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **referred to:** *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *United States of America v. Jawad*, Military Commission, September 24, 2008, online: www.defense.gov/news/Ruling%20D-008.pdf; *R. v. Collins*, [1987] 1 S.C.R. 265; *Re*

relatives à des accusations criminelles sérieuses, tout en sachant qu'il a été privé de sommeil et que les fruits des interrogatoires seraient communiqués aux procureurs américains, contrevient aux normes canadiennes les plus élémentaires quant aux traitements à accorder aux suspects adolescents détenus.

K a droit à une réparation en vertu du par. 24(1) de la *Charte*. La réparation demandée par K — une ordonnance intimant au Canada de demander son rapatriement — est suffisamment liée à la violation de la *Charte* survenue en 2003 et 2004 parce que les incidences de cette violation persistent jusqu'à présent et pourraient influer sur son procès lorsqu'il sera finalement tenu. Bien que le gouvernement doive disposer d'une certaine marge de manœuvre lorsqu'il décide de quelle manière il doit s'acquitter des obligations relevant de sa prérogative en matière de relations étrangères, l'exécutif n'est pas à l'abri du contrôle constitutionnel. Les tribunaux ont compétence, et sont tenus d'exercer cette compétence, pour déterminer si la prérogative invoquée par la Couronne existe véritablement et, dans l'affirmative, pour décider si son exercice contrevient à la *Charte* ou à d'autres normes constitutionnelles. Lorsque cela s'avère nécessaire, les tribunaux ont aussi compétence pour donner à la branche exécutive du gouvernement des directives spécifiques. En l'espèce, le juge de première instance s'est fondé sur des considérations erronées en ordonnant au gouvernement de demander le rapatriement de K, compte tenu de la responsabilité constitutionnelle de l'exécutif de prendre les décisions concernant les affaires étrangères et du dossier qui n'est pas suffisamment probant. La réparation appropriée, en l'espèce, consiste à déclarer que les droits de K garantis par la *Charte* ont été violés, et à laisser au gouvernement le soin de décider de quelle manière il convient de répondre à la lumière de l'information dont il dispose actuellement, de sa responsabilité en matière d'affaires étrangères et de la *Charte*.

Jurisprudence

Arrêts appliqués : *Canada (Justice) c. Khadr*, 2008 CSC 28, [2008] 2 R.C.S. 125; *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3; **arrêts mentionnés :** *Khadr c. Canada*, 2005 CF 1076, [2006] 2 R.C.F. 505; *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292; *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462; *Rasul c. Bush*, 542 U.S. 466 (2004); *Hamdan c. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene c. Bush*, 128 S. Ct. 2229 (2008); *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *United States of America c. Jawad*, commission militaire, 24 septembre 2008, en ligne : www.defense.gov/news/Ruling%20D-008.pdf; *R. c. Collins*, [1987]

B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269; *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gamble*, [1988] 2 S.C.R. 595.

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Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, s. 10.
Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739.
Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Evans and Sharlow JJ.A.), 2009 FCA 246, 310 D.L.R. (4th) 462, 393 N.R. 1, [2009] F.C.J. No. 893 (QL), 2009 CarswellNat 2364, affirming a decision of O'Reilly J., 2009 FC 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] F.C.J. No. 462 (QL), 2009 CarswellNat 1206. Appeal allowed in part.

Robert J. Frater, *Doreen C. Mueller* and *Jeffrey G. Johnston*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Sacha R. Paul, *Vanessa Gruben* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

1 R.C.S. 265; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] R.C.S. 269; *Black c. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228; *Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441; *Air Canada c. Colombie-Britannique (Procureur général)*, [1986] 2 R.C.S. 539; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Kaunda c. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *R. c. Gamble*, [1988] 2 R.C.S. 595.

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Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

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Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Scarborough, Ont. : Thomson/Carswell, 2007 (loose-leaf updated 2009, release 1).

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Nadon, Evans et Sharlow), 2009 CAF 246, 310 D.L.R. (4th) 462, 393 N.R. 1, [2009] A.C.F. n^{o} 893 (QL), 2009 CarswellNat 2699, qui a confirmé une décision du juge O'Reilly, 2009 CF 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] A.C.F. n^{o} 462 (QL), 2009 CarswellNat 1472. Pourvoi accueilli en partie.

Robert J. Frater, *Doreen C. Mueller* et *Jeffrey G. Johnston*, pour les appelants.

Nathan J. Whitling et *Dennis Edney*, pour l'intimé.

Sacha R. Paul, *Vanessa Gruben* et *Michael Bossin*, pour l'intervenante Amnesty International (Canadian Section, English Branch).

John Norris, *Brydie Bethell* and *Audrey Macklin*, for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights.

Emily Chan and *Martha Mackinnon*, for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth.

Sujit Choudhry and *Joseph J. Arvay*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Brian H. Greenspan, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman and *Jacqueline Swaisland*, for the intervener the Canadian Bar Association.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* and *Fannie Lafontaine*, for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* and *Jessica Orkin*, for the intervener the Canadian Civil Liberties Association.

Dean Peroff, *Chris MacLeod* and *H. Scott Fairley*, for the intervener the National Council for the Protection of Canadians Abroad.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

John Norris, *Brydie Bethell* et *Audrey Macklin*, pour les intervenants Human Rights Watch, University of Toronto, Faculty of Law — International Human Rights Program et David Asper Centre for Constitutional Rights.

Emily Chan et *Martha Mackinnon*, pour les intervenants la Coalition canadienne pour les droits des enfants et Justice for Children and Youth.

Sujit Choudhry et *Joseph J. Arvay*, *c.r.*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Brian H. Greenspan, pour l'intervenante Criminal Lawyers' Association (Ontario).

Lorne Waldman et *Jacqueline Swaisland*, pour l'intervenante l'Association du Barreau canadien.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* et *Fannie Lafontaine*, pour les intervenants Avocats sans frontières Canada, le Barreau du Québec et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* et *Jessica Orkin*, pour l'intervenante l'Association canadienne des libertés civiles.

Dean Peroff, *Chris MacLeod* et *H. Scott Fairley*, pour l'intervenant National Council for the Protection of Canadians Abroad.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Omar Khadr, un citoyen canadien, est détenu à Guantanamo (Cuba) par le gouvernement des États-Unis depuis plus de sept ans. Le premier ministre voudrait que la Cour infirme la décision par laquelle la Cour d'appel fédérale a ordonné au gouvernement canadien de demander aux États-Unis le rapatriement de M. Khadr au Canada.

[2] For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

[3] Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

[4] On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

[5] In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him

[2] Pour les motifs exposés ci-après, nous estimons, à l'instar des juridictions inférieures, que les droits garantis à M. Khadr par l'art. 7 de la *Charte canadienne des droits et libertés* ont été violés. Nous arrivons toutefois à la conclusion que l'ordre donné par les tribunaux d'instances inférieures au gouvernement de demander le renvoi de M. Khadr au Canada ne constitue pas la réparation convenable de cette violation visée au par. 24(1) de la *Charte*. Conformément à la séparation des pouvoirs et à la réticence légitime des tribunaux à intervenir dans les questions relatives aux affaires étrangères, la réparation appropriée consiste à prononcer, en faveur de M. Khadr, un jugement déclaratoire confirmant la violation des droits qui lui sont garantis par la *Charte*, tout en laissant au gouvernement une certaine latitude pour décider de la manière dont il convient de répondre. Nous sommes donc d'avis d'accueillir le pourvoi en partie.

II. Le contexte

[3] M. Khadr était âgé de 15 ans lorsqu'il a été fait prisonnier par les forces américaines en Afghanistan, le 27 juillet 2002. Il lui est reproché d'avoir lancé une grenade qui a tué un soldat américain, lors du combat au cours duquel il a été capturé. Trois mois plus tard environ, il a été transféré aux installations militaires américaines à Guantanamo et placé dans un centre de détention pour adultes.

[4] Le 7 septembre 2004, M. Khadr a été traduit devant un tribunal d'examen du statut de combattant (*Combatant Status Review Tribunal*) qui a confirmé une décision antérieure selon laquelle il était un [TRADUCTION] « combattant ennemi ». Par la suite, il a été accusé de crimes de guerre et détenu en vue de la tenue d'un procès devant une commission militaire. Par suite de nombreux reports et obstacles de nature procédurale, ce procès est toujours pendant.

[5] En février et en septembre 2003, des agents du Service canadien du renseignement de sécurité (« SCRS ») et des membres de la Direction du renseignement extérieur du ministère des Affaires étrangères et du Commerce international (« MAECI ») ont interrogé M. Khadr sur des sujets

and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 ("*Khadr 2008*").

liés aux accusations portées contre lui et ont relayé l'information recueillie aux autorités américaines. En mars 2004, un responsable du MAECI a interrogé M. Khadr une nouvelle fois, en sachant que les autorités américaines l'avaient soumis à une technique de privation de sommeil, connue sous le nom de « programme grand voyageur » (*frequent flyer program*), dans le but d'amoindrir sa résistance lors des interrogatoires. Durant cet interrogatoire, M. Khadr a refusé de répondre aux questions. En 2005, le juge von Finckenstein, de la Cour fédérale, interdisait par une injonction provisoire aux agents du SCRS et aux fonctionnaires du MAECI d'interroger M. Khadr de nouveau, « pour empêcher une éventuelle injustice grave » : *Khadr c. Canada*, 2005 CF 1076, [2006] 2 R.C.F. 505, par. 46. En 2008, notre Cour, se fondant sur l'art. 7 de la *Charte*, ordonnait au gouvernement canadien de communiquer à M. Khadr les transcriptions des interrogatoires auxquels il avait été soumis par des agents du SCRS et du MAECI à Guantanamo : *Canada (Justice) c. Khadr*, 2008 CSC 28, [2008] 2 R.C.S. 125 (« *Khadr 2008* »).

[6] Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report of Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

[6] M. Khadr a demandé à plusieurs reprises que le gouvernement du Canada sollicite auprès des États-Unis son rapatriement au Canada : en mars 2005, lors d'une visite de responsables consulaires canadiens; le 15 décembre 2005, lorsqu'il a été indiqué dans un rapport sur le bien-être de M. Khadr que [TRADUCTION] « [ce dernier] veut que son gouvernement le ramène au pays » (*Rapport quant à une visite relative au bien-être*, pièce « L », jointe à l'affidavit de Sean Robertson, 15 décembre 2005 (D.C., vol. IV, p. 534)); et dans une demande écrite officielle présentée par l'intermédiaire de son avocat le 28 juillet 2008.

[7] The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

[TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these

[7] Le 10 juillet 2008, lors d'une conférence de presse, le premier ministre a annoncé sa décision de ne pas demander le rapatriement de M. Khadr. À une question que lui a posée une journaliste en français pour savoir si le gouvernement allait demander le rapatriement, il a répondu ceci :

La réponse c'est non. Comme je l'ai dit, l'ancien gouvernement et notre gouvernement, avec l'avis du ministère de la Justice, ont considéré toutes ces questions-là et la

issues and the situation remains the same. . . . We keep on looking for [assurances] of good treatment of Mr. Khadr.

(http://watch.ctv.ca/news/clip65783#clip65783, at 3'3", referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32).)

[8] On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[9] After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

[10] The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462. Dissenting, Nadon J.A. reviewed the many

situation reste la même. [. . .] Nous continuons à chercher des assurances de bon traitement de M. Khadr.

(http://watch.ctv.ca/news/clip65783#clip65783, à 3 min. 3 sec., auquel renvoie l'affidavit d'April Bedard, 8 août 2008 (D.C., vol. II, p. 131-132).)

[8] Le 8 août 2008, M. Khadr a présenté, à la Cour fédérale, une demande de contrôle judiciaire à l'égard de [TRADUCTION] « la décision et [de] la politique inchangée » (Avis de demande de l'intimé, 8 août 2008 (D.C., vol. II, p. 113)) du gouvernement de ne pas demander son rapatriement. Cette décision et cette politique violaient, selon lui, les droits qui lui sont garantis par l'art. 7 de la *Charte*, dont voici le texte :

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[9] Après avoir passé en revue l'historique de la détention de M. Khadr et les principes applicables du droit canadien et du droit international, le juge O'Reilly a conclu que, dans les circonstances particulières de l'espèce, le Canada avait « l'obligation de protéger » M. Khadr (2009 CF 405, [2009] A.C.F. nº 462 (QL)). Il a jugé que « [l]e refus constant du Canada de solliciter le rapatriement de M. Khadr est contraire à un principe de justice fondamental et porte atteinte aux droits que l'article 7 de la *Charte* lui garantit » (par. 92). En outre, il a conclu que « [p]our atténuer l'effet de cette atteinte, le Canada [devait] demander le plus tôt possible aux États-Unis de rapatrier M. Khadr » (par. 92).

[10] Les juges majoritaires de la Cour d'appel fédérale (les juges Evans et Sharlow) ont confirmé l'ordonnance du juge O'Reilly, tout en définissant cependant de façon plus étroite l'atteinte à l'art. 7. Ils ont jugé que cette atteinte découlait de l'interrogatoire de mars 2004 auquel on avait procédé en sachant que M. Khadr avait été soumis au « programme grand voyageur » qui, selon les juges majoritaires, constituait un traitement cruel et abusif contraire aux principes de justice fondamentale : 2009 CAF 246, [2009] A.C.F. nº 893 (QL).

steps the government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

III. The Issues

[11] Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

[12] Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

A. Was There a Breach of Section 7 of the *Charter*?

1. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

2. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

3. If so, does the deprivation accord with the principles of fundamental justice?

Le juge Nadon, dissident, a rappelé les nombreuses mesures que le gouvernement avait prises en faveur de M. Khadr. Il est arrivé à la conclusion que puisque la Constitution conférait à la branche exécutive du gouvernement la compétence en matière d'affaires étrangères, la réparation souhaitée allait au-delà de ce que les tribunaux avaient le pouvoir d'octroyer.

III. Les questions en litige

[11] M. Khadr soutient que le gouvernement a violé les droits que lui garantit l'art. 7 de la *Charte* et que la réparation convenable consiste à ordonner au gouvernement de demander aux États-Unis son rapatriement au Canada.

[12] M. Khadr ne prétend pas que le gouvernement est tenu de demander le rapatriement de tous les citoyens canadiens détenus à l'étranger dans des circonstances suspectes. Il soutient plutôt que la conduite du gouvernement du Canada à l'égard de sa détention à Guantanamo par les autorités militaires américaines, et en particulier la collaboration du Canada avec le gouvernement américain en 2003 et 2004, a porté atteinte aux droits qui lui sont garantis par la *Charte*. Il exige en outre, à titre de réparation, que le gouvernement demande maintenant son rapatriement au Canada. Les questions soulevées par cette demande peuvent être résumées de la façon suivante :

A. Y a-t-il eu violation de l'art. 7 de la *Charte*?

1. La *Charte* s'applique-t-elle à la conduite des responsables canadiens qui, selon M. Khadr, ont porté atteinte aux droits que lui garantit l'art. 7 de la *Charte*?

2. Si tel est le cas, la conduite du gouvernement canadien porte-t-elle atteinte aux droits de M. Khadr à la vie, à la liberté ou à la sécurité de sa personne?

3. Si tel est le cas, cette atteinte est-elle compatible avec les principes de justice fondamentale?

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

[13] We will consider each of these issues in turn.

A. *Was There a Breach of Section 7 of the Charter?*

1. Does the Canadian *Charter* Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 *Charter* Rights?

[14] As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, *per* LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

[15] The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

[16] This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United

B. La réparation demandée est-elle convenable et juste eu égard à toutes les circonstances?

[13] Nous étudierons chacune de ces questions successivement.

A. *Y a-t-il eu violation de l'art. 7 de la Charte?*

1. La *Charte* canadienne s'applique-t-elle à la conduite des responsables canadiens qui, selon M. Khadr, ont porté atteinte aux droits que lui garantit l'art. 7 de la *Charte*?

[14] De manière générale, les Canadiens qui sont à l'étranger sont assujettis au droit du pays où ils se trouvent et ne peuvent pas se prévaloir des droits que leur garantit la *Charte*. Le droit international coutumier et le principe de la courtoisie entre les nations s'opposent, en règle générale, à l'application de la *Charte* aux actions des responsables canadiens en mission à l'étranger : *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 48, le juge LeBel citant *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462, par. 123. La jurisprudence prévoit une exception dans le cas d'une participation canadienne à des activités d'un État étranger ou de ses représentants qui sont contraires aux obligations internationales du Canada ou aux normes relatives aux droits fondamentaux de la personne : *Hape*, par. 52, le juge LeBel; *Khadr 2008*, par. 18.

[15] La question dont nous sommes saisis est donc celle de savoir si la règle excluant l'application extraterritoriale de la *Charte* empêche son application aux actions de responsables canadiens à Guantanamo.

[16] Statuant sur cette question dans *Khadr 2008*, la Cour a conclu que la *Charte* s'appliquait aux actions des responsables canadiens en mission à Guantanamo qui avaient transmis aux autorités américaines le fruit de leurs interrogatoires avec M. Khadr. La Cour a conclu, au par. 26, que « les principes du droit international et de la courtoisie entre les nations qui, dans d'autres circonstances, pourraient soustraire à l'application de la *Charte* les actes des responsables canadiens en mission à l'étranger ne s'appliquent pas à l'assistance fournie en l'espèce

States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24; *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

[17] We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

[18] Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

aux autorités américaines à Guantanamo », étant donné les arrêts de la Cour suprême des États-Unis selon lesquels le régime de commission militaire alors en vigueur constituait une atteinte manifeste aux droits fondamentaux de la personne reconnus en droit international : *Khadr 2008*, par. 24; voir *Rasul c. Bush*, 542 U.S. 466 (2004), et *Hamdan c. Rumsfeld*, 548 U.S. 557 (2006). Selon les principes de justice fondamentale, les responsables canadiens qui avaient interrogé M. Khadr étaient donc tenus de lui révéler la teneur des déclarations qu'il leur avait faites. Le gouvernement canadien s'est conformé à l'ordonnance de la Cour.

[17] Nous constatons que le régime dans le cadre duquel M. Khadr est actuellement détenu a été modifié de façon notable au cours des dernières années. Le Congrès américain a adopté des lois et les tribunaux ont rendu des décisions visant à harmoniser les procédures militaires de Guantanamo avec le droit international. (La *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, interdit de soumettre les détenus à des traitements inhumains et exige que les interrogatoires soient menés en conformité avec le manuel de service de l'armée. Avec la *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, le législateur a tenté de légaliser le régime de Guantanamo après l'arrêt rendu par la Cour suprême des États-Unis dans l'affaire *Hamdan c. Rumsfeld*. Or, le 12 juin 2008, cette même cour a déclaré — dans *Boumediene c. Bush*, 128 S. Ct. 2229 (2008) — que les détenus de Guantanamo ont le droit constitutionnel de faire contrôler la légalité de leur détention par voie d'*habeas corpus*, et a annulé les dispositions de la *Military Commissions Act of 2006* qui avaient suspendu ce droit.)

[18] S'il est vrai que la procédure à laquelle est soumis M. Khadr a changé, la demande qu'il formule repose sur la série de faits survenus à Guantanamo — les interrogatoires et la communication d'éléments de preuve ayant eu lieu en 2003 et 2004 — que nous avons déjà examinée dans *Khadr 2008*. Nous sommes convaincus que les arguments sur lesquels nous nous sommes fondés dans cet arrêt pour conclure à l'application de la *Charte* aux actions de responsables canadiens à Guantanamo valent également pour la présente affaire.

TAB 8

Caterpillar Financial Services Corp. v. Boale, Wood & Company Ltd., 2014 BCCA 419

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Caterpillar Financial Services Corporation v. Boale, Wood & Company Ltd.,* 2014 BCCA 419

Date: 20141031
Docket: CA041207

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 and the *Business Corporations Act*, S.B.C. 2002, c. 57

and

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd.

Between:

Caterpillar Financial Services Corporation

Appellant
(Applicant)

And

Boale, Wood & Company Ltd.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated September 3, 2013 (*Worldspan Marine Inc. (Re)*, 2013 BCSC 1593, Vancouver Docket S113550).

Counsel for the Appellant: A.H. Brown

Counsel for the Respondent: G.H. Dabbs

Place and Date of Hearing:	Vancouver, British Columbia June 3, 2014
Place and Date of Judgment:	Vancouver, British Columbia October 31, 2014

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurring Reasons by:
The Honourable Madam Justice Garson (page 16, para. 44)

Concurring in both:
The Honourable Madam Justice Neilson

Summary:

Worldspan Marine Inc. designed, manufactured and sold luxury yachts. The Supreme Court granted an order under the Companies' Creditors Arrangement Act ("CCAA") providing protection to Worldspan and appointing the respondent as Monitor. The court also provided for an Administrative Charge in favour of the Monitor ranking in priority to the security of Worldspan's creditors. The appellant was a secured creditor with a mortgage on a vessel in Washington State, U.S.A. The Monitor was granted a Recognition Order by a Washington court. There was no specific reference to the Administrative Charge in the Washington proceedings or in the Recognition Order. That order recognized the CCAA proceedings as a foreign main proceeding and directed that the administration and realization of Worldspan's assets in the United States was entrusted to the Monitor acting in the CCAA case. The vessel was sold and the proceeds paid into court in the CCAA proceedings. The court rejected the appellant's contention that the Monitor's Administrative Charge did not apply because the vessel was in the United States when the charge was imposed on the basis that the Administrative Charge attached to the vessel in Washington.

Held: appeal dismissed. The Administrative Charge was an in rem order that did not have extra-territorial effect and did not attach to the vessel in Washington when it was made. The property over which the Administrative Charge had priority included proceeds. The Recognition Order vested the realization of the assets of Worldspan in the CCAA court. Insofar as the security on the vessel was realized in the CCAA proceedings, the Administration Charge attached to the proceeds of sale and had the priority given to it by the CCAA court.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal concerns the relationship between Canadian and United States insolvency proceedings.

Background

[2] Worldspan Marine Inc. ("Worldspan") designed, manufactured and sold luxury yachts. On June 6, 2011, the Supreme Court granted an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). The chambers judge described the situation at that time (2013 BCSC 1593):

> [3] … This Court, in its Reasons for Judgment granting the initial order, indexed as *Sargeant v. Worldspan Marine Inc*., 2011 BCSC 767, found that the petitioners collectively owned assets worth approximately $30.7 million. The petitioners' principal assets then consisted of the real property in Maple Ridge, British Columbia, owned by 27222 Developments Ltd. and appraised at $8.9 million, where the petitioners' shipyard was located, and a partially completed 142-foot Queenship motor yacht bearing hull number QE0142226C010, then valued at $15.1 million.

[3] The judge provided useful background to this appeal:

> [4] The petitioner, Worldspan Marine Inc. ("Worldspan") had entered into a vessel construction agreement with Mr. Harry Sargeant III for the construction of the 142-foot yacht, which has been referred to throughout these proceedings as the Sargeant yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. Mr. Sargeant ceased making payments under the vessel construction agreement, which led to the insolvency of the petitioners and ultimately, to the initiation of these proceedings.
>
> [5] This Court's initial order included an Administration Charge, not to exceed $500,000, as security for the fees and disbursements of the Monitor [Boale, Wood & Company Ltd.], counsel to the Monitor, and counsel to the petitioners that charged the "Non-Vessel Property" as defined in the initial order. Under the terms of the initial order, the Administration Charge ranked in priority to all other security in the Non-Vessel Property.

[4] "Non-Vessel Property" is all of Worldspan's property other than the Sargeant yacht. In the initial order, property is defined as "including all proceeds". The judge continued:

> [6] At the time of the initial order, the applicant, CAT [Caterpillar Financial Services Corporation], held a mortgage charging another vessel, the Queenship 70' yacht with hull identification number A129 (the "A129"). In May 2011, CAT brought foreclosure proceedings against the A129 in Seattle, Washington.
>
> [7] The A129, a Canadian vessel, was owned by the petitioner Worldspan. … Worldspan had moved the A129 to Seattle, and was attempting to sell it there.
>
> [8] The issues arising on this application are whether the Administration Charge attaches to the A129, or the proceeds of sale of that vessel, and if so, whether the Administration Charge ranks in priority to the mortgage charging the A129 held by CAT.

[5] On May 10, 2011, on the application of Caterpillar Financial Services Corporation ("CAT"), the court in Washington State exercised its maritime jurisdiction

and issued an *in rem* warrant for the arrest of the A129. The *CCAA* court was aware of the initiation of the Washington State proceedings, the arrest of the A129 were noted in the court's reasons granting the initial order in the *CCAA* proceedings.

[6] At para. 20, the judge observed:

> [20] Following the pronouncement of the initial order, on June 8 and June 27, 2011, counsel for CAT wrote to counsel for Worldspan advising that if the petitioners did not apply to the United States Bankruptcy Court for the Western District of Washington at Seattle (the "U.S. Bankruptcy Court") for an order pursuant to Chapter 15 of the U.S. Bankruptcy Code recognizing the *CCAA* proceedings, CAT would continue to execute against the A129.

[7] On June 28, 2011, CAT applied to the Washington Court for an order of default. Worldspan was served with the application, but did not respond. The order was granted on July 1, 2011.

[8] Further proceedings in the Washington Court were described by the chambers judge at paras. 24 and 27:

> On September 11, 2011, on the application of the petitioners and the Monitor, the U.S. Bankruptcy Court granted an order recognizing these proceedings as a "Foreign Main Proceeding" under Chapter 15 of the U.S. Bankruptcy Code (the "Recognition Order").
>
> …
>
> Although CAT put evidence before the U.S. Court that the petitioners were seeking to increase the Administration Charge from $500,000 to $1 million, neither CAT nor Grand Banks Yacht Sales LLC opposed the grant of the Recognition Order on the ground that the Administration Charge would have priority over their claims respecting the A129.

[9] The chambers judge quoted at length from the Recognition Order:

> D. This Chapter 15 case was properly commenced pursuant to §§1504 and 1515 of the United States Bankruptcy Code (the "Code") and the petition on file in this case meets all requirements of §1515 of the Code;
>
> E. The *CCAA* Case now pending before the Supreme Court of British Columbia is a "foreign proceeding" within the meaning of §101(23) of the Code;
>
> F. The Monitor is a duly appointed "foreign representative"; within the meaning of §101(24) of the Code;

G. Notwithstanding the fact that one asset of Worldspan is in Washington State, the center of main interest of Worldspan is in British Columbia, Canada, and the *CCAA* Proceeding is properly designated a "foreign main proceeding" within the meaning of §§1502(4) and 1517(b)(1) of the Code with respect to the Petitioners;

H. The relief requested by the Monitor and the Petitioners is necessary and appropriate and in the interest of international comity and the purposes of Chapter 15, as provided in §1501 of the Code;

I. As the duly appointed foreign representative of a foreign main proceeding, the Monitor is entitled to all of the relief provided under §1520 of the Code;

J. The relief sought by the Monitor pursuant to §1521 of the Code is necessary and appropriate to effectuate the purposes of Chapter 15 and to protect the assets of Worldspan in the United States and to protect the interests of all creditors of the Petitioners; and

K. Notice of these proceedings was sufficient and proper under the circumstances and no further notice is required or necessary.

…

… the application filed on behalf of the Foreign Applicants is hereby granted and this Court hereby recognizes the *CCAA* Case as a foreign main proceeding pursuant to Chapter 15 (the "Foreign Main Proceeding") with the Monitor and the Petitioners or either of them as appropriate under the supervision of the Canadian Court, serving as the foreign representatives as authorized under orders the *CCAA* Case and applicable provisions of the *CCAA* (the "Foreign Representatives");

…

The following are stayed:

a. the commencement or continuation of an individual action or proceeding concerning the Petitioners' assets, rights, obligations or liabilities, other than pursuit of claims through the *CCAA* Case and this Chapter 15 case; and

b. any execution against the Petitioners' assets in the United States;

… except with respect to the Foreign Representatives' rights as authorized in the Foreign Main Proceeding …

… the administration and realization of the Petitioners' assets within the United States are hereby entrusted to the Foreign Representative acting in the *CCAA* Case.

[10] At para. 30 he observed:

On the hearing of the application for the Recognition Order, counsel made no submissions respecting the Administration Charge. There was no discussion or argument on the question of whether the Administration Charge might attach to the A129.

[11] On April 20, 2012, the *CCAA* court approved a sale of the A129 and ordered the net proceeds to be held in trust. The order further provided at para. 3:

> The Net Proceeds…shall stand in the place and stead of the A129 on the basis that it is located in Seattle Washington, USA, and without prejudice to the rights of the parties as if the disposition approved herein had not occurred.

[12] With respect to this aspect of the order the judge stated:

> [32] … the net proceeds stood in the place of the A129 and that any claim that the net proceeds were subject to the Administration Charge would be determined as if the A129 was still located in Seattle, Washington. Claims against the net proceeds based on the assertion that they were subject to the Administration Charge were limited to the aggregate amount of $170,000.

[13] On the application of CAT, supported by all other interested parties, an order was obtained from the Washington Court releasing the A129 from arrest and she was sold. An application was brought in the *CCAA* proceedings for payment out of the proceeds of sale, and it is the outcome of this application that is now under appeal.

[14] CAT took the position that it was entitled to full payment because the Washington Court did not attach the Administration Charge to the A129 when it issued the Recognition Order and that it would be unlikely to do so if that request had been made. CAT relied on the opinion of a United States attorney that in United States financial restructuring cases under Chapter 11 of United States bankruptcy legislation, administrative expenses normally rank behind secured creditors. It also relied on Canadian maritime law to similar effect.

[15] The Monitor asserted that there is "no restriction … on the type or location of property that may be subject to a charge for the benefit of a monitor". The Monitor also argued that CAT had the opportunity to contend its charge ranked in priority in the proceedings before the *CCAA* and Washington Court, but did not.

The Chambers Judgment

[16] The judge concluded that the Administration Charge was an *in rem* charge which attached both to the A129 and to the proceeds of sale from the vessel. The judge also held that the charge ranked in priority to CAT's mortgage.

[17] The judge began his analysis by referring to the law concerning the court's jurisdiction to make orders in *CCAA* proceedings. He then addressed the role of the Monitor and the purpose and operation of the Administration Charge, stating at paras. 48-52:

> [48] The Monitor, as an officer of the court, oversees the financial affairs and restructuring of the insolvent company. The Administration Charge serves the purposes of the *CCAA* and facilitates the restructuring process by providing security for fees and expenses incurred by the Monitor in its oversight of the debtor, and by counsel retained by the Monitor and the debtor company to provide necessary assistance in the *CCAA* proceedings.
>
> [49] Section 11.52(1) of the *CCAA* authorizes the court to make an order declaring that "all or part of the property of the debtor company" is subject to a security or charge, in an amount the court considers appropriate, in respect of the fees and expenses of the Monitor, legal experts engaged by the Monitor, and legal experts engaged by the debtor company for the purpose of the *CCAA* proceedings.
>
> [50] Section 11.52(2) provides:
>
> > The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> [51] There is no restriction in s. 11.52 on the type or location of property that may be subject to the security or charge.
>
> [52] When Parliament enacted s. 11.52 in 2009, it authorized courts in *CCAA* proceedings to grant a super priority charge attaching to all or part of the property of the debtor as security for the fees and expenses of the Monitor. That super priority serves the objectives of the *CCAA* by providing some assurance to the Monitor and other professionals engaged by it or by the debtor company for the purpose of *CCAA* proceedings that they will be paid for their services.

[18] The judge continued at para. 54:

> … Bearing in mind that the *CCAA* is remedial insolvency legislation, and reading the words of s. 11.52 in the context of the *CCAA* as a whole, and taking into account the purpose of the *Act*, I interpret s. 11.52 as providing the court with authority to grant an Administration Charge that attaches to all or

> part of the property of the debtor company, whether or not that property is located in British Columbia.

He stated at para. 58 that by its initial order the court "granted an Administration Charge that attached the A129 *in rem*", but added at para. 59:

> Before the U.S. Bankruptcy Court made the Recognition Order, any attempt to enforce the Administration Charge against the A129 in Seattle, Washington would have required the assistance and cooperation of the Washington Court, or the U.S. Bankruptcy Court.

[19] The judge described the effect of the Recognition Order at para. 60:

> By the Recognition Order of September 29, 2011, the U.S. Bankruptcy Court recognized the *CCAA* proceedings and ordered that the administration and realization of the petitioners' only asset in the United States, the A129, was entrusted to the foreign representative acting in the *CCAA* case. That foreign representative is the Monitor. By the Recognition Order, the U.S. Bankruptcy Court deferred to this Court matters relating to the administration and realization of the petitioners' assets in the United States, including the issue of whether the Administration Charge attached to the A129. The Recognition Order precluded CAT from executing against the A129 in the United States. After the Recognition Order, CAT had no means of asserting its security interest in the A129, other than through the *CCAA* proceedings.

[20] It was the judge's view that it was unnecessary to determine what the Washington Court would have done if asked to determine whether the Administration Charge attached to the A129 or whether it ranked in priority to CAT's mortgage under United States law. He stated, "I must decide this case having regard to the orders actually made by this Court, and by the [Washington Court]" (para. 61).

[21] The judge concluded at para. 65:

> The Administration Charge is an in rem charge that attached to the A129 and continues to attach the proceeds of sale, which now stand in place of the vessel. Accordingly, the solicitors for CAT, Boughton Law Corporation, will pay and deliver to the Monitor the balance of the proceeds of sale of the A129 in the amount of $170,000.

Discussion

[22] Two different lines of inquiry are relevant to the determination of whether the Administration Charge ultimately attached to the sale proceeds of the A129. The first question is whether the Administration Charge attached to the A129 *in rem* under the *CCAA* proceedings. The second question relates to the status of the charge in light of both the *CCAA* proceedings and the Recognition Order.

Extra-territoriality

[23] The judge stated that the Administration Charge attached to the A129 *in rem*. Insofar as this may suggest the extra-territorial operation of the order granting the charge, I do not agree. As the judge noted, prior to the Recognition Order, resort would have been required to the United States courts to enforce the charge.

[24] The Supreme Court of Canada has stated that while Parliament has the legislative competence to enact laws having extra-territorial effect, it is presumed not to intend to do so in the absence of clear words or necessary implication to the contrary: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 54:

> While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This is because '[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected'; see *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1051, *per* La Forest J.

[25] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, is an example of legislation that explicitly allows a court to deal with property outside Canada. It defines "property" as:

> … any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

When a court assigns the property of a bankrupt to a trustee, this includes assigning movable and immovable property outside Canada. The *CCAA* does not contain a definition of property and does not explicitly specify whether it refers to property within Canada only or property everywhere.

[26] Although the implications of the definition of property in the *Bankruptcy and Insolvency Act* is not a matter before us on this appeal, in my view it operates *in personam*, not *in rem*; the rights of the debtor are vested in the trustee. Realization of those rights is governed by the law where the property is located. The issue does not arise under the *CCAA* because there is nothing in the legislation to suggest that its reach extends *in rem* to property outside Canada.

[27] More importantly, Part IV of the *CCAA* deals specifically with cross-border insolvency. It is based on the *Model Law on Cross-Border Insolvency* drafted by the United Nations Commission on International Trade Law in 1997. Chapter 15 of the *United States Bankruptcy Code* (USC tit 11 §§1501-1532) also is based on the *Model Law*.

[28] In the present case, the initial *CCAA* order from June 6, 2011 contained the following provisions:

> 46. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.
>
> …

> 48. Each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§101-1330, as amended.

[29] In my view, it is clear that neither the *CCAA* nor the orders made in this case support the proposition that the Administration Charge attached *in rem* to the A129. They are inconsistent with the unilateral attachment of the charge to property in the United States.

Effect of the court orders

[30] The starting point in the analysis is the *CCAA*. Pursuant to s. 11.52, a *CCAA* court may establish a charge to cover the costs and expenses of a monitor and those who assist the monitor. The court also is authorized to order that the charge ranks in priority over the claim of any secured creditor. The Administration Charge at issue in this case was made in accordance with s. 11.52. It ranked in priority to the interests of creditors who had security on the non-vessel property of Worldspan. As noted, property was defined as "including all proceeds".

[31] The Recognition Order was granted on the joint application of Worldspan and the Monitor. The United States court was provided with information concerning the initiation of the *CCAA* proceedings. A copy of the order appointing the Monitor was exhibited to the affidavit of a member of the firm appointed as the Monitor.

[32] The judge recited the style of cause and action number of the *CCAA* proceeding and declared it to be a "foreign proceeding" under United States bankruptcy law. He stated:

> The Monitor is a duly appointed "foreign representative" within the meaning of §101(24) of the Code.

He then designated the *CCAA* proceeding as a "foreign main proceeding".

[33] The judge made the following orders:

> … this Court hereby recognizes the *CCAA* Case as a foreign main proceeding pursuant to Chapter 15 (the "Foreign Main Proceeding") with the Monitor and the Petitioners or either of them as appropriate under the supervision of the Canadian Court, serving as the foreign representatives as authorized under orders the *CCAA* Case and applicable provisions of the *CCAA* (the "Foreign Representatives");
>
> … the following are stayed:
>
> a. the commencement or continuation of an individual action or proceeding concerning the Petitioners' assets, rights, obligations or liabilities, other than pursuit of claims through the *CCAA* Case and this Chapter 15 case; and
>
> b. any execution against the Petitioners' assets in the United States;
>
> … except with respect to the Foreign Representatives rights to act as authorized in the Foreign Main Proceeding as provided herein, the right to transfer, encumber, or otherwise dispose of any assets of the Petitioners in the United States is suspended;
>
> … the administration and realization of the Petitioners' assets within the United States are hereby entrusted to the Foreign Representative acting in the *CCAA* Case.

[34] In my view, there is nothing in the Recognition Order to suggest that the portion of the *CCAA* order authorizing the Administration Charge and granting it priority would not apply to funds realized from the sale of the A129. The United States court did not purport to limit in any way the process of realization to be undertaken under the supervision of the *CCAA* court. It specifically entrusted that realization to the Monitor acting in the *CCAA* case.

[35] In argument, the parties did not address the implications of para. 3 of the judge's April 20, 2012 order or his comments about the provision in para. 32 of his reasons for the order under appeal. In my view, para. 3 and the judge's comments flowed out of his view that the Administrative Charge attached to the A129 in the United States. As noted, in my view, it did not.

[36] More importantly, I agree with the judge that the issue in this case must be determined by looking at the orders of the *CCAA* court and the Recognition Order. The latter stayed execution on the debtor's assets in the United States and, as

noted, entrusted realization to the Monitor "acting in the *CCAA* Case". Those proceedings attached the Administrative Charge to the proceeds of sale in Canada.

[37] I do not suggest that questions of foreign law may not arise in these matters, but they do not do so in the context of the issue on this appeal.

[38] Although the appellant argued that priorities must be determined in the context of maritime law, in my view, it is not necessary to deal with that issue in this case. The Federal Court's maritime jurisdiction was engaged in the context of the Sargeant yacht because a maritime lien was involved. The United States court discharged the maritime lien filed against the A129 in that jurisdiction to enable the vessel to be sold. No challenge was made to the authority of the *CCAA* court to grant the Administration Charge. This issue is the effect of that order in conjunction with the Recognition Order on the proceeds of the sale of the A129.

Conclusion

[39] The Administration Charge did not attach *in rem* to the A129.

[40] The Monitor's entitlement to the Administration Charge in priority to the rights of CAT is determined on a consideration of the *CCAA* proceedings and the Recognition Order.

[41] The United States court directed that all matters concerning the A129 be dealt with by the Monitor in the *CCAA* proceedings. The United States court was fully cognizant of the terms of the *CCAA* order appointing the Monitor and establishing the Administration Charge. It placed no limitation on its direction.

[42] While the Administration Charge did not attach *in rem* to the A129, insofar as the security on that vessel was realized in the *CCAA* proceedings, the Administration Charge attached to the proceeds of sale and had the priority given to it by the *CCAA* court.

[43] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

Concurring Reasons for Judgment of the Honourable Madam Justice Garson:

[44] I have had the privilege of reading in draft the reasons for judgment of my colleague, Mr. Justice Chiasson. I agree with his analysis and his conclusions but wish to add the following further analysis concerning the application of the Model Law on Cross-Border Insolvency.

[45] The *CCAA* order is an *in rem* order. This is clear from paras. 32 and 35 of the order, which were framed in *in rem* language as follows:

> The monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Non-Vessel Property . . . .
>
> . . .
>
> Each of the Administration Charge and the Directors' Charge . . . shall constitute a mortgage, security interest, assignment by way of security and charge on the Non-Vessel Property and such Charges shall rank in priority to all other security interests . . .
>
> [Emphasis added.]

[46] This is consistent with the language of s. 11.52 of the *CCAA*, which states,

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge …
>
> . . .
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

This language contemplates the court making an order declaring all or part of the property of a debtor subject to a charge. This can only be interpreted as an *in rem* order.

[47] The chambers judge was correct that the *CCAA* order was an *in rem* order, but incorrect when he suggested that, without more, it could have extra-territorial effect. Thus the *CCAA* order could not, without more, attach a priority charge to a foreign asset (i.e., the vessel situated in Washington).

[48] The May 10, 2011 Washington arrest warrant in the Washington foreclosure proceeding was an arrest warrant in which that court exercised its *in rem* jurisdiction over the vessel in Washington.

[49] The April 20, 2012 British Columbia Supreme Court order for sale preserves the parties' positions; that is, it provided that the sale proceeds were to be treated on the same basis as the vessel itself.

[50] Therefore the Recognition order is the only basis by which the British Columbia court could exert any extra-territorial reach in order to enforce a British Columbia priority charge on foreign property or proceeds. The effect of the recognition order is to stay the Washington foreclosure proceeding in favour of the "foreign main proceeding"; that is, the British Columbia *CCAA* proceeding.

[51] The recognition order was made pursuant to Chapter 15 of the *Bankruptcy Code*, which is the U.S. enactment based on the Model Law on Cross-Border Insolvency. The Model Law on Cross-Border Insolvency was drafted by the United Nations Commission on International Trade Law ("UNCITRAL"), and approved by the General Assembly of the United Nations without objection in 1997: A/RES/52/158. The Model Law was also adopted by the Parliament of Canada through the enactment of Part IV of the *CCAA*, ss. 44 to 61: see Bill C-55, *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*, 1st Sess, 38th Parl, 2005, cls. 124–31 (as given royal assent on November 25, 2005). The intention of Parliament to adopt the Model Law is evidenced by a review of the Parliamentary debate surrounding the passage of the amendments to Canada's insolvency regime: see *House of Commons Debates*, 38th Parl, 1st Sess, No. 128 (September 29, 2004) at 1243, 1345 (Hon. Hedy Fry; Hon. Don Boudria).

[52] The Guide to Enactment and Interpretation of the UNCITRAL Model Law describes the purpose of the model law:

> **Purpose**
>
> The Model Law is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

The Guide describes the key provisions of the law. Of relevance to this appeal is the key provision relating to Recognition:

> *(b) Recognition*
>
> One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects—principal amongst them is the relief accorded to assist the foreign proceeding.

[53] The relevant (for the purposes of this appeal) provisions of the *CCAA* implementing the Model Law are found at ss. 44, 45, and 48, under the Part titled "Cross Border Insolvencies":

> Purpose
>
> **44.** The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;

> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (*d*) the protection and the maximization of the value of debtor company's property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment.
>
> …
>
> Definitions
>
> **45.** (1) The following definitions apply in this Part.
>
> "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.
>
> "foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.
>
> "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.
>
> …
>
> **48.** (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor 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 debtor company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

[54] The Model Law has previously been recognized by Canadian courts as the basis of Part IV of the *CCAA*: see e.g. *Probe Resources Ltd. (Re)*, 2011 BCSC 552 at para. 18; *MtGox Co. (Re)*, 2014 ONSC 5811 at para. 11.

[55] Consistent with the goals and objectives of the Model Law, Chapter 15 of the United States' *Bankruptcy Code* includes mirror provisions to Part IV of the *CCAA*:

> (a) The purpose of [Chapter 15] is to incorporate the Model law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.
>
> . . .
>
> In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.
>
> [11 U.S.C. §§ 1501, 1508]

[56] In summary, the Recognition Order was made pursuant to the Model Law adopted by Chapter 15. This order recognized the British Columbia *CCAA* proceeding as the foreign main proceeding. It stayed the local proceeding (the foreclosure) pursuant to §§ 1521(a)(1) and (2) of Chapter 15, and, most importantly, it ordered that "the administration and realization of Worldspan's assets within the United States are entrusted to the foreign representative acting in the *CCAA* case pursuant to s. 1521(5)". The only U.S. asset of Worldspan was the vessel. It was unnecessary for the Recognition order to specify that it applied to that one specific asset. The whole purpose of the Model Law as adopted into U.S. and Canadian law is to coordinate the two regimes. Once the Canadian proceedings were recognized as the foreign main proceeding, it was entirely for the British Columbia Supreme Court to determine priority. This is consistent with Part IV of the *CCAA*.

[57] I conclude that the chambers judge was correct in ordering that the monitor's charge had priority over the CAT mortgage. The adoption of the Model Law into Part IV provided him with the jurisdiction to make the order under appeal, despite the general principle that a domestic court will not make an *in rem* order affecting title to foreign property, as the Washington Court had deferred such determinations to the British Columbia Supreme Court. In such circumstances, comity dictates that the chambers judge had the jurisdiction to give priority to the *CCAA in rem* Administrative Charge over CAT's mortgage.

[58] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree with both my colleagues:

"The Honourable Madam Justice Neilson"

TAB 9

Fraser Paper Inc v Superintendent of Pensions,
2007 NBQB 196

F/M/28/07

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N:

FRASER PAPERS INC.,

Appellant

— and —

SUPERINTENDENT OF PENSIONS,

Respondent

Date of Hearing: May 30, 2007

Date of Decision: May 31, 2007

Before: Mr. Justice David H. Russell

Representation of Parties at Hearing:

Deborah Lamont, Esqe., Solicitor for the Appellant.

David Eidt, Esq., Solicitor for the Respondent, Superintendent of Pensions

Joel Michaud, Esq., Solicitor for the Union.

D E C I S I O N

RUSSELL, J. (Orally):

[1] The Appellant by motion seeks the following relief:

> That all matters in relation to the Labour and Employment Board's April 13, 2007 Decision (hereinafter the "Board's April 13, 1007 Decision") and the subsequent correspondence from the Superintendent of Pensions dated April 20, 2007 (hereinafter the "Superintendent's letter dated April 20, 2007") be stayed until further order of this Honourable Court, pursuant to Rule 69.06 of the *Rules of Court.*

[2] The grounds referred to in the motion include the following:

(a) Fraser Papers has sought judicial review of the Board's April 13, 2007 Decision by Notice of Application dated May 22, 2007;

(b) After receiving the Board's April 13, 2007 Decision, the Superintendent of Pensions issued a letter dated April 20, 2007, where in she confirmed that Fraser Papers must, by no later than May 25, 2007:

(i) fund the solvency deficiencies identified for both Plans 1 and 2 over a period of not more than five years;

(ii) immediately pay all special payments due in respect of the solvency deficiency identified in the actuarial valuation reports for Plans 1 and 2; and

(iii) continue to make the special payments necessary to amortize the solvency deficiency identified in the actuarial valuation reports as they come due.

(c) Fraser Papers' ability to refinance its debt, finance the committed equipment improvements and follow through on its present business strategy will be hindered if it is required to immediately pay all special payments

> due in respect of the solvency deficiencies identified in the actuarial valuation reports for Plans 1 and 2.
>
> (d) This requirement for Fraser Papers to immediately pay all special payments due in respect of the solvency deficiencies identified in the actuarial valuation reports for Plans 1 and 2 will result in irreparable harm to Fraser Papers and the balance of convenience favours the granting of a stay in this instance.

THE BACKGROUND

[3] The two pension plans, those for unionized and salaried employees of Fraser have a significant solvency deficiency as verified by actuarial valuation reports with a review date of December 31, 2004. After issuing an aborted order of March 29, 2006 the Superintendent of Pensions issued orders of September 5, 2006 and October 20th of that year in response to Fraser's request to extend the amortization period for repayment of the arrears to the outer limits allowed by the *Pension Benefit Act*. By letter of September 5, 2006 the Superintendent ordered (See Record p126):

> As a result of the foregoing, pursuant to paragraph 72(2)(a) of the *Pension Benefit Act*, I hereby Order Fraser Papers Inc. to immediately pay all special payments due in respect to the solvency deficiency identified in their actuarial valuation reports of December 31, 2004 in compliance with paragraph 36(1)(c) of the *General Regulation Pension Benefits Act* for the period from December 31, 2004 to present.
>
> And later:
>
> It is further ordered that Fraser Papers Inc. continue to make the special payments necessary to amortize the solvency deficiency identified in the actuarial reports of December 31, 2004 in accordance with paragraph 36(1)(c) of the *General Regulation Pension Benefits Act* as they come due.

On October 20, 2006, the Superintendent rendered her decision with respect to the application by Fraser for reduced special payments. In

her decision the Superintendent declined the application. This is what she said to support her decision:

> After careful review of this file, I am declining your request. In rendering this decision, I took into account and balanced many considerations.
>
> She further wrote:
>
> The basic intent of the *Pension Benefits Act*, which is to ensure that pension benefits are adequately funded so that the risk of employees receiving less than the retirement benefits promised to them by their employer, is minimized. Solvency valuations, and the special payments required to offset any solvency deficiencies, are an integral part of this protection. As such, any amendments made to the *Pension Benefits Act* or *General Regulation – Pension Benefits Act* in order to lessen the burden o n plan sponsors (including those introduced through subsection 36(1.2) of the *General Regulations – Pension Benefits Act*), and any discretionary decision made by the Superintendent of Pensions regarding an extension in the amortization period for solvency deficiencies, must carefully balance these competing interests.
>
> For this particular application, I am unable to balance these interests in favour of granting Fraser Papers Inc. an extension in the solvency amortization period.

[4] Fraser then, pursuant to Section 73 of the *Pension Benefits Act* took the decision to the New Brunswick Labour & Employment Board. That Board heard the matter on January 10 and 11th, 2007 and rendered a decision on April 13th, 2007 affirming the Superintendent's decision. Fraser has now, by application, sought judicial review of the decision. A hearing for that has not yet been set.

[5] Rule 69.06(1)(a) says:

> (1) The court may make interim orders, including
>
> (a) an order for a stay of proceedings until final disposition of the matter or until ordered otherwise.

THE LAW

[6] It is accepted the principles for granting a stay are effectively the same as those for granting an interlocutory injunction.

[7] In *Melanson et al v The Province of New Brunswick et al*, 2006, NBQB 073 I said:

> Two important judgments in Canada involving a stay of legislation on constitutional grounds at the *Attorney General of Manitoba v Metropolitan Stores* decided in 1987 and *RJR-MacDonald Inc. and Imperial Tobacco Ltd. v Attorney General of Canada* in 1994. In the *Metropolitan Stores* case, the Metropolitan Stores were upset about Manitoba legislation that allowed the Manitoba Labour Board to impose a first collective agreement on them. They sued to have the legislation set aside and pending the trial applied to stay or to stop the Labour Board from imposing that collective agreement. In the *RJR-MacDonald* case the two tobacco companies fought legislation forcing them to put warnings on cigarette packages. In the Supreme Court of Canada the companies, before the case was heard, applied for a stay of the legislation's effect as it would be very expensive to alter the packages and these expenses would be unrecoverable if they were successful in having the legislation struck out.

[8] The *Metropolitan Store* case is reported at 1987 1SCR 110 and the *RJR-MacDonald* judgment at 1994 1SCR 311.

[9] The first requirement is that there be a serious question to be tried. This does not mean the Applicant must establish a reasonable prospect of success in the substantive matter. I conclude that Fraser has met the low threshold requirement based on the alleged errors in the decision set out in the affidavit in support of the motion.

[10] The second question is whether the Application will suffer irreparable harm if the stay is not granted. The Supreme Court of Canada *in RJR-MacDonald* stated at p341:

> "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.

[11] The only evidence before me is contained in the affidavit of Glen McMillan Chief Financial Officer for the Appellant. At paragraph 12(d) and (e) Mr. McMillan deposed:

> By letter dated August 10, 2006… I wrote to the Superintendent…and also provided the Superintendent with additional information regarding Fraser Papers business, finances, financial viability and labour relations, including the following.
>
> (d) Fraser Papers' net debt to net debt plus equity ration of 5% which is among the lowest leverage ratios in the paper industry;
>
> (e) A recent increase in Fraser Papers' borrowing capacity from US$50 million to US$90 million;

[12] At paragraph 23(b), (c) and (f) he swore:

> At the hearing before the Board, I testified that:
>
> (b) Fraser Papers have faced challenges in recent years due to high interest rates, market conditions for certain of its products and the effect of certain obligations assumed as a result of its spin out from its former parent company, but that many of these issues are behind us;
>
> (c) Plan 1 and Plan 2 are in deficit positions due, in large part, to the aforementioned challenges relating to interest rates and investment returns, but that Fraser

> Papers' solvency funded position of the plans improved, not deteriorated, between December 31, 2004 and May 31, 2006;
>
> (f) Despite Fraser Papers' financial viability, there is no doubt that the increased immediate costs to fund the pension plan deficiencies over 5 years as opposed to the requested extended period will hinder Fraser Papers' ability to follow through on its present business strategy.

[13] And finally at paragraph 31 he deposed, in part:

> If Fraser Papers is required to immediately pay all special payments due in respect of the solvency deficiencies identified in the actuarial valuation reports for Plans 1 and 2 it will certainly hinder Fraser Papers' ability to refinance its debt, finance the committed equipment improvements and follow through on its present business strategy.

[14] Evidence of irreparable harm cannot be inferred and must be clear and not be speculative. See *Injunctions and Specific Performance*, Looseleaf Edition, Honourable R. J. Sharpe: Canada Law Book at 2.413. Here, on the other hand the affidavit evidence previously cited would lead to a conclusion the Applicant is doing well financially. The only statement to the contrary is that the impugned order, if not stayed will "hinder Fraser Papers ability to follow through on its present business strategy" or "if Fraser Papers is required to immediately pay all special payments…it will certainly hinder Fraser Papers' ability to refinance its debt, finance the committed equipment improvements and follow through on its present business strategy."

[15] There was no concrete evidence about the appellant's financial situation. The evidence falls short of establishing the difficulties or hardship that is required to conclude there will be irreparable harm should the stay not be granted.

[16] While it may not be necessary to look at the third prong of the test, that is, the balance of convenience, I will do so because of the comments in *Gestion Cayouette Inc v Co-Operators General Insurance Co.* (1997), 190 NBR (2d) 397 where Justice Bastarache (as he then was) said:

> To succeed the applicant must show that there is merit to the appeal and that he will suffer irreparable harm if the application is denied. There is also a convenience test that is inescapably applied together with the examination of the harm that may result from the refusal to grant the application.

[17] In *Metropolitan Stores* at page 153, the Supreme Court of Canada wrote:

> To repeat what was said by Browne, L.J. in *Smith v Inner London Education Authority*, supra, at page 422: … where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interest of the public in general to whom those duties are owed.

[18] If, in fact, the appellant is in serious financial difficulty (and there is no evidence of that) the plan members (the public) would be seriously affected if the stay is granted and the applicant does not survive. If the application is dismissed, it is doubtful (although I do not have any corporate financial figures) the dismissal standing alone could lead to the appellants demise. If on the other hand the Appellants financial position is solid, the balance favours the plan's being bought up to date as soon as possible. If Fraser is successful in the judicial review application the it may well be entitled to a payment holiday.

[19] In any event, the balance of convenience favours the interest of the plan members as established by the Superintendent's order and the Board's decision.

[20] The motion is refused. The Superintendent will have costs of $750 and the several Unions will have one set of costs in the amount of $750.

DATED at Fredericton, New Brunswick this 31st day of May, A.D. 2007.

_____
David H. Russell, J.C.Q.B.

TAB 10

IBM Canada Limited v. Waterman 2013 SCC 70

IBM Canada Limited *Appellant*

v.

Richard Waterman *Respondent*

Indexed as: IBM Canada Limited *v.* Waterman

2013 SCC 70

File No.: 34472.

2012: December 14; 2013: December 13.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Employment law — Wrongful dismissal — Damages — Compensating advantage — Dismissed employee drawing pension benefits upon dismissal — Trial judge establishing appropriate notice period at 20 months without deduction for pension benefits — Whether pension benefits constitute compensating advantage — Whether pension benefits should be deducted from damages for wrongful dismissal.

IBM dismissed W without cause on two months' notice. W was 65 years old, had 42 years of service, and had a vested interest in IBM's defined benefit pension plan. Under the plan, IBM contributed a percentage of W's salary to the plan on his behalf. Upon termination, W was entitled to a full pension, and his termination had no impact on the amount of his pension benefits.

W sued to enforce his contractual right to reasonable notice. The trial judge set the appropriate period of notice at 20 month and declined to deduct the pension benefits paid to W during the notice period in calculating his damages. The Court of Appeal dismissed the appeal.

Held (McLachlin C.J. and Rothstein J. dissenting): The appeal should be dismissed.

IBM Canada Limitée *Appelante*

c.

Richard Waterman *Intimé*

Répertorié : IBM Canada Limitée *c.* Waterman

2013 CSC 70

N° du greffe : 34472.

2012 : 14 décembre; 2013 : 13 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit de l'emploi — Congédiement injustifié — Dommages-intérêts — Avantage compensatoire — Employé congédié touchant des prestations de retraite à compter de son congédiement — Juge de première instance estimant approprié un préavis de 20 mois sans déduction des prestations de retraite reçues — Les prestations de retraite constituent-elles un avantage compensatoire? — Les prestations de retraite devraient-elles être déduites des dommages-intérêts accordés pour congédiement injustifié?

IBM a congédié W sans motif valable en lui donnant un préavis de deux mois. W était alors âgé de 65 ans, comptait 42 années de service et avait un intérêt acquis dans le régime de retraite à prestations déterminées d'IBM. Aux termes du régime, IBM versait au nom de W un pourcentage de son salaire à la caisse de retraite. Au moment de son congédiement, W était admissible à une pension maximale et son congédiement n'avait aucune incidence sur le montant de ses prestations de retraite.

W a intenté une action en justice en vue de faire reconnaître son droit contractuel à un préavis raisonnable. Le juge de première instance a conclu qu'un préavis de 20 mois aurait dû être donné et a refusé, dans son calcul des dommages-intérêts, de déduire les prestations de retraite versées à W au cours de la période de préavis. La Cour d'appel a rejeté l'appel.

Arrêt (la juge en chef McLachlin et le juge Rothstein sont dissidents) : Le pourvoi est rejeté.

Per LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.: The rule that damages are measured by the plaintiff's actual loss does not cover all cases. The law has long recognized that applying the general rule of damages — the compensation principle — strictly and inflexibly sometimes leads to unsatisfactory results. Employee pension payments, including payments from a defined benefit plan, should generally not reduce the damages otherwise payable for wrongful dismissal. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment.

A compensating advantage arises if a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiff as a result of the defendant's breach of a legal duty. However, not all benefits received by a plaintiff raise a compensating advantages problem. A problem only arises with a compensating advantage when the advantage is one that (a) would not have accrued to the plaintiff but for the breach, or (b) was intended to indemnify the plaintiff for the sort of loss resulting from the breach.

The question is whether the compensation principle should be strictly applied and the compensating advantage should be deducted. Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied. The deductibility of compensating advantages also depends on justice, reasonableness and public policy.

Benefits received by a plaintiff through private insurance are generally not deductible from damages awards. While there is no single marker to sort which benefits fall within the private insurance exception, the more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. Whether the plaintiff has contributed to the benefit also remains a relevant consideration, although the basis for this is debatable. In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it. Finally, there is room in the analysis of the deduction issue for broader policy

Les juges LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis et Wagner : La règle selon laquelle les dommages-intérêts sont calculés en fonction de la perte réelle du demandeur ne s'applique pas dans toutes les situations. Il est depuis longtemps reconnu en droit que l'application stricte et rigide de la règle générale des dommages-intérêts — le principe de l'indemnisation — donne parfois lieu à des résultats insatisfaisants. Les prestations de retraite versées aux employés, y compris les sommes versées au titre d'un régime à prestations déterminées, ne devraient généralement pas réduire le montant des dommages-intérêts autrement payables pour congédiement injustifié. Les prestations de retraite sont une forme de rémunération différée pour les services rendus par l'employé et constituent un type d'épargne-retraite. Elles ne sont pas censées représenter une indemnité pour la perte de salaire découlant d'une perte d'emploi.

Il y a avantage compensatoire si un revenu d'une source autre que les dommages-intérêts payables par le défendeur atténue la perte causée au demandeur par le manquement du défendeur à une obligation légale. Les prestations qu'un demandeur peut toucher ne soulèvent toutefois pas toutes un problème d'avantages compensatoires. Un tel problème ne se pose que lorsque l'avantage est a) une prestation que le demandeur n'aurait pas reçue, n'eût été le manquement, ou b) une prestation qui visait à indemniser le demandeur pour la perte découlant du manquement.

Il faut se demander s'il convient d'appliquer de manière stricte le principe d'indemnisation et de déduire l'avantage compensatoire. L'application du principe d'indemnisation repose sur des facteurs autres que l'importance de la perte réelle du demandeur. La déductibilité des avantages compensatoires dépend aussi de la justice, de la raisonnabilité et de l'intérêt public.

Les prestations que reçoit un demandeur en application d'un régime d'assurance privée ne sont habituellement pas déductibles des dommages-intérêts. Bien qu'aucun facteur unique ne permette de déterminer les prestations qui sont visées par l'exception relative à l'assurance privée, plus la prestation s'apparente, de par sa nature et son objet, à un dédommagement du type de perte causée par le manquement du défendeur, plus les circonstances militent en faveur de la déduction. La question de savoir si le demandeur a contribué à la prestation demeure aussi pertinente, bien que son fondement soit discutable. En général, une prestation ne sera pas déduite s'il ne s'agit pas d'une indemnité pour la perte causée par le manquement du défendeur et que le

considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply. While this exception is called the private insurance exception, it has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

Although the courts have not relied on any broad "single contract" rule, where a cause of action and a benefit arise under the contract of employment, the terms of a contract and the dealings between the parties will inform the analysis.

A compensating advantage issue arises in this case: W received his full pension benefits and the salary he would have earned had he worked during the period of reasonable notice; had IBM given him working notice, he would have received only his salary during that period. However, the private insurance exception applies to benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach. As such, the compensation principle should not be applied strictly in this case.

In this case, the factors clearly support not deducting the retirement pension benefits from wrongful dismissal damages. W's contract of employment is silent on this issue, but it does not have any general bar against receiving full pension entitlement and employment income. W's retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While IBM made all of the contributions to fund the plan, W earned his entitlement to benefits through his years of service, as the plan's primary purpose is to provide periodic pension payments to eligible employees after retirement in respect of their service as employees. Thus, this case falls into the category of cases in which the insurance exception has always been applied — the benefit is not an indemnity and W contributed to the benefit.

Although *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, is distinguishable on the facts, the factors it sets out support the conclusion that W's benefits should

demandeur a contribué dans le but d'y avoir droit. Enfin, l'analyse de la question de la déduction permet l'examen de considérations de principe plus générales, comme le fait qu'il soit souhaitable que toutes les personnes dans des situations semblables reçoivent un traitement équivalent, la possibilité d'offrir des incitations pour une conduite sociale souhaitable et la nécessité que des règles claires puissent facilement s'appliquer. Cette exception dite relative à l'assurance privée a été appliquée par analogie à diverses prestations qui ne découlent pas d'un contrat d'assurance.

Bien que les tribunaux n'aient invoqué aucune règle générale du « contrat unique », les modalités du contrat et les rapports entre les parties guideront l'analyse lorsqu'une cause d'action et une prestation découlent du contrat de travail.

Une question d'avantage compensatoire se pose en l'espèce : W a touché le plein montant des prestations de retraite et le salaire qu'il aurait gagné s'il avait travaillé pendant la période de préavis raisonnable; si IBM lui avait donné un préavis, il n'aurait touché que son salaire pendant cette période. Cependant, l'exception relative à l'assurance privée s'applique à des prestations comme les prestations de retraite auxquelles un employé a contribué et qui n'étaient pas censées constituer une indemnité pour le type de perte subie en raison de la rupture du contrat de travail par le défendeur. Le principe d'indemnisation ne devrait donc pas être appliqué strictement en l'espèce.

Les facteurs de la présente affaire militent clairement en faveur de la non-déduction des prestations de retraite des dommages-intérêts pour congédiement injustifié. Le contrat de travail de W ne précise rien sur ce point, mais n'interdit pas qu'une personne touche la pension maximale et le revenu d'emploi. Les prestations de retraite de W ne constituent pas une indemnité pour perte de revenus mais plutôt une forme d'épargne-retraite. Bien qu'IBM ait fait toutes les cotisations au régime, W a acquis pendant ses années de service le droit de recevoir des prestations, parce que le régime vise principalement à assurer le versement périodique des prestations aux employés admissibles après la retraite pour les services qu'ils ont rendus à titre d'employés. Par conséquent, la présente espèce entre dans la catégorie des situations auxquelles l'exception relative à l'assurance s'est toujours appliquée : la prestation n'est pas une indemnité et W a cotisé au régime.

Même s'il faut distinguer la présente affaire de l'arrêt *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315, les facteurs qu'il énonce appuient la conclusion selon

not be deducted from his wrongful dismissal damages. The pension benefits were clearly not an indemnity benefit for loss of salary due to inability to work, and W's interest in the pension bears many of the hallmarks of a property right. Looking at the contract as a whole, it is not a fair implication that the parties agreed that pension entitlements should be deducted from wrongful dismissal damages.

Finally, the broader policy concerns in this case support not deducting the pension benefits. The law should not provide an economic incentive to dismiss pensionable employees rather than other employees. The other policy concerns raised by Justice Rothstein or present in *Sylvester* either do not arise here or are highly speculative.

Per McLachlin C.J. and Rothstein J. (dissenting): This case requires an assessment of W's loss under the terms of a single contract which gave rise to both a right to reasonable notice and a right to pension benefits. The private insurance exception has no application to such a case. Where a court is called upon to assess loss under a single contract, the plaintiff's entitlement turns on the ordinary governing principle that he should be put in the position he would have been in had the contract been performed. In this case, that means that the pension benefits W received must be deducted in calculating his damages for wrongful dismissal; not deducting would give W more than he bargained for and would charge IBM more than it agreed to pay.

The governing principle for damages upon breach of contract is that the non-breaching party should be provided with the financial equivalent of performance. Employer-provided benefits are integral components of the employment contract, so deductibility turns on the terms of the employment contract and the intention of the parties. Under the terms of W's employment contract, he would have been eligible to receive pension benefits only upon being terminated or retiring. Therefore, as in *Sylvester*, W's contractual right to wrongful dismissal damages and his contractual right to his pension are based on opposite assumptions about his availability to

laquelle les prestations de W ne devraient pas être déduites des dommages-intérêts pour congédiement injustifié. Les prestations de retraite n'étaient manifestement pas des prestations indemnitaires pour perte de salaire en raison d'une incapacité à travailler, et l'intérêt de W dans les prestations de retraite revêt plusieurs des caractéristiques d'un droit de propriété. Lorsqu'on examine le contrat dans son ensemble, il n'est pas juste d'en inférer que les parties ont convenu que les droits à la pension devraient être déduits des dommages-intérêts pour congédiement injustifié.

Enfin, les préoccupations de principe plus générales en l'espèce appuient la non-déduction des prestations de retraite. La loi ne devrait pas avoir pour effet d'inciter les employeurs à congédier, pour des raisons économiques, les employés admissibles à la pension plutôt que les autres. Les autres considérations de principe soulevées par le juge Rothstein ou présentes dans *Sylvester* n'entrent pas en ligne de compte en l'espèce ou sont éminemment conjecturales.

La juge en chef McLachlin et le juge Rothstein (dissidents) : Dans la présente affaire, il faut déterminer la perte subie par W selon les modalités d'un seul contrat qui a donné le droit à un préavis raisonnable et le droit de toucher des prestations de retraite. L'exception relative à l'assurance privée ne s'applique pas à un tel cas. Lorsqu'un tribunal est appelé à déterminer une perte aux termes d'un seul contrat, le droit du demandeur repose sur le principe ordinaire applicable suivant lequel celui-ci doit être rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. Cela signifie en l'espèce que les prestations de retraite que W a touchées doivent être déduites lors du calcul de ses dommages-intérêts pour congédiement injustifié; la non-déduction aurait pour effet de lui accorder davantage que ce qu'il a négocié et d'obliger IBM à verser une somme plus élevée que celle qu'elle a convenu de verser.

Selon le principe applicable en matière de dommages-intérêts pour violation de contrat, la partie non fautive devrait recevoir l'équivalent matériel de la prestation qu'elle aurait obtenue si le contrat avait été respecté. Les prestations versées par l'employeur sont des éléments faisant partie intégrante du contrat de travail. Ainsi, la déductibilité repose sur les modalités du contrat de travail et sur l'intention des parties. Suivant les modalités de son contrat de travail, W aurait été admissible à des prestations de retraite uniquement à compter de son congédiement ou de sa retraite. Par conséquent, tout comme dans l'affaire *Sylvester*, le droit contractuel de

work. Damages cannot be paid on the assumption that he could have earned both.

This conclusion is necessitated by the fact that the pension plan at issue here is a defined benefit plan. Unlike a defined contribution plan, a defined benefit plan guarantees the employee fixed predetermined payments upon retirement for life. Deducting the benefits would provide the wrongfully terminated employee with exactly what he would have received had the employment contract been performed: an amount equal to his salary during the reasonable notice period and thereafter defined benefits for the rest of his life.

This is materially different from a defined contribution plan, which provides an employee with a finite total amount or lump sum of retirement benefits. Deducting benefits that a wrongfully terminated employee receives from a defined contribution plan would leave the employee in a worse position that he would have been in had his employment contract not been breached.

In this case, W's wrongful dismissal had no impact on his pension entitlement, and he could not have received both his salary and his pension benefits had he continued to work for IBM through the reasonable notice period. Whether the benefit is non-indemnity or contributory does not answer the question of whether the plaintiff will be provided with the financial equivalent of performance or will receive excess recovery under the governing principle of contract damages.

Furthermore, the private insurance exception is not applicable to cases that involve a single contract that is the source of both the plaintiff's cause of action and his right to a particular benefit. In such circumstances, there is no justification for resorting to the private insurance exception because the plaintiff's entitlement to the benefits is established based on the terms of his contract. If the plaintiff is entitled to the benefits under his contract, he will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral

W à des dommages-intérêts pour congédiement injustifié et son droit contractuel à des prestations de retraite reposent sur des hypothèses opposées en ce qui concerne la possibilité qu'il puisse travailler. On ne peut lui verser des dommages-intérêts en supposant qu'il aurait pu recevoir les deux montants.

Cette conclusion découle du fait que le régime de retraite en litige dans la présente affaire est un régime à prestations déterminées. Contrairement à un régime à cotisations déterminées, le régime à prestations déterminées garantit à l'employé des paiements prédéterminés fixes à compter de sa retraite, et ce, sa vie durant. Déduire les prestations permettrait à l'employé congédié injustement de recevoir exactement ce qu'il aurait reçu si le contrat de travail avait été respecté, soit un montant égal à son salaire au cours de la période de préavis raisonnable et, par la suite, des prestations déterminées sa vie durant.

Un tel régime se distingue sensiblement d'un régime à cotisations déterminées, qui permet à l'employé de recevoir en prestations de retraite un montant total ou un montant forfaitaire déterminé. Déduire les prestations que l'employé congédié injustement a retirées d'un régime de retraite à cotisations déterminées placerait l'employé dans une situation pire que celle dans laquelle il se serait trouvé si son contrat de travail avait été respecté.

En l'espèce, le congédiement injustifié de W n'a eu aucune incidence sur son droit aux prestations de retraite; W n'aurait pas pu toucher à la fois son salaire et ses prestations de retraite s'il avait continué à travailler pour IBM au cours de la période de préavis raisonnable. La nature non indemnitaire ou contributive des prestations n'offre pas de réponse à la question de savoir si le demandeur recevra l'équivalent matériel de la prestation qu'il aurait obtenue si le contrat avait été respecté ou s'il recevra une indemnisation excédentaire, suivant le principe applicable en matière de dommages-intérêts contractuels.

De plus, l'exception relative à l'assurance privée ne s'applique pas aux affaires portant sur un contrat unique à l'origine de la cause d'action du demandeur et de son droit à des prestations particulières. Dans ces circonstances, rien ne justifie le recours à l'exception relative à l'assurance privée parce que le droit du demandeur aux prestations est établi aux termes de son contrat. Si son contrat lui donne droit aux prestations, le demandeur touchera celles-ci en raison du principe ordinaire applicable suivant lequel il devrait être rétabli dans la situation dans laquelle il se serait trouvé si le contrat avait été respecté. Il ne sera pas nécessaire

benefit exception. A straightforward reading of *Sylvester* demonstrates that it is a fully applicable authority supporting the proposition that, under a single contract of employment, barring contractual provisions to the contrary, an individual cannot receive salary as if he is working and pension benefits as if he is retired. These are opposite, incompatible assumptions. Thus, applying *Sylvester* to this case, salary and pension income are not payable at the same time.

Cases Cited

By Cromwell J.

Distinguished: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; **discussed:** *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; **referred to:** *Phillips v. Western Company of North America*, 953 F.2d 923 (1992); *United States v. Price*, 288 F.2d 448 (1961); *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380 (2010); *Parry v. Cleaver*, [1970] A.C. 1; *Attorney General v. Blake*, [2001] 1 A.C. 268; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601; *Redpath v. Belfast and County Down Railway* (1947), N.I. 167; *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713; *Quebec Workmen's Compensation Commission v. Lachance*, [1973] S.C.R. 428; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756; *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101, aff'd (1993), 2 C.C.P.B. 99; *Emery v. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302; *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321; *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1; *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502; *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565; *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084; *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72.

By Rothstein J. (dissenting)

Girling v. Crown Cork & Seal Canada Inc. (1995), 9 B.C.L.R. (3d) 1; *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Chandler v. Ball Packaging Products Canada Ltd.*

d'invoquer l'exception relative à la prestation parallèle. Une interprétation simple de *Sylvester* montre que cet arrêt est tout à fait favorable à la thèse voulant qu'aux termes d'un contrat de travail unique, sous réserve de dispositions contraires du contrat, une personne ne peut toucher un salaire comme si elle travaillait ainsi que des prestations de retraite comme si elle avait pris sa retraite. Il s'agit là d'hypothèses opposées et incompatibles. Ainsi, si l'on applique l'arrêt *Sylvester* en l'espèce, le salaire et le revenu de pension ne sont pas payables en même temps.

Jurisprudence

Citée par le juge Cromwell

Distinction d'avec les arrêts : *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315; *Ratych c. Bloomer*, [1990] 1 R.C.S. 940; **arrêt analysé :** *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; **arrêts mentionnés :** *Phillips c. Western Company of North America*, 953 F.2d 923 (1992); *United States c. Price*, 288 F.2d 448 (1961); *Sloas c. CSX Transportation, Inc.*, 616 F.3d 380 (2010); *Parry c. Cleaver*, [1970] A.C. 1; *Attorney General c. Blake*, [2001] 1 A.C. 268; *Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601; *Redpath c. Belfast and County Down Railway* (1947), N.I. 167; *Jack Cewe Ltd. c. Jorgenson*, [1980] 1 R.C.S. 812; *Canadien Pacifique Ltée c. Gill*, [1973] R.C.S. 654; *Grand Trunk Railway c. Beckett* (1887), 16 R.C.S. 713; *Commission des Accidents du Travail de Québec c. Lachance*, [1973] R.C.S. 428; *Guy c. Trizec Equities Ltd.*, [1979] 2 R.C.S. 756; *Chandler c. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101, conf. par (1993), 2 C.C.P.B. 99; *Emery c. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2003 CAF 86 (CanLII); *Bradburn c. Great Western Railway Co.* (1874), L.R. 10 Ex. 1; *National Insurance Co. of New Zealand Ltd. c. Espagne* (1961), 105 C.L.R. 569; *Graham c. Baker* (1961), 106 C.L.R. 340; *Smoker c. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502; *Hopkins c. Norcross plc*, [1993] 1 All E.R. 565; *Knapton c. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084; *Gilbert c. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72.

Citée par le juge Rothstein (dissident)

Girling c. Crown Cork & Seal Canada Inc. (1995), 9 B.C.L.R. (3d) 1; *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315; *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; *Chandler c. Ball Packaging Products Canada Ltd.*

(1992), 2 C.C.P.B. 101; *Parry v. Cleaver*, [1970] A.C. 1; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654; *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812; *United States v. Price*, 288 F.2d 448 (1961); *Phillips v. Western Company of North America*, 953 F.2d 923 (1992); *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601.

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(1992), 2 C.C.P.B. 101; *Parry c. Cleaver*, [1970] A.C. 1; *Guy c. Trizec Equities Ltd.*, [1979] 2 R.C.S. 756; *Canadien Pacifique Ltée c. Gill*, [1973] R.C.S. 654; *Jack Cewe Ltd. c. Jorgenson*, [1980] 1 R.C.S. 812; *United States c. Price*, 288 F.2d 448 (1961); *Phillips c. Western Company of North America*, 953 F.2d 923 (1992); *Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601.

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CLLC ¶210-021, [2010] B.C.J. No. 510 (QL), 2010 CarswellBC 679. Appeal dismissed, McLachlin C.J. and Rothstein J. dissenting.

D. Geoffrey Cowper, *Q.C.*, and *Lorene A. Novakowski*, for the appellant.

Christopher J. Watson and *Matthew G. Siren*, for the respondent.

The judgment of LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] When IBM Canada Ltd. wrongfully dismissed its long-time employee, Richard Waterman, he had to start drawing his pension. The question before the Court is whether his receipt of those pension benefits reduces the damages otherwise payable by IBM for wrongful dismissal. The British Columbia courts decided not to deduct the pension benefits and IBM appeals.

[2] The question looks straightforward enough at first glance. The general rule is that contract damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract. IBM's obligation was to give Mr. Waterman reasonable notice of dismissal or pay in lieu of it. Had it given him reasonable working notice, he would have received only his regular salary and benefits during the period of notice. As it is, he in effect has received both his regular salary and his pension for that period. It therefore seems clear, under the general rule of contract damages, that the pension benefits should be deducted. Otherwise, Mr. Waterman is in a better economic position than he would have been in had there been no breach of contract.

376, 2010 CLLC ¶210-021, [2010] B.C.J. No. 510 (QL), 2010 CarswellBC 679. Pourvoi rejeté, la juge en chef McLachlin et le juge Rothstein sont dissidents.

D. Geoffrey Cowper, *c.r.*, et *Lorene A. Novakowski*, pour l'appelante.

Christopher J. Watson et *Matthew G. Siren*, pour l'intimé.

Version française du jugement des juges LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis et Wagner rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Quand IBM Canada Ltée a congédié injustement son employé de longue date, Richard Waterman, ce dernier a dû commencer à toucher sa pension. La Cour doit déterminer si la réception de ces prestations de retraite a pour effet de réduire les dommages-intérêts pour congédiement injustifié qu'IBM doit par ailleurs payer. Les tribunaux de la Colombie-Britannique ont décidé de ne pas déduire les prestations de retraite et IBM se pourvoit devant notre Cour.

[2] La question semble assez simple à première vue. Selon la règle générale, les dommages-intérêts contractuels devraient placer le demandeur dans la situation financière où il se serait trouvé si le défendeur avait respecté le contrat. IBM était tenue de donner à M. Waterman un avis de congédiement raisonnable ou une indemnité de préavis. Si elle lui avait donné un préavis raisonnable, M. Waterman n'aurait reçu pendant cette période que son salaire et ses avantages réguliers. En l'espèce, il a en fait touché son salaire régulier ainsi que ses prestations de retraite pendant cette période. Il semble donc clair, selon la règle générale applicable aux dommages-intérêts en matière contractuelle, que les prestations de retraite devraient être déduites. Sinon, M. Waterman se trouve dans une meilleure situation financière qu'il ne l'aurait été s'il n'y avait pas eu violation du contrat.

contributed money or money's worth in order to obtain the benefit. The Court specifically left open the question of whether "disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan": para. 22.)

définies par cette perte. (Comme je l'ai déjà signalé, la Cour a aussi pris soin de ne pas se prononcer sur la question de savoir si la conclusion serait la même si l'employé avait cotisé, en argent ou autrement, dans le but d'obtenir les prestations. La Cour a explicitement indiqué qu'elle ne se prononçait pas sur la question de savoir si les « prestations d'invalidité devraient être déduites des dommages-intérêts pour congédiement injustifié lorsque l'employé a cotisé au régime de prestations d'invalidité » : par. 22.)

[82] The benefit in issue in this case is of an entirely different nature. Unlike the disability benefits in *Sylvester*, the pension benefit is clearly not an indemnity benefit for loss of salary due to inability to work. The purpose of the pension benefits, as expressed in the plan documents, "is to provide periodic pension payments to eligible employees . . . after retirement and until death in respect of their service as employees": art. 1.01, A.R., at p. 117. The pension plan is, in essence, a retirement savings vehicle to which an employee earns an absolute entitlement over time. Benefits are determined by years of service and salary level. An employee who leaves employment after 10 or more years of service receives either a deferred pension or a transfer of the lump sum commuted value of the pension entitlement to a locked-in retirement vehicle. Pensionable earnings are credited at 100 percent of salary while on approved unpaid leave or short-term disability. Moreover, unlike the disability payments in *Sylvester*, pension payments or entitlements are not in general reduced by other income or benefits received by the recipient. Mr. Waterman could have retired, drawn his full pension, and drawn a full salary from another employer. Pension benefits are clearly not intended to provide an indemnity for loss of income.

[82] Les prestations en l'espèce sont de nature complètement différente. Contrairement aux prestations d'invalidité en cause dans *Sylvester*, les prestations de retraite ne sont manifestement pas des prestations indemnitaires pour perte de salaire en raison d'une incapacité à travailler. Selon ce qu'indiquent les documents relatifs au régime, les prestations de retraite visent à [TRADUCTION] « assurer le versement périodique des prestations aux employés admissibles [. . .] après leur retraite et jusqu'à leur décès pour les services qu'ils ont rendus à titre d'employés » : art. 1.01, d.a., p. 117. Le régime de retraite est essentiellement un outil d'épargne-retraite sur lequel l'employé acquiert un droit absolu au fil du temps. Les prestations sont fonction des années de service et du niveau de salaire. L'employé qui quitte son emploi après 10 ans ou plus de service touche des prestations de retraite différées ou obtient le transfert de la valeur de rachat globale admissible de sa pension dans un compte de retraite immobilisé. Les gains ouvrant droit à pension sont calculés en fonction du plein salaire pendant un congé sans solde autorisé ou un congé d'invalidité de courte durée. De plus, contrairement aux prestations d'invalidité dans *Sylvester*, les autres sources de revenus ou prestations reçues par le bénéficiaire ne sont généralement pas déduites des prestations de retraite ou des droits à pension. M. Waterman aurait pu prendre sa retraite, toucher sa pleine pension et recevoir un plein salaire d'un autre employeur. Les prestations de retraite n'ont manifestement pas pour objet de compenser une perte de revenus.

[83] There is an even more fundamental difference. As Prowse J.A. points out in her reasons in

[83] Il existe une différence encore plus fondamentale. Comme la juge Prowse l'a souligné

the Court of Appeal, pension benefits like those in issue here bear many of the hallmarks of a property right. They, as she put it, are regarded as belonging to the employee:

> . . . although the payments under the [Defined Benefit Pension] Plan are made wholly by IBM, they are made "on behalf of" the employee. This is also reflected in IBM's [Defined Contribution] Plan, where employer contributions are attributed to a fund in the name of the employee. In both instances, the pension benefits are regarded as belonging to the employee. They have the right to designate beneficiaries of the benefit; they can elect to transfer their pension account to another locked-in RRSP or to another employer after 10 years of service upon leaving IBM; there is a provision for a lump-sum pay-out on retirement in the case of "small pensions" (of lesser magnitude than that enjoyed by Mr. Waterman (Article 10.08)); and, in many jurisdictions, their pension rights are divisible between spouses on marriage breakdown. [Emphasis added; para. 60.]

[84] This view is supported by basic principles of pension law. Mr. Waterman's pension was vested. As A. Kaplan and M. Frazer explain in *Pension Law* (2nd ed. 2013), at p. 203:

> Vesting is the "foundation stone" of employee protections upon which pension regulation is based . . . . An employee who is vested has an enforceable statutory right to the accrued value of his or her pension benefit earned to date, even if the employee terminates employment and plan membership prior to retirement age. It is the vesting of pension benefits that shift our perception of pensions from purely contractual entitlements to quasi-proprietary interests.

[85] Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry*, at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded

dans ses motifs en Cour d'appel, les prestations de retraite telles celles en cause dans la présente affaire revêtent plusieurs des caractéristiques d'un droit de propriété. Pour reprendre ses propos, ces prestations sont considérées comme appartenant à l'employé :

> [TRADUCTION] . . . bien que les paiements prévus au régime [de retraite à prestations déterminées] soient entièrement versés par IBM, ils le sont « pour le compte de » l'employé. C'est également ce qui appert du régime [à cotisations déterminées] d'IBM, où les cotisations de l'employeur sont versées dans une caisse au nom de l'employé. Dans les deux cas, les prestations de retraite sont considérées comme appartenant à l'employé. Ce dernier peut désigner les bénéficiaires des prestations et décider de transférer son compte de pension dans un autre REÉR immobilisé ou chez un autre employeur après 10 ans de service au moment où il cesse de travailler pour IBM; une disposition prévoit le versement d'une indemnité de départ forfaitaire à l'employé qui prend sa retraite et qui a droit à une « petite pension » (inférieure à celle dont jouit M. Waterman (article 10.08)); et, dans plusieurs ressorts, la valeur de ses droits à pension peut être partagée entre les conjoints en cas de rupture du mariage. [Je souligne; par. 60.]

[84] Ce point de vue s'appuie sur les principes de base du droit des pensions. La pension de M. Waterman était acquise. Comme l'expliquent A. Kaplan et M. Frazer dans *Pension Law* (2e éd. 2013), p. 203 :

> [TRADUCTION] L'acquisition est la « pierre d'assise » des mesures de protection offertes à l'employé sur laquelle repose la réglementation des régimes de retraite [. . .] L'employé ayant acquis une pension se voit conférer par la loi un droit exécutoire à la valeur accumulée des prestations de retraite qu'il a déjà gagnées, même s'il met fin à son emploi et cesse de participer au régime de retraite avant d'avoir atteint l'âge de la retraite. C'est l'acquisition des prestations de retraite qui nous amène à voir les pensions non plus comme des droits de nature purement contractuelle, mais comme des intérêts quasi propriétaux.

[85] Les prestations de retraite ont toujours été perçues comme un droit acquis par l'employé. Comme l'a expliqué lord Reid à la p. 16 de l'arrêt *Parry* : [TRADUCTION] « Le produit des sommes versées dans la caisse de retraite constitue, en fait, une rémunération différée du travail actuel [de

as earned income." The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquires specific and enforceable rights. This is no less the case because the pension benefits were not reduced by the wrongful dismissal; had they been, there would be no collateral benefit problem and no question of deduction. It is useful to ask this question: In light of the contract of employment, would the parties have intended to use an employee's vested pension entitlements to subsidize his or her wrongful dismissal? In my view, the answer must be no. As Joseph M. Perillo writes:

> Suppose an employer fires an employee without justification, breaching a contract of employment, and the employee turns to his or her savings account for living expenses. No one would argue that the employee's recovery against the employer should be diminished by the employee's withdrawals from savings. The savings account is a collateral source. To the extent that another collateral source resembles a savings account, the plaintiff should be able to recover damages without a deduction for the amount received from the collateral source. [Emphasis added; p. 706.]

[86] My colleague Rothstein J. does not accept that the different nature of the benefits in issue here and in *Sylvester* is a relevant distinction between the two cases. However, Major J., writing for a unanimous Court in *Sylvester*, clearly thought it was. His first reason for deciding that the benefits ought to be deducted was that "the disability benefits were intended to be a substitute for the respondent's regular salary": para. 14. In other words, it was a key aspect of the Court's reasoning in *Sylvester* that the benefit in issue was intended to be an indemnity for wage loss. I find it impossible to dismiss the first reason the Court in *Sylvester* gave for its decision as irrelevant.

l'employé]. C'est la raison pour laquelle on considère les prestations de retraite comme un revenu gagné. » Il s'agit donc d'une forme d'épargne-retraite gagnée au fil des années de service sur laquelle l'employé acquiert des droits spécifiques et exécutoires. Il n'en est pas moins ainsi du fait que le congédiement injustifié n'a pas entraîné une réduction des prestations de retraite; si elles avaient été réduites du fait du congédiement injustifié, il n'y aurait aucun problème de prestation parallèle et la question de la déduction ne se poserait pas. Il convient de poser la question suivante : compte tenu du contrat d'emploi, les parties auraient-elles eu l'intention d'utiliser les droits à pension acquis à l'employé pour financer son congédiement injustifié? À mon avis, il faut répondre par la négative. Joseph M. Perillo a écrit ce qui suit :

> [TRADUCTION] Supposons qu'un employeur congédie un employé sans justification, qu'il rompt le contrat d'emploi, et que l'employé utilise ses épargnes pour couvrir ses frais de subsistance. Personne n'irait prétendre que les montants retirés du compte d'épargne de l'employé devraient être déduits de la réparation payée à l'employé par l'employeur. Le compte d'épargne est une source parallèle. Dans la mesure où une autre source parallèle ressemble à un compte d'épargne, le demandeur devrait pouvoir recouvrer des dommages-intérêts sans que le montant provenant de la source parallèle ne soit déduit. [Je souligne; p. 706.]

[86] Mon collègue le juge Rothstein n'accepte pas que la nature différente des prestations en l'espèce par rapport à celles dont il est question dans *Sylvester* puisse constituer une distinction pertinente entre les deux affaires. Cependant, le juge Major, qui a rédigé la décision unanime de la Cour dans *Sylvester*, croyait manifestement que c'était le cas. La première raison pour laquelle il était d'avis que les prestations devaient être déduites était que « les prestations d'invalidité visaient à remplacer le salaire reçu ordinairement par l'intimé » : par. 14. Autrement dit, le fait que les prestations en cause devaient être une indemnité pour perte de salaire constituait un aspect essentiel du raisonnement adopté par la Cour dans *Sylvester*. J'estime qu'il est impossible de rejeter la première raison donnée par la Cour à l'appui de sa décision dans *Sylvester* au motif qu'elle n'est pas pertinente.

TAB 11

McNaughton v. Saskatchewan Government and General Employees' Union, 2010 SKQB 5

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2010 SKQB 5**

Date: **2010 01 08**
Docket: Q.B.G. No. 1943/2009
Judicial Centre: Regina

BETWEEN:

JEFF McNAUGHTON, LARRY DAWSON,
JOE PYLATUK and BARB GOODWIN

PLAINTIFFS

- and -

SASKATCHEWAN GOVERNMENT AND
GENERAL EMPLOYEES' UNION

DEFENDANT

Counsel:

Peter J. Barnacle	for the applicants (plaintiffs)
Fred C. Zinkhan	for the respondent (defendant) SGEU
Hugh O'Reilly	for the respondent (defendant) SGEU in its capacity as Pension Plan Administrator

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JUDGMENT
January 8, 2010

BALL J.

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[1] The plaintiffs apply for an interim injunction restraining the respondent (defendant) from implementing an increase in the rate of member contributions to a Retirement Benefit Plan pending the hearing and determination of the within action or, in the alternative, until the Minister of National Revenue (Canada Revenue Agency) approves the increases.

FACTS

[2] The applicants are employed by the respondent. They are also active members of a defined benefit pension plan established and administered by the respondent. There are approximately 35 active Plan members. Their contributions to the Plan, which are matched by the respondent, were historically 9% of covered salary. During the past approximately two years their contributions have increased as follows:

October 1, 2007	-	11.5%
January 1, 2008	-	14.5%
April 1, 2008	-	17.3%
November 5, 2009	-	19.6%

[3] In addition to increasing contributions to 19.6% of salary on November 5, 2009, the respondent has notified Plan members that it intends to increase their contributions from 19.6% to 54.25% of earnings effective on the January 14, 2010 pay day. The increase to 19.6% on November 5, 2009 was stated to be for current service costs to address an actuarial deficiency on a going concern basis. The respondent says the most of the proposed increase from 19.6% to 54.25% is required to address a solvency deficiency. The respondent argues that the increases are required by virtue of an actuarial valuation as at December 31, 2008 which it caused to be prepared and filed with the Saskatchewan Pension Division.

[4] The December 31, 2008 valuation itself stated that all increased contributions were subject to the approval of the Saskatchewan Pension Division and the Canada Revenue Agency. It would appear that the increase to 19.6% implemented November 5,

2009 was approved by the Saskatchewan Pension Division pursuant to *The Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001 as am. It appears reasonably likely that it will also be approved by the Canada Revenue Agency. It is clear, however, that the proposed increase from 19.6% to 54.25% has not been, and almost certainly will not be, approved by the Canada Revenue Agency.

[5] It is common ground that the Plan's solvency deficiency would be substantially reduced if an actuarial valuation is prepared on a normal three year basis (that is, as at December 31, 2009) in accordance with the minimum requirements of *The Pension Benefits Act* — a choice that remains open to the respondent. If that occurs, increased contributions may be required but they will be substantially less than 54.25%.

ANALYSIS

[6] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 the Supreme Court of Canada held that an applicant for interim or interlocutory injunctive relief must establish that:

1. There is a serious issue raised by the applicant to be determined at the trial of the action;
2. The applicant will suffer irreparable harm that cannot be compensated by money damages if the applicant succeeds at trial and if the injunction does not issue; and
3. The balance of convenience favours the granting of the injunction.

[7] Other decisions in Saskatchewan have held that the applicant must demonstrate a "strong *prima facie* case" rather than satisfy the less onerous "serious issue to be tried" test, particularly where the application is based on the plaintiff's assertion that there is imminent danger of irreparable harm. (See, for example, *Danka Canada Inc. v. Huntington et al.* 2003 SKQB 532, (2004), 242 Sask. R. 216 (Sask. Q.B.)).

[8] For the purposes of this application I will adopt the higher standard of "strong *prima facie* case". Even so, I am satisfied that the applicants have met the necessary requirements.

(i) Strong *Prima Facie* Case

[9] The respondent notes that past contribution increases have been implemented prior to Canada Revenue Agency approval being received. This is contemplated by s. 147.1(15) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) which provides:

> (**15**) Any reference in this Act and the regulations to a pension plan as registered means the terms of the plan on the basis of which the Minister has registered the plan for the purposes of this Act and as amended by
>
> (a) each amendment that has been accepted by the Minister, and
>
> (b) each amendment that has been submitted to the Minister for acceptance and that the Minister has neither accepted nor refused to accept, ***if it is reasonable to expect the Minister to accept the amendment,***
>
> and includes all terms that are not contained in the documents constituting the plan but are terms of the plan by reason of the *Pension Benefits Standards Act, 1985* or a similar law of a province.
>
> [Emphasis Added]

[10] In this case it is clearly **not** reasonable to expect the Minister to approve increased contributions of 54.25%: the evidence is that on or about December 23, 2009 the Canada Revenue Agency itself informed a lawyer in the firm representing the respondent that it would not do so. Moreover, there is a cogent argument that deducting the proposed amounts from Participants' salary without Canada Revenue Agency approval would be inconsistent with the Plan text.

[11] Underlying this litigation is a dispute between the respondent and its past and present employees related to the continuation of the defined benefit plan. The respondent wants Plan members to agree to terminate the Plan. To this point they have not agreed to do so. The applicants contend that as a tactic in the dispute the respondent chose to file the actuarial report as at December 31, 2008 (which was the lowest point of an historic downturn in financial markets) and now insists that the resulting solvency deficiency be addressed immediately by special payments.

[12] The respondent says that Plan members now have only three options. They can:

1. Accept that 54.25% will be deducted from their wages by way of Plan contributions; or
2. Quit their employment; or
3. Agree to terminate the Plan.

Those choices overlook another, a more rational option: to administer the Plan in accordance with the Plan text and to implement necessary increases in contributions when

they have been, or it is reasonable to expect they will be, approved by the Saskatchewan Pension Division and the Canada Revenue Agency.

[13] The respondent itself acknowledges that the proposed increases are unrealistic. An affidavit sworn by Richard Schramm on December 2, 2009 in the related proceeding of *Pickering v. SGEU* Q.B.G. 1703/2009 states at para. 79:

> 79. A 54.25% contribution rate is unrealistic and unsustainable and will potentially result in significant resignation of staff such that SGEU encouraged CEP Local 481 to negotiate a viable solution of the pension crisis.

Mr. Schramm is employed by the respondent and is the person responsible for the administration of the Plan.

(ii) Irreparable Harm

[14] The applicants have established that Plan Participants will suffer irreparable harm if the respondent is not enjoined from implementing the proposed contribution increase on January 14, 2010. Affidavits sworn by each of the individual plaintiffs describe the impossible financial situations confronting them if the respondent implements the proposed deductions from their salaries. It is reasonable to infer that most of the other Plan Participants would be facing similar financial hardship. Mr. Schramm acknowledges in his affidavit sworn December 2, 2009 (at paragraph 93) that a significant number of Plan participants have stated “they cannot afford such payments and will resign and seek employment elsewhere”. One has already done so. The harm is exacerbated because unless and until the increased contributions have been approved by

Canada Revenue Agency no amount over 17.3% may be deducted in computing the income of the Participants. Irreparable harm refers to the inability to calculate or compensate for harm caused, not its size or quantum.

(iii) Balance of Convenience

[15] In his affidavit sworn December 22, 2009 Mr. Schramm states:

> 33. I have been advised by Doug Poapst, the actuary at Eckler Ltd. and do verily believe it to be true that CRA has the increase to contributions under consideration and expects to make a decision sometime in late January or February 2010.

[16] This is modified somewhat by counsel for the respondent employer, Mr. Zinkhan, who stated in his submissions that the time frame for receiving a decision from the Canada Revenue Agency is uncertain.

[17] In all of the circumstances the harm to individual Plan Participants that would be caused by an unnecessary increase in contribution rates to 54.25% of earnings for an indefinite period of time would far exceed the inconvenience to SGEU if it is required to wait for a decision to be made by Canada Revenue Agency. The balance of convenience test clearly favours the applicants.

[18] Accordingly, there will be an interim injunction restraining the respondent (defendant) Saskatchewan Government and General Employees Union, as Administrator of Pension Plan No. GA 8366, Canada Revenue Agency Registration No. 0304717 from

deducting Participant Contributions to the Plan over and above 19.6% unless and until the said respondent obtains the written waiver and approval of the Minister of National Revenue (Canada Revenue Agency), or satisfactorily demonstrates to the court on application that it is reasonable to expect such written waiver and approval will be obtained, allowing increased contributions to be made.

J.
D. P. Ball

TAB 12

Melanson v. N.B., 2006 NBQB 73

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

Citation: Melanson v. N.B. - 2006 NBQB 073

Date: 20060303 Docket: F/C/82/06

B E T W E E N :

CRAIG MELANSON, LARRY AMIRAULT, JOHN ARSENEAULT, THOMAS BANKS, PAUL BASTARACHE, GERALD BELL, RONALD BERUBE, DEAN BLANEY, GERALD BLANEY, HENRY BLANEY, LIONEL BOUCHARD, NORMAN BOUCHER, HENRY BOURGEOIS, NOEL BOURGOIN, ROBERT BRAWN, ELMO BREWER, J. ELLIOTT BRIDGES, MAURICE BRISSON, DONALD BROOKS, MARSHALL BROWN, SHIRLEY BROWN, G. HERB BURTT, GEORGE CHASE, GARY CLARK, WILSON CLARKSON, REGINALD COLLETT, EDGAR COMEAU, AMBROSE CONNORS, BASIL CRAIN, ANDREW CRONKHITE, DALE CULLIGAN, KLAAS DEBOER, DONALD DEGAGNE, JOHN DEMPSEY, WILLIS DEMPSEY, THOMAS D'ENTREMONT, DOUGLAS DERRICK, JOHN DEWEYERT, GILLES DION, ARNOLD DORE, MEDLEY DORE, ROGER DUREPOS, MARCEL FILTEAU, DAVID FREEMAN, EARL GALLAGHER, GERALD GAUDREAU, P. KERRY GIBERSON, ARTHUR GILLINGHAM, CLAUDE GRANT, DELTON GRANT, LESTER GRANT, LEWIS GRANT, RALPH GRANT, RICHARD GRANT, ROBERT GRANT, RUSSELL GRANT, JAMES GRENNAN, DONALD HARRIS, RANDOLPH HARRISON, ARNOLD HICKEY, DONALD HICKEY, EUGENE HILL, GEORGE HILL, WILLIAM HOWARD, S. BILL HUGHSON, WILLIAM INGRAM, CLAUDE JEAN, DAVID JOHNSEN, H. WAYN KESWICK, WALLACE KETCH, SANDOR KOVACS, MEREL LANTEIGNE, J. DONALD LAVIGNE, ROBIN LAWSON, MAURICE LEBLANC, PHILIPPE LEGER, GUERTIN LEVESQUE, TIM HENNESY, GAYLON LINDSAY, MARIE MCGUIRE, ALBERT LUIMES, WENDELL MACARTHUR, ROBERT MACLEAN, DARRELL MACQUARRIE, ROLAND MALLET, ROGERT MARTEL, MERLE MARTIN, LEON MAZEROLLE, KENNETH MCCONAGHY, REGINALD MCCONAGHY, BERNADETTE MCGREGOR, GLEN MCGUIRE, LORNE MCHATTEN, HAROLD MCKAY, MURRAY (SONNY) MCLELLAN, BRENDAN MCMULLEN, EVERETT MILLER, ARWOOD MOORCROFT, BERTON MORECRAFT, ROBERT

MORRISON, RODERICK MURPHY, RONALD NICHOLSON, TIMOTHY NOEL, LAUZA MARTIN, GARRY NORRAD, E. DOUG OGDEN, GEORGE O'KEEFE, ROBERT PALMER, CURTIS PARKER, MICHAEL PATTERSON, ABIGAIL PAUL, WILLIAM PAWSEY, ROYDEN PIERCY, MARCUS PIKE, WILLIAM POWER, REGINALD RATHWELL, GORDON REINHART, DONALD ROBART, GERALD ROBBINS, RONALD ROBICHAUD, KEITH RODGERS, RONALD ROY, SYDNEY RYAN, CHARLES SCHRIVER, DONALD SCHRIVER, WAYNE SCHRIVER, EARL SCOTT, M. SHANNON, DAVID SHARP, GLEN SLOAT, IRENE ST. MICHAEL, KENNETH ST. MICHAEL, ARCHIE STAIRS, PAUL STAIRS, JOHN STEWART, DONNIE STONE, GERALD STONE, THOMAS SULLIVAN, HAROLD SWAN, ROLAND TARDIF, KENNETH TAYLOR, RAYMOND THEBEAU, VITAL THEBEAU, ROCH THERIAULT, J. RAYMOND THIBODEAU, CHARLES THOMPSON, ARNOLD THORNTON, DELMONT THORNTON, PAUL THORNTON, CLIFFORD TOMLINSON, DANIEL TONNER, LLOYD WATSON, DAVID WEBB, JOHN WHALEN, ROBERT WILSON, RUSSELL WILSON, MINTO WONG, PETER WONG, and P. KERRY GIBERSON (hereinafter called Group "A"), and DALE ARMSTRONG, RICHARD BARROW, RONALD BLANEY, GARY BOONE, JAMES R. BOULTER, DAVE BRADBURY, VERA BRADBURY, JOSEPH B. BRAWN, RODNEY BREWER, JOSEPH W. BROCZKOWSKI, REX BROWN, GARY C. BUNNELL, ERNEST CHATTERTON, GERALD E. CLARK, BOB CONNON, RAYMOND F. CRAIG, DON CULLINGHAM, LAWRENCE G. DERRICK, CHARLES A. DICKINSON, EUGENE DICKINSON, PATRICIA DIDUCH, MRS. RICHARD DIXON, JAMES FEARNELEY, BRIAN D. FEERO, ANITA FIRLOTT (FLOYD), KENNETH FLEWELLING, MALCOLM G. FOX, BEECHER R. FOSTER, RONALD B. FOSTER, DANA FOX, CARL GABEL, KENNETH GALLAGHER, ALEXANDER GRAHAM, ELDON GREGOIRE, JEAN-PAUL HACHEY, HUGH HAMBLY, VICTOR HAPE, CLIFF HARTLEY, ARTHUR E. HATFIELD, WAYNE R. HATHAWAY, JAMES E. HAY, GARY HINTON, ALEX HOFFMAN, DOUG HOMER, BEVERLY JACOBSON, DARRYL J. JARDINE, DAVID JONES, RAYMOND G. KAINE, CLARENCE G. KOENIG, CARL J. KONEFAL, BERNARD A. LAMEH, LAZADE LANDRY, ALONZO LANTEIGNE, CHARLES E. MACKILLOP, WINSTON J. MACKINNON, HUBERT MATHESON, DAVID MCCONAGHY, RALPH MCCUTCHEON, GLEN MCGAGHEY, ROD MCGILVERY, C. NEIL MCKAY, BERNIE MCKINNON,

DARRELL A. MCLELLAN, JOHN D. MERCER, JOHN E. MONTGOMERY, DAVE MOORE, HERBERT MORELL, ROBERT MURPHY, GARY NASON, CLIFFORD ORR, EILEEN (JEAN) PELLERIN, DALE PIKE, CLAUDE R. PLOURDE, WELDON J. POLLOCK, PETE QUINN, GERALD D. RAYMOND, TREVOR RIDLEY, MIKE ROBITAILLE, DONALD E. ROCKWELL, NORMAN E. ROHOVICH, ARMAND E. ROUSSEL, HARRY W. SEYMOUR, JOSEPHINE SHEPHARD, REGINALD G. K. SHERREN, FRED SOMERVILLE, BARRY STEPHEN, LLOYD SUTHERLAND, RICHARD TAYLOR, ZENAS W. THORNTON, BRIAN E. TOOLE, ELWOOD A. TRACY, ADOLF WAWER, and LEBARON WOOD, (hereinafter called Group "B"),

Plaintiffs;

- and -

THE PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE HONOURABLE BRADLEY GREEN, ATTORNEY GENERAL AND MINISTER OF HEALTH, ANGELA MAZEROLLE STEPHENS, SUPERINTENDENT OF PENSIONS FOR THE PROVINCE OF NEW BRUNSWICK, AND MORNEAU SOBECO LIMITED PARTNERSHIP, ADMINISTRATOR OF THE ST. ANNE-NACKAWIC PULP COMPANY LTD. PENSION PLANS,

Defendants.

Date of Hearing: February 27, 2006

Date of Decision: February 28, 2006

Before: Mr. Justice David H. Russell

Counsel at Hearing:

E. J. Mockler, Q.C. and Adam Neal, Esq., for the Plaintiffs.

John G. Furey, Esq., for the Defendants.

D E C I S I O N

RUSSELL, J. (Orally):

[1] In this motion the Plaintiffs seek the following:

> 1. An Order staying the force and effect of New Brunswick Regulation 2005-157 … under the *Pension Benefits Act*, (O.C. 2005-510) until the final disposition of this action or until further order.
>
> 2. Until the issue of the validity and enforceability of the said Regulation is disposed of or until further order all distributions from the Hourly Workers Plan and the Salaried Plan be continued without reduction by Morneau-Sobeco to those persons entitled to a pension thereunder in accordance with the terms of the Plans as at the 14th day of September, 2004.

THE ACTION

[2] The lawsuit is brought by two groups of former St. Anne-Nackawic employees. They are the hourly paid employees and non-union salaried employees. Their commonality, as set out in the Statement of Claim, is that at the time of the bankruptcy of St. Anne on September 15, 2004 they were 55 years of age and older, either retired and receiving or working and entitled to receive, upon retirement, a pension under the terms of the Plans.

[3] The Plaintiffs seek relief in the Statement of Claim on two fronts. First, they say the Superintendent of Pensions failed in her function to properly monitor the St. Anne Pension Fund and let it slip into an underfunded position. For this they seek special damages equal to the amount of underfunding in the said Pension Plans as at September 14, 2004. If this portion of the lawsuit is successful, then all the employees, including those under 55, will receive 100% of their pension entitlement.

[4] More concerned with this motion is the second component of the lawsuit, that is, the creation of a Regulation under the *Pension Benefits Act* mentioned previously. Prior to that Regulation the underfunded plans, according to the *Pension Benefits Act* and its Regulations, was to be distributed on an order of priority basis among the Plaintiffs. The third group of employees, that is, those under 55 at the date of St. Anne's bankruptcy on September 15, 2004 would, because of the Plan's underfunding, receive nothing. The impugned Regulation changes that. In particular, the Statement of Claim alleges:

> 7. The Plaintiffs say that on the day of bankruptcy of St. Anne each Pension Plan was underfunded and in a deficit position but that pensions could be paid in accordance with the Plans as follows:
>
> Group "A" employees - full pensions less approximately 12%
>
> Group "B" employees - full pensions less approximately 9%
>
> 13. On or about the 28th day of December 2005 Regulation 2005-157 … was passed … which said Regulation purported to alter the model for distribution of the assets on the winding-up of each of the said Plans so that the amounts to be received by the Plaintiffs would now be reduced as follows:
>
> Group "A" - Full pension less approximately 36%
>
> Group "B" - Full pension less approximately 28%
>
> 15. The Plaintiffs say the Government of the Province of New Brunswick has deliberately discriminated against them in reducing pension benefits to which they were by contract and by law entitled in an effort to achieve political credits and have effectively seized their property and contrary to the principles of fundamental justice and without due process deprived them of life and security of their persons all contrary

> to Section 3 of the Canadian Bill of Rights and Sections 7, 8 and 15 of the Canadian Charter of Rights and Freedoms and have as well contravened the principles of the rule of law upon which Canada is founded.
>
> 16. In the premises the Plaintiffs say Regulation 2005-157 is illegal and of no force and effect and should be so declared pursuant to Sections 24 and 52 of the Charter of Rights and Freedoms.
>
> 20. On or about the 3rd day of January 2006 Morneau advised the Plaintiffs that persons who were in receipt of a pension would receive 100% of their pension until February 28, 2006 and commencing March 1, 2006, the commuted value payable to all persons under the plans after allowing for certain defined priority payments would be as follows:
>
> > Group "A" - estimated to be approximately 65%
> >
> > Group "B" - estimated to be approximately 72%
>
> and the said Morneau further advised the said Plaintiffs that Regulation 2005-157 changed the asset distribution basis of their pensions to a pro-rata asset distribution subject to certain priorities.
>
> 21. The Plaintiffs therefore claim:
>
> (a) A DECLARATION that N.B. Regulation … is illegal and of no force or effect;

THE LEGISLATION

[5] In her affidavit Angela Mazerolle Stephens, the Province's Superintendent of Pensions, says in part:

> 6. In the event of a wind-up of each of the Union Plan and the Salaried Plan following the bankruptcy of the Company, a distribution in accordance with the

> provisions of s. 50 of the General Regulation of the *Act* (as it existed on 14 September 2004) would be required, which called for distribution in the following priority;
>
> a. all members and former members to receive their own contributions, together with accrued interest;
>
> b. all members or former members currently receiving a pension or who were, at the date of wind-up, eligible to receive a pension, would receive the commuted value of their pension;
>
> c. all individuals who would be eligible for a deferred pension if they had terminated employment on the date of the wind-up would receive the commuted value of their pension;
>
> d. all other persons deemed to be entitled to a deferred pension because of the wind-up would then receive the commuted value of their pension.

[6] Under this scheme — which existed for all such pension plans in New Brunswick — the Plaintiffs, because the Plan was underfunded, would receive 88% of their pension (unionized) and 87% (salaried employees). Those under 55 who may have been employed by St. Anne for many years would receive nothing. (See: Section 50, Regulation 91-195, *Pension Benefits Act*.) Because of the hardship this would cause to those under 55 the Province decided — to quote an old phrase — to "take from Peter to pay Paul". Thus Regulation 2005-157 was born. In general, this said (and I quote from the same affidavit):

> 15. Following the enactment of Regulation 2005-157, the distribution model on the wind-up of the Plans is as set out in s. 7(1) of that Regulation, which calls for funds to be allocated to the following groups in the following order of priority:

> b. all members and former members in receipt of a pension as of 14 September 2004 would receive payment of 100% of their pension entitlement during the period 14 September 2004 to 28 February 2006;
>
> c. all members and former members entitled to benefits but not in receipt of a pension as of 14 September 2004 would then receive any contributions, other than additional voluntary contributions already paid;
>
> d. all members and former members entitled to benefits would then receive the commuted value of their pension.

[7] The bone that was thrown to the retirees or persons entitled to retire was that they would receive 100% of their entitlement to February 28, 2006 — even though the diminished fund could not support that payment. There will be no attempt under the Regulation to recoup these excess payments. Subsequent to March 1, 2006, however, according to Angela Mazerolle Stephens:

> 19. I have been advised by a representative of Morneau Sobeco, Mr. Paul Chang, and do verily believe that, after 1 March 2006, the impact upon those individuals in receipt of a pension as of 14 September 2004 will be to reduce their pension entitlement from 88% to 65% in the case of the Union Plan and from 87% to 72% in the case of the Salaried Plan. I have been further advised by Mr. Paul Chang, and do verily believe, that those individuals who were eligible to receive, but not in receipt of, a pension as of 14 September 2004, were subject to this impact immediately upon electing to commence receipt of their pension.

[8] The difference, of course, is that the persons under 55 will now receive the same amounts.

THE FUND

[9] Without question and without monies being distributed to those under 55, the two Plans do not have enough money to pay the Plaintiffs their full pensions, as has been mentioned. The only evidence before me on this point is that the Plaintiffs should be receiving 88% (Union) and 87% (Salaried). (See: Affidavit of Angela Mazerolle Stephens, para. 7.) Nevertheless, the Plaintiffs have been receiving 100% of their pensions to date. As noted, under this scheme those under 55 receive nothing.

[10] If the stay was not granted and the Regulation takes effect on March 1st, the Plaintiffs will not have to pay back any of the excess amounts they have received to date and will receive 65% (Union) and 72% (Salaried). The members under 55 will, as already noted, receive the same percentages.

[11] If the stay is granted and the Plaintiffs continue to receive 100% of their pensions but are ultimately unsuccessful in the cause, they will pay a big price, on the evidence before me, for obtaining the stay. If the overpayments continue at 100% until, say, June 2007 and the lawsuit fails and there is a three year recovery of the overpayment implemented, the Plaintiffs' monthly cheques will be reduced to 51.7% (Union) and 62% (Salaried). (See: Affidavit of Mike O'Connell, paras. 16 & 17.) Even if they are successful in getting the Regulation set aside in the main action, the Plans' administrators will have to collect the overpayment from September 15, 2004 onward. This, of course, will be done by reducing monthly pension cheques. For example, only taking it to January 1, 2006 and using a three year recovery of the overpayments, the hourly plan

could drop to 82.4% and the salaried plan to 81%. (See: Affidavit of Mike O'Connell, para. 20.)

[12] I mention these figures because there may be an element of "short term gain for long term pain" in seeking a stay of the legislation. The Plaintiffs, however, are apparently prepared to live with that result. In any event, that is not something that substantially affects the parameters I must consider.

REQUIREMENTS FOR A STAY

[13] Effectively, a stay and an injunction have the same result. They are called extraordinary remedies because, if granted, the Plaintiffs receive, long before a trial, what they are seeking following a trial. Thus, they get the "fruits of the victory" before the trial on the merits.

[14] Two important judgments in Canada involving a stay of legislation on constitutional grounds are the *Attorney General of Manitoba v. Metropolitan Stores* decided in 1987 and *RJR-MacDonald Inc. and Imperial Tobacco Ltd. v. Attorney General of Canada* in 1994. In the *Metropolitan Stores* case, the Metropolitan Stores were upset about Manitoba legislation that allowed the Manitoba Labour Board to impose a first collective agreement on them. They sued to have the legislation set aside and pending the trial applied to stay or to stop the Labour Board from imposing that collective agreement. In the *RJR-MacDonald* case the two tobacco companies fought legislation forcing them to put warnings on cigarette packages. In the Supreme Court of Canada the companies, before the case was heard, applied for a stay of the legislation's

effect as it would be very expensive to alter the packages and these expenses would be unrecoverable if they were successful in having the legislation struck out.

[15] These two cases set the standards I must apply. The first consideration is whether there is a serious question to be tried; the second — and I am quoting from *RJR-MacDonald*:

> ¶57 "… consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm".
>
> ¶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 …; where one party will suffer permanent market loss or irrevocable damage to its business reputation …; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined …

[16] The Court went on to say in *MacDonald*:

> ¶61 … 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.

[17] The third item I must consider is the balance of convenience. This means "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".

[18] Because this is a *Charter* case, I must consider public interests under the heading "balance of convenience", but, as this legislation affects a small group of people as opposed to the public at large the following comment from *MacDonald* is appropriate:

> ¶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 is suspended entirely.

ANALYSIS

[19] Both sides agree there is a serious question to be tried, so I need not spend any more time on the first component. I agree that component has been established.

[20] The second component, that is, irreparable harm if the stay is not granted, is more difficult. The two sides approach the test differently. The Province says, because the lawsuit has been started by the Plaintiffs, they have no intention of paying those under 55 until the final results are known. Therefore, the fund not being depleted in the meantime, there can be no irreparable harm if the stay is not granted. The Province focuses on the last ten words of the phrase already quoted "usually because one party cannot collect damages from the other".

[21] In his brief, counsel for the Province says about payments to those under 55:

> 37. The Province submits that no such payments will be made, based on these practical considerations faced by Morneau Sobeco and the Superintendent of Pensions. On this basis, the Province is prepared to consent to an Order of this Court declaring that no such payments shall be made until further Order of the Court, or final resolution of this litigation. This, it is submitted, removes any doubt as to the ability of the Applicants to recover any amounts that are ultimately found to be entitled to.

[22] As well, the Province says even if the Plaintiffs are successful there will be a substantial reduction in pensions to the Plaintiffs in order to recoup overpayments. Mr. Furey's brief says:

> 34. The Province further submits that, by law, some level of reduction of the pension entitlements of the 55 and over group is required, regardless of whether Regulation 2005-157 is upheld or not. The evidence clearly establishes that, due to the underfunding in each Plan, and the fact that overpayments from 14 September 2004 to 28 February 2006 will be required to be recouped by the administrator in the absence of Section 7(1)(b) of the Regulation, payouts will be reduced to a range of 81% to 84.5%, depending upon the length of the recovery period. This reduction will be required, even if the Applicants are completely successful in the relief sought in the main action.

That should say completely successful in the second area of relief sought in the main action.

[23] The Plaintiffs approach irreparable harm from another perspective. In brief, they consider irreparable harm to be the unpalatable choices between making mortgage payments and funding of medical treatments, loss of homes and/or cars, and anxiety and stress, as well as other associated problems that will occur to the Plaintiffs in

the interval because of the drastic drop in monthly pension allotments should the Regulation not be stayed. Mr. Melanson says in part of his affidavit:

> 9. … I say we will suffer irreparable harm unless the same is granted (that is the interim relief) in that all of the Plaintiffs named herein as employees of St. Anne were dedicated and hard working and planned their retirement around the pension plans provided by St. Anne and they have expected and have earned the right to enjoy a quality of life in which they could take pride. …

[24] In *RJR.-MacDonald*, supra, the Supreme Court of Canada, citing from other cases, spoke of irreparable harm occurring when a party was put out of business or suffering irreparable damage to a business reputation.

[25] While the evidence is scanty here, I do not really need much to conclude that if a family income was reduced by a substantial amount bills might not be paid and life styles would be drastically altered — all with respect to people in their late fifties, sixties and older. In my view, that is irreparable harm. The Plaintiffs have therefore met the second part of the test.

[26] I turn now to the balance of convenience.

[27] While I must consider the public interest, this is an “exemption” case and not a “suspension” matter. The general public is not affected — as I’ve already said on several occasions; only the two relatively small groups involved, that is, the Plaintiffs and those under 55. That having been said, I am not certain I should consider the latter as neither they as a group or their members are parties to the lawsuit.

[28] In their documentation the Plaintiffs seek continued payments at 100% until the trial. In argument, Plaintiffs' counsel yesterday reduced this amount to 88% and 87%.

[29] It seems to me the balance of convenience favours the maintenance of the fund so it can do the most good for those entitled to proceeds from it over the long term. That group includes the Plaintiffs. That can be accomplished by granting a stay of the Regulation, although perhaps with more limited payments than those sought by the Plaintiffs. I conclude, therefore, the Plaintiffs have met the third part of the test — that is, the balance of convenience favours the Plaintiffs' present motion.

[30] There will be a stay of Regulation 2005-157 under the *Pension Benefits Act* until the final disposition of this action or until further order.

[31] As already noted, the Plaintiffs in their material sought continuation of their pension payments at 100%. In argument they reduced this to approximately 87%. I have discretion to order some other figure. Obviously, on the evidence before me (see: Affidavit of Mike O'Connell, para. 20), even if the Plaintiffs are successful in the second part of their lawsuit overpayments must be recouped by the Administrator. On the basis that overpayments were made between 14 September 2004 and today, it is suggested that figure ranges from 81 to 84.5% depending on the recovery period. Without any actuarial input, apart from the material before me by way of affidavit, I order the payments continue at the rate of 83% until further order.

[32] In *Metropolitan Stores*, supra, the Court said:

> ¶90 I would finally add that in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part. …

[33] I accept that principle applies here. Accordingly, it is further ordered that this matter be entered for trial on or before the March 2007 Motions Day. Either party may apply on short notice to enhance this direction. Given the black letter nature of major components of the problem, it may be possible to accelerate the process or even split the two issues that I have mentioned.

[34] The Plaintiffs are entitled to costs on this motion which I fix in the amount of $1500.00 which will be costs in the cause.

_____

David H. Russell, J.C.Q.B.

March 3, 2006

TAB 13

Moore v. Sweet, 2018 SCC 52

SUPREME COURT OF CANADA

CITATION: Moore *v.* **Sweet, 2018 SCC 52**

APPEAL HEARD: February 8, 2018
JUDGMENT RENDERED: November 23, 2018
DOCKET: 37546

BETWEEN:

Michelle Constance Moore
Appellant

and

Risa Lorraine Sweet
Respondent

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 96)	Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown and Martin JJ. concurring)
JOINT DISSENTING REASONS: (paras. 97 to 144)	Gascon and Rowe JJ.

Michelle Constance Moore *Appellant*

v.

Risa Lorraine Sweet *Respondent*

Indexed as: Moore *v.* Sweet

2018 SCC 52

File No.: 37546.

2018: February 8; 2018: November 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Equity — Restitution — Unjust enrichment — Remedy — Constructive trust — Husband and wife separating and entering into contractual agreement pursuant to which wife will pay husband's life insurance policy premiums in order to remain named sole beneficiary of policy — Husband subsequently naming new common law spouse as beneficiary without wife's knowledge — Insurance proceeds

payable to common law spouse on husband's death despite wife having continued to pay premiums — Whether common law spouse unjustly enriched at wife's expense — If so, whether constructive trust is appropriate remedy.

Insurance — Life insurance — Beneficiary designation — Wife designated as revocable beneficiary of husband's life insurance policy — After separation, wife agreeing to continue to pay policy premiums to maintain beneficiary designation — Husband subsequently designating new common law spouse as irrevocable beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death — Whether designation of common law spouse as irrevocable beneficiary in accordance with statute precludes recovery for wife with prior claim to benefit of policy — Insurance Act, R.S.O. 1990, c. I.8, ss. 190, 191.

During L and M's marriage, L purchased a term life insurance policy and designated M as revocable beneficiary. They later separated, and entered into an oral agreement whereby M would pay all of the policy premiums and, in exchange, L would maintain M's beneficiary designation. Unbeknownst to M, L subsequently designated his new common law spouse, R, as the irrevocable beneficiary of the policy. When L passed away, the proceeds were therefore payable to R and not to M. At the time of L's death, his estate had no significant assets. M, who had paid about $7,000 in policy premiums since separation, commenced an application regarding her entitlement to the $250,000 policy proceeds. The application judge held that R had

been unjustly enriched at M's expense and impressed the proceeds with a constructive trust in M's favour. The Court of Appeal allowed R's appeal and set aside the judgment of the application judge.

Held (Gascon and Rowe JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, **Côté**, Brown and Martin JJ.: R was enriched, M was correspondingly deprived, and both the enrichment and deprivation occurred in the absence of a juristic reason. Therefore, a remedial constructive trust should be imposed for M's benefit.

A constructive trust is understood primarily as an equitable remedy that may be imposed at a court's discretion. A proper equitable basis, such as a successful claim in unjust enrichment, must first be found to exist. A plaintiff will succeed on the cause of action in unjust enrichment if he or she can show three elements: (1) that the defendant was enriched; (2) that the plaintiff suffered a corresponding deprivation; and (3) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

Regarding the first element, the parties do not dispute the fact that R was enriched to the full extent of the insurance proceeds in the amount of $250,000, by virtue of her right to receive them as the designated irrevocable beneficiary of L's policy.

The second element focuses on what the plaintiff actually lost and on whether that loss corresponds to the defendant's enrichment, such that the latter was enriched at the expense of the former. The measure of deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of loss also captures a benefit that was never in the plaintiff's possession but that the court finds would have accrued for his or her benefit had it not been received by the defendant instead. This element does not require that the disputed benefit be conferred directly by the plaintiff on the defendant. In this case, the extent of M's deprivation is not limited to the $7,000 she paid in premiums. She stands deprived of the right to receive the entirety of the insurance proceeds, a value of $250,000. It is also clear that R's enrichment came at M's expense. Not only did M's payment of the premiums make R's enrichment possible, but R's designation gave her the statutory right to receive the insurance proceeds. Because R received the benefit that otherwise would have accrued to M, the requisite correspondence exists: the former was enriched at the expense of the latter.

To establish the third element, it must be demonstrated that both the enrichment and corresponding deprivation occurred without a juristic reason. The juristic reason analysis proceeds in two stages. The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the established categories of juristic reasons, such as disposition of law or statutory obligations. A plaintiff's claim will necessarily fail if a legislative enactment justifies the enrichment and corresponding deprivation.

In this case, a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* does not provide a juristic reason for R's enrichment at M's expense. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. The legislature is presumed not to depart from prevailing law without expressing its intention to do so with irresistible clearness. While the *Insurance Act* provides the mechanism by which beneficiaries become statutorily entitled to receive policy proceeds, no part of the Act operates with the necessary irresistible clearness to preclude the existence of contractual or equitable rights in those proceeds once they have been paid to the named beneficiary. Furthermore, the *Insurance Act* provisions applicable to irrevocable beneficiary designations do not require, either expressly or implicitly, that a beneficiary keep the proceeds as against a plaintiff in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death. Accordingly, an irrevocable designation under the Act cannot constitute a juristic reason for R's enrichment and M's deprivation. Neither by direct reference nor by necessary implication does the *Insurance Act* either foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary — revocable or irrevocable — or preclude the imposition of a constructive trust in circumstances such as these. Therefore, no established category of juristic reason applies.

Once the plaintiff has successfully demonstrated that no category of juristic reason applies, a *prima facie* case is established and the analysis proceeds to the second stage. At this stage, the defendant must establish some residual reason why the enrichment should be retained. Considerations such as the parties' reasonable expectations and moral and policy-based arguments come into play. In the present case, it is clear that both parties expected to receive the proceeds of the life insurance policy. However, the residual considerations favour M, given that her contribution towards the payment of the premiums actually kept the policy alive and made R's entitlement to receive the proceeds upon L's death possible.

Once each of the three elements of the cause of action in unjust enrichment is made out, the remedy is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation and can be viewed as the default remedy for unjust enrichment. In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature. The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust. Courts will impress the disputed property with a constructive trust only if the plaintiff can establish that a personal remedy would be inadequate; and that there is a link between his or her contributions and the disputed property. Ordinarily, a personal award would be adequate in cases such as this one where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Moreover, M's payment of the premiums was causally connected

to the maintenance of the policy under which R was enriched. A constructive trust to the full extent of the proceeds should therefore be imposed in M's favour.

Per **Gascon** and **Rowe** JJ. (dissenting): There is disagreement with the majority that M has established a claim in unjust enrichment on these facts and therefore, that a constructive trust should be imposed.

M had a contract with L to be maintained the named beneficiary of his life insurance policy while she paid the premiums. However, this contract does not create a proprietary or equitable interest in the policy's proceeds and simply being named as a beneficiary does not give one a right in the proceeds before the death of the insured. The right to claim the proceeds only crystalizes upon the insured's death. Further, as a revocable beneficiary, M had no right to contest L's redesignation of R as an irrevocable beneficiary outside of a claim against L for breach of contract. Thus, at the time of L's death, the only rights that M possessed in relation to the life insurance contract were her contractual rights.

While M would have a claim against L's estate for breach of contract, the estate's lack of assets has rendered any such recourse fruitless. Instead, M's claim is to reverse the purported unjust enrichment of R. In an action for unjust enrichment, a plaintiff must show that their deprivation corresponds to the defendant's enrichment. The correspondence between the deprivation and the enrichment, while seemingly formalistic, is fundamental. Correspondence is the connection between the parties — a plus and a minus as obverse manifestations of the same event — that uniquely

identifies the plaintiff as the proper person to seek restitution against a particular defendant.

In this case, it is clear that but for M's payments, the policy would have lapsed, and but for L's breach of contract, M would have been the beneficiary at the time of his death. But these facts are not enough to establish that the deprivation and the enrichment are corresponding. R's enrichment was not at the expense of M because R's enrichment is not dependent on M's deprivation. What R received (a statutory entitlement to proceeds) is different from M's deprivation (the inability to enforce her contractual rights) — they are not two sides of the same coin.

Even if a corresponding deprivation could be established, M's claim in unjust enrichment would fail at the first stage of the juristic reason analysis, because the *Insurance Act* establishes a juristic reason for R's enrichment. Section 191(1) of the *Insurance Act* provides that an insured may designate an irrevocable beneficiary under a life insurance policy, and thereby provide special protections to that beneficiary. From the moment an irrevocable beneficiary is designated, they have a right in the policy itself: the insurance money is not subject to the control of the insured or to the claims of his or her creditors, and the beneficiary must consent to any subsequent changes to beneficiary designation. As it is undisputed that R was the validly designated irrevocable beneficiary of the policy, she is entitled to the proceeds free of the claims of L's creditors.

The fact that M had an agreement with L for the proceeds of the policy pursuant to which she paid its premiums does not undermine the presence of this juristic reason. As M's rights are contractual in nature, she is a creditor of L's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds. The *Insurance Act* explicitly protects irrevocable beneficiaries from the claims of the deceased's creditors and provides that the insurance proceeds do not form part of the insured's estate. Thus, the *Insurance Act* precludes the existence of contractual rights in those insurance proceeds.

The *Insurance Act*'s legislative history further supports R's retention of the insurance proceeds notwithstanding M's claim. The provisions of the *Insurance Act* were designed to protect the interests of beneficiaries in retaining the proceeds and provide no basis whatsoever for a person paying the premiums to assume she would have any claim to the eventual proceeds. The *Insurance Act* is deliberately indifferent to the source of the premium payments and renders the actions of the payers irrelevant as far as the beneficiaries are concerned.

In immunizing beneficiaries from the claims of the insured's creditors, the *Insurance Act* does not distinguish between types of creditors. Creditors of the insured's estate simply do not have a claim to the insurance proceeds. There is no basis to carve out a special class of creditor who would be exempt from the clear wording of the *Insurance Act*. Neither M's contributions to the policy, nor her

contract with L are sufficient to take her outside the comprehensive scheme and grant her special and preferred status.

Even if the *Insurance Act* did not establish a juristic reason for R's enrichment, the policy considerations at the second stage of the juristic reason analysis weigh against allowing M's claim of unjust enrichment. It is an unfortunate reality that a person's death is sometimes accompanied by litigation that can tie up funds that the deceased intended to support loved ones for a significant period of time, adding financial hardship to personal tragedy. In an attempt to ensure that life insurance proceeds could be free from such strife, the Ontario legislator empowered policy holders to designate an irrevocable beneficiary under s. 191(1) of the *Insurance Act*. Such a designation ensures that the proceeds can be disbursed free from claims against the estate, giving certainty to insured, insurer and beneficiary alike. This provision should be given full effect.

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By Côté J.

Applied: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Shannon v. Shannon* (1985), 50 O.R. (2d) 456; **distinguished:** *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325; **referred to:** *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v.*

Beblow, [1993] 1 S.C.R. 980; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660; *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67; *Lacroix v. Valois*, [1990] 2 S.C.R. 1259; *Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Garland v. Consumers' Gas Company Ltd.* (2001), 57 O.R. (3d) 127; *Saskatchewan Crop Insurance Corp. v. Deck*, 2008 SKCA 21, 307 Sask. R. 206; *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273; *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3; *Chanowski v. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244; *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506; *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65, aff'd [1991] 3 S.C.R. 593; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

By Gascon and Rowe JJ. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J. and Blair and Lauwers JJ.A.), 2017 ONCA 182, 134 O.R. (3d) 721, 409 D.L.R. (4th) 312, 65 C.C.L.I. (5th) 175, 32 C.C.P.B. (2nd) 254, [2017] O.J. No. 1129 (QL), 2017 CarswellOnt 2958 (WL Can.), setting aside a decision of Wilton-Siegel J., 2015 ONSC 3914, [2015] O.J. No. 7761 (QL), 2015 CarswellOnt 20995 (WL Can.). Appeal allowed, Gascon and Rowe JJ. dissenting.

Ian M. Hull, *Suzana Popovic-Montag* and *David M. Smith*, for the appellant.

Jeremy Opolsky and *Jonathan Silver*, for the respondent.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ. was delivered by

CÔTÉ J. —

I. Overview

[1] This appeal involves a contest between two innocent parties, both of whom claim an entitlement to the proceeds of a life insurance policy.

[2] The appellant, Michelle Constance Moore ("Michelle"), and the owner of the policy, Lawrence Anthony Moore ("Lawrence"), were former spouses. They entered into a contractual agreement pursuant to which Michelle would pay all of the policy's premiums and, in exchange, Lawrence would maintain Michelle as the sole beneficiary thereunder — and she would therefore be entitled to receive the proceeds of the policy upon Lawrence's death. While Michelle held up her end of the bargain, Lawrence did not. Shortly after assuming his contractual obligation, and unbeknownst to Michelle, Lawrence designated his new common law spouse — the respondent, Risa Lorraine Sweet ("Risa") — as the *irrevocable* beneficiary of the policy. When Lawrence passed away several years later, the proceeds were payable to Risa and not to Michelle.

[3] Should these proceeds be impressed with a constructive trust in Michelle's favour? A majority of the Ontario Court of Appeal found that they should not. I disagree; in my view, Risa was enriched, Michelle was correspondingly deprived, and both the enrichment and the deprivation occurred in the absence of a juristic reason. In these circumstances, a remedial constructive trust should be imposed for Michelle's benefit. I would therefore allow the appeal.

II. Context

[4] Michelle and Lawrence were married in 1979. Together, they had three children. In October 1985, Lawrence purchased a term life insurance policy from Canadian General Life Insurance Company, the predecessor of RBC Life Insurance Company (the "Insurance Company"). He purchased this policy, with a coverage amount of $250,000, and initially designated Michelle as the beneficiary — but not as an *irrevocable* beneficiary. The annual premium of $507.50 was paid out of the couple's joint bank account until 2000.

[5] In December 1999, Michelle and Lawrence separated. Shortly thereafter, they entered into an oral agreement (the "Oral Agreement") whereby Michelle "would pay the premiums and be entitled to the proceeds of the Policy on [Lawrence's] death" (Superior Court decision, 2015 ONSC 3914, at para. 13 (CanLII)). The effect of this agreement was therefore to require that Michelle remain designated as the sole beneficiary of Lawrence's life insurance policy.

[6] In the summer of 2000, Lawrence began cohabiting with Risa. They remained common law spouses and lived in Risa's apartment until Lawrence's death 13 years later.

[7] On September 21, 2000, Lawrence executed a change of beneficiary form designating Risa as the *irrevocable* beneficiary of the policy. Risa testified that Lawrence did so because he did not want her to worry about how she would pay the rent or buy medication, and wanted to make sure that she would be able to continue living in the building where she had resided for the preceding 40 years.

[8] The change in beneficiary designation was made through, and after consultation with, Lawrence's insurance broker, who also happened to be Michelle's brother-in-law. The new designation was recorded by the Insurance Company on September 25, 2000. Although Lawrence did not change the beneficiary designation surreptitiously, he did not advise Michelle that she was no longer named as beneficiary.[1]

[9] Michelle and Lawrence entered into a formal separation agreement in May 2002. This agreement dealt with a number of issues as between them, but was silent as to the policy and anything related to it. They finalized their divorce on October 3, 2003.

[10] Pursuant to her obligation under the Oral Agreement, and without knowing that Lawrence had named Risa as the irrevocable beneficiary, Michelle continued to pay all of the premiums on the policy until Lawrence's death. By then, a total of $30,535.64 had been paid on account of premiums; about $7,000 had been paid since 2000.

[11] Lawrence died on June 20, 2013. His estate had no significant assets.

[12] Michelle was advised by the Insurance Company that she was not the designated beneficiary of the policy on July 5, 2013, around two weeks after

[1] There is no dispute between the parties that the Oral Agreement was entered into sometime prior to the date on which Lawrence designated Risa as irrevocable beneficiary (Transcript, at pp. 6-7).

Lawrence's death. On February 12, 2014, Michelle commenced an application seeking the opinion, advice and direction of the Ontario Superior Court of Justice as to her entitlement to the proceeds of the policy. Pursuant to a court order dated December 19, 2013, the Insurance Company paid the proceeds of the policy into court pending the resolution of the dispute.

[13] Part V of the *Insurance Act*, R.S.O. 1990, c. I.8, sets out a comprehensive scheme that governs the rights and obligations of parties to a life insurance policy. It applies to all life insurance contracts "[d]espite any agreement, condition or stipulation to the contrary" (s. 172(1)), which means that the parties cannot contract out of its provisions.

[14] Of particular relevance for the purposes of this appeal are the provisions of the *Insurance Act* that deal with the designation of beneficiaries. A "beneficiary" of a life insurance policy is defined as "a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration" (s. 171(1)). A beneficiary designation therefore identifies the intended recipient of the proceeds under the life insurance policy upon the death of the insured person, in accordance with the terms of the policy.

[15] Part V of the *Insurance Act* recognizes two types of beneficiary designations: those that are *revocable* and those that are *irrevocable*. A revocable beneficiary designation is one that can be altered or revoked by the insured without

the beneficiary's knowledge or consent (s. 190(1) and (2)). An irrevocable beneficiary designation, by contrast, can be altered or revoked only if the designated beneficiary consents (s. 191(1)). When a valid irrevocable beneficiary designation is made, s. 191 of the *Insurance Act* makes clear that the insurance money ceases to be subject to the control of the insured, is not subject to the claims of the insured's creditors and does not form part of the insured's estate.

[16] It is clear that the interest of an irrevocable beneficiary is afforded much more protection than that of a revocable beneficiary; the former has a "statutory right to remain as the named beneficiary entitled to receive the insurance monies unless he or she consents to being removed" (Court of Appeal decision, 2017 ONCA 182, 134 O.R. (3d) 721, at para. 82). The legislation contemplates only one situation where insurance money can be clawed back from a beneficiary, regardless of whether his or her designation is irrevocable: to satisfy a support claim brought by a dependant against the estate of the now-deceased insured person (*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 58 and 72(1)(f)). No such claim has been brought in this case.

[17] Part V of the *Insurance Act* also deals with the assignment of a life insurance policy. A life insurance contract entails a promise by the insurer "to pay the contractual benefit when the insured event occurs" (*Norwood on Life Insurance Law in Canada* (3rd ed. 2002), by D. Norwood and J. P. Weir, at p. 359). It can therefore be understood as creating a chose in action against the insurer, which is transferrable

from one person to another through the mechanism of an assignment. The statute provides that where the assignee gives written notice of the assignment to the insurer, he or she assumes all of the assignor's rights and interests in the policy. Pursuant to s. 200(1)(b) of the *Insurance Act*, however, an assignee's interest in the policy will not have priority over that of an irrevocable beneficiary who was designated prior to the time the assignee gave notice to the insurer — unless the irrevocable beneficiary consents to the assignment and surrenders his or her interest in the policy.

[18] The relevant provisions of the *Insurance Act* read as follows:

> **190** (1) Subject to subsection (4)[2], an insured may in a contract or by a declaration designate the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable.
>
> (2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.
>
> . . .
>
> **191** (1) An insured may in a contract, or by a declaration other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate.
>
> (2) Where the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

[2] The exception in subsection (4) does not apply in the circumstances of this case.

200 (1) Where an assignee of a contract gives notice in writing of the assignment to the insurer at its head or principal office in Canada, the assignee has priority of interest as against,

(a) any assignee other than one who gave notice earlier in like manner; and

(b) a beneficiary other than one designated irrevocably as provided in section 191 prior to the time the assignee gave notice to the insurer of the assignment in the manner prescribed in this subsection.

(2) Where a contract is assigned as security, the rights of a beneficiary under the contract are affected only to the extent necessary to give effect to the rights and interests of the assignee.

(3) Where a contract is assigned unconditionally and otherwise than as security, the assignee has all the rights and interests given to the insured by the contract and by this Part and shall be deemed to be the insured.

. . .

III. Decisions Below

A. *Ontario Superior Court of Justice (Wilton-Siegel J.) — 2015 ONSC 3914*

[19] The application judge, Wilton-Siegel J., held that Risa had been unjustly enriched at Michelle's expense, and therefore impressed the proceeds of the policy with a constructive trust in Michelle's favour. He began his reasons by addressing a preliminary matter: the Oral Agreement that Lawrence and Michelle had entered into during their separation. He held that Michelle and Lawrence "each had an equitable interest in the proceeds of the Policy from the time that it was taken out" and that the Oral Agreement had effectively resulted in the "equitable assignment to [Michelle] of [Lawrence's] equitable interest in the proceeds in return for [Michelle's] agreement to pay the premiums on the Policy" (para. 17). According to the application judge, this

equitable interest "took the form of a right to determine the beneficiary of the Policy" (para. 18).

[20] The application judge then turned to Michelle's unjust enrichment claim. He found that the first two elements of the cause of action in unjust enrichment — an enrichment of the defendant and a corresponding deprivation suffered by the plaintiff — were easily met in this case: Risa had been enriched by virtue of her valid designation as irrevocable beneficiary, and Michelle had suffered a corresponding deprivation to the extent that she paid the premiums and to the extent that the proceeds had been payable to Risa "notwithstanding the prior equitable assignment of such proceeds to her" (para. 27). With respect to the third and final element — the absence of a juristic reason for the enrichment — the application judge held that Risa's designation as beneficiary under the policy did not constitute a juristic reason that entitled her to retain the proceeds in the particular circumstances of this case (para. 46). This was because Risa's entitlement to the proceeds would not have been possible if Michelle had not performed her obligations under the Oral Agreement, and because the Oral Agreement itself amounted to an equitable assignment of the proceeds to Michelle (para. 48).

B. *Ontario Court of Appeal (Strathy C.J.O. and Blair J.A., Lauwers J.A. dissenting) — 2017 ONCA 182, 134 O.R. (3d) 721*

[21] The Ontario Court of Appeal allowed Risa's appeal and set aside the judgment of the application judge. It ordered that the $7,000 Michelle had paid in

premiums between 2000 and 2013 be paid out of court to her and that the balance of the insurance proceeds be paid to Risa.

(1) Majority Reasons

[22] Writing for himself and for Strathy C.J.O., Blair J.A. held that it was not open to the application judge to find that the Oral Agreement amounted to an equitable assignment, since the doctrine of equitable assignment had not been placed in issue by the parties before him.

[23] Turning to Michelle's unjust enrichment claim, Blair J.A. accepted the application judge's finding that Risa was enriched. He found it unnecessary to resolve the issue of whether the corresponding deprivation element had been made out as he found there was a juristic reason justifying the receipt by Risa of the proceeds. Specifically, Blair J.A. held that the application judge had erred in his approach to the juristic reason element of the unjust enrichment framework — first, by failing to recognize the significance of Risa's designation as an *irrevocable* beneficiary, and second, by failing to apply the two-stage analysis mandated by this Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. In Blair J.A.'s view, "the existence of the statutory regime relating to revocable and irrevocable beneficiaries . . . falls into an existing recognized category of juristic reason", constituting "both a disposition of law and a statutory obligation" (para. 99).

[24] Blair J.A. declined to decide whether a constructive trust can be imposed only to remedy unjust enrichment and wrongful acts or can also be based on the more elastic concept of "good conscience". He took the position that there was nothing in the circumstances of this case that put it in some "good conscience" category beyond what was captured by unjust enrichment and wrongful act.

(2) Dissenting Reasons

[25] In dissent, Lauwers J.A. agreed with the majority that the application judge had erred in relying on the equitable assignment doctrine. However, he disagreed with the majority as to the disposition of Michelle's unjust enrichment claim and the propriety of imposing a constructive trust over the proceeds in these circumstances. He would therefore have dismissed the appeal.

[26] Lauwers J.A. began by considering this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, and held that it leaves open four routes by which a constructive trust may be imposed: (1) as a remedy for unjust enrichment; (2) for wrongful acts; (3) in circumstances where its availability has long been recognized; and (4) otherwise where good conscience requires it. According to Lauwers J.A., in relation to the fourth route, the *Soulos* court anticipated that the law of remedial trusts would continue to develop in a way that accommodates the changing needs and mores of society.

[27] On the issue of unjust enrichment, Lauwers J.A. concluded that Michelle had made out each of the requisite elements and that a constructive trust ought therefore to be imposed over the proceeds in her favour. With respect to the corresponding deprivation element, he rejected the submission that Michelle's financial contribution was the correct measure of her deprivation, and instead found that the asset for which she had paid and of which she stood deprived was the full payout of the life insurance proceeds — not just the amount she had paid in premiums.

[28] Lauwers J.A. also rejected the proposition that the applicable *Insurance Act* provisions provided a juristic reason for Risa's retention of the proceeds. In his view, Michelle's entitlement to the insurance proceeds as against Risa was neither precluded nor affected by the operation of the *Insurance Act*. He also held that a juristic reason could not be found based on the parties' reasonable expectations or public policy considerations.

[29] Finally, regarding to the imposition of a constructive trust, Lauwers J.A. considered a number of other cases that involved disappointed beneficiaries. Noting that these cases fit awkwardly under the unjust enrichment rubric, he observed that

> . . . the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* — circumstances where the availability of a trust has previously been recognized — and the fourth route — where good conscience otherwise demands it, quite independent of unjust enrichment. [para. 276]

IV. Issues

[30] The issues in this case are as follows:

A. Has Michelle made out a claim in unjust enrichment by establishing:

(1) Risa's enrichment and her own corresponding deprivation; and

(2) the absence of any juristic reason for Risa's enrichment at her expense?

B. If so, is a constructive trust the appropriate remedy?

V. Analysis

[31] In the present case, Michelle requests that the insurance proceeds be impressed with a constructive trust in her favour. The primary basis on which she seeks this remedy is unjust enrichment. In the alternative, she submits that the circumstances of her case provide a separate good conscience basis upon which a court may impose a constructive trust.

[32] A constructive trust is a vehicle of equity through which one person is required by operation of law — regardless of any intention — to hold certain property for the benefit of another (*Waters' Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 478). In Canada, it is understood primarily as a *remedy*, which may be imposed at a court's discretion where good conscience so requires. As McLachlin J. (as she then was) noted in *Soulos*:

> . . . under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. . . . Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate. [Emphasis added; para. 43.]

[33] What is therefore crucial to recognize is that a proper equitable basis *must* exist before the courts will impress certain property with a remedial constructive trust. The cause of action in unjust enrichment may provide one such basis, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 997; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 50-51). Absent this, a plaintiff seeking the imposition of a remedial constructive trust must point to some other basis on which this remedy can be imposed, like breach of fiduciary duty.[3]

[34] I now turn to consider Michelle's claim in unjust enrichment.

A. *Unjust Enrichment*

[35] Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As

[3] Whether the availability of a remedial constructive trust is limited to cases involving unjust enrichment or wrongful acts need not be decided in the present case (see para. 95).

recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, "At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."

[36] Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" — including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request (*Peel*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.

[37] In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 *Can. Bus. L.J.* 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, per Laskin J., dissenting). Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the

principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.

[38] This principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another. Recovery is therefore not restricted to cases that fit within the categories under which the retention of a conferred benefit was traditionally considered unjust (*Kerr*, at para. 32). As observed by McLachlin J. in *Peel* (at p. 788):

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

[39] Justice and fairness are at the core of the dispute between Michelle and Risa, both of whom are innocent parties. Moreover, and to complicate matters, resolution of this dispute requires this Court to consider the elements of an unjust enrichment claim as they apply in a context that involves several parties. Pursuant to her Oral Agreement with Lawrence, Michelle paid around $7,000 in premiums to the Insurance Company between 2000 and 2013 in exchange for the right to remain named as beneficiary of the policy. When Lawrence passed away, however, the insurance proceeds (which totalled $250,000) were payable by the Insurance Company not to Michelle, but to Risa — the person whom Lawrence had

subsequently named the irrevocable beneficiary, contrary to the contractual obligation he owed to Michelle. The result of this arrangement was that Risa's enrichment was significantly greater than Michelle's out-of-pocket loss. Moreover, Risa was entitled to receive the proceeds from the Insurance Company by virtue of her designation as irrevocable beneficiary, pursuant to ss. 190 and 191 of the *Insurance Act*.

[40] These unusual circumstances raise two distinct questions respecting the law of unjust enrichment. First, what is the proper measure of Michelle's deprivation, and in what sense does it "correspond" to Risa's gain? Second, does the legislative framework at issue provide a juristic reason for Risa's enrichment and Michelle's corresponding deprivation — and if not, can such a juristic reason be found on some other basis? I will deal with each of these questions in turn.

(1) Risa's Enrichment and Michelle's Corresponding Deprivation

[41] The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (*Kerr*, at para. 37; *Garland*, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (*Kerr*, at para. 38; *Garland*, at para. 31; *Peel*, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at

para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 ("*PIPSC*"), at para. 151) and thus as being "essentially two sides of the same coin" (*Peter*, at p. 1012).

[42] The parties in the present case do not dispute the fact that Risa was enriched to the full extent of the $250,000 by virtue of her right to receive the insurance proceeds as the designated irrevocable beneficiary. The application judge found as much (at para. 27), and this finding is not contested on appeal.

[43] In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 149; see also *Peel*, at pp. 789-90, and *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 (C.A.), at pp. 393 and 400). Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (*Pettkus*, at p. 852). Put simply, the

transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched *at the plaintiff's expense* (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (*The Canadian Law of Unjust Enrichment and Restitution*, at p. 149).

[44] The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 30). This makes sense because in either case, the result is the same: the defendant becomes richer in circumstances where the plaintiff becomes poorer. As was succinctly articulated by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 669-70:

> When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary

> proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, [the respondent] never in fact owned the [disputed] property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by [the appellant], [the respondent] would have acquired the property. In *Air Canada* . . . , at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." (Emphasis added.) In my view the fact that [the respondent in this case] never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. [The appellant] has therefore been enriched at the expense of [the respondent]. [Emphasis in original.]

While *Lac Minerals* turned largely on the defendant's breach of confidence and breach of fiduciary duty, the above comments were made in the context of La Forest J.'s analysis of the tripartite unjust enrichment framework as it was applied in that case. My view is thus that these comments are applicable to the analysis in the present case.

[45] The foregoing also indicates that the corresponding deprivation element does not require that the disputed benefit be conferred *directly* by the plaintiff on the defendant (see McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 155, but also see pp. 156-83; Maddaugh and McCamus, *The Law of Restitution*, at p. 35-1). This understanding of the correspondence between loss and gain has also been accepted under Quebec's civilian approach to the law of unjust enrichment:

> The theory of unjustified enrichment does not require that the enrichment pass directly from the property of the impoverished to that of the enriched party . . . . The impoverished party looks to the one who profited from its

> impoverishment. It is then for the enriched party to find a legal justification for its enrichment.
>
> (*Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 79; see also *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at pp. 1278-79.)

[46] Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.

[47] To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the *full* value of the insurance payout.

In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 42).

[48] My colleagues, Gascon and Rowe JJ., approach Michelle's loss differently. They take the position that unjust enrichment cannot be invoked by a claimant to protect his or her "contractual expectations against innocent third parties" (para. 104). While they agree that the Canadian principle against unjust enrichment operates where a plaintiff has lost wealth that was either in his or her possession or that would have accrued for his or her benefit, they take the position that "awards for expected property have generally been where there was a breach of an equitable duty", and they distinguish that situation from cases where the plaintiff held "a valid contractual expectation" of receiving certain property (para. 104).

[49] My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at

para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff *actually* lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense* of the former. As was observed by Professors Maddaugh and McCamus in *The Law of Restitution*, one source of difficulty in these kinds of disappointed beneficiary cases is

> a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff. . . . [R]estitution of benefits received from third parties may well provide a basis for recovery. In this particular context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]

I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

[50] From this perspective, it is equally clear that Risa's enrichment came at Michelle's expense. It is not only that Michelle's payment of the premiums made Risa's enrichment possible — something which the application judge found to be the case: "The change of designation, and [Risa's] later receipt of the proceeds of the Policy, would not have been possible but for [Michelle's] performance of her

obligations under the agreement" (para. 48). What is more significant is that Risa's designation gave her the statutory right to receive the insurance proceeds, the necessary implication being that Michelle would have no such right *despite* the fact that she had a contractual entitlement, by virtue of the agreement with Lawrence, to remain named as beneficiary. Because Risa received the benefit that otherwise would have accrued to Michelle, the requisite correspondence exists: the former was enriched at the expense of the latter.

[51] My colleagues also dispute this proposition. They say that any deprivation suffered by Michelle is attributable to the fact that she lacks the practical ability to recover anything against Lawrence's insolvent estate. The result, in their view, is that what Risa received — a statutory entitlement to the proceeds — is different than what Michelle lost — which they characterize as the ability to enforce her contractual rights against Lawrence's estate (para. 111). Again, I disagree; since Risa was given the very thing that Michelle had contracted to receive *and was otherwise entitled to receive* (given that she held up her end of the bargain), it seems evident to me that Risa was enriched at Michelle's expense. To be clear, it is not simply that Risa gained a benefit with a value equal to the amount of Michelle's deprivation. Rather, what Risa gained is the precise benefit that Michelle lost: the right to receive the proceeds of Lawrence's life insurance policy. I would also add that the insolvency of Lawrence's estate simply means that Michelle would be unable to recover the value of her loss by bringing an action against Lawrence's estate in breach of contract; it does not affect her ability to bring an unjust enrichment claim

against Risa. The fact that a plaintiff has a contractual claim against one defendant does not preclude the plaintiff from advancing his or her case by asserting a separate cause of action against another defendant if it appears most advantageous (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 206).

[52] I would therefore conclude that the requisite enrichment and corresponding deprivation are both present in this case. The payability of the insurance proceeds by the Insurance Company for Risa's benefit did in fact impoverish Michelle "to the full extent of the insurance payout in [Risa's] favour" (Court of Appeal decision, at para. 208 (Lauwers J.A., dissenting)).

[53] In light of this, the Court of Appeal's order — which was made on the consent of the parties, and which requires that $7,000 of the proceeds be paid to Michelle and that the balance be paid to Risa — cannot be upheld on a principled basis. If there is a juristic reason for Risa's retention of the insurance money, then Michelle's claim will necessarily fail and Risa will be entitled to the full $250,000. If there is no such juristic reason, however, then Michelle's unjust enrichment claim will succeed and she will be entitled to a restitutionary remedy totalling that amount.

(2) Absence of Any Juristic Reason

[54] Having established an enrichment and a corresponding deprivation, Michelle must still show that there is no justification in law or equity for the fact that

Risa was enriched at her expense in order to succeed in her claim. As observed by Cromwell J. in *Kerr* (at para. 40):

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case . . . . [Emphasis added.]

[55] This understanding of juristic reason is crucial for the purposes of the present appeal. The third element of the cause of action in unjust enrichment is essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense — or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant's enrichment and the plaintiff's corresponding deprivation. If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff's expense, and the plaintiff's claim will fail accordingly. At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis. As McLachlin J. stated in *Peter* (at p. 990), "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'."

[56] In *Garland*, this Court shed light on exactly what must be shown under the juristic reason element of the unjust enrichment analysis — and in particular, on whether this third element requires that cases be decided by "finding a 'juristic

reason' for a defendant's enrichment" or instead by "asking whether the plaintiff has a positive reason for demanding restitution" (para. 41, citing *Garland v. Consumers' Gas Company Ltd.* (2001), 57 O.R. (3d) 127 (C.A.), at para. 105). In an effort to eliminate the uncertainty between these competing approaches, Iacobucci J. formulated a juristic reason analysis that proceeds in two stages.

[57] The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).

[58] If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an

opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).

[59] This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance of applying the doctrine of unjust enrichment flexibly, and in a manner that reflects our evolving perception of justice, on the other.

(a) *First Stage — None of the Established Categories Applies in These Circumstances*

[60] The first stage of the *Garland* framework asks whether a juristic reason from an established category operates to deny recovery. Michelle submits that none of these categories applies in the circumstances of this case. Risa takes the position that the *Insurance Act* required the proceeds of the policy to be paid exclusively to her as the validly designated beneficiary, such that the applicable legislation constitutes a juristic reason to deny the recovery sought by Michelle.

[61] The main issue at this stage of the analysis is therefore whether a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance*

Act — which, when coupled with Lawrence's insurance policy, makes it clear that Risa is the one to whom the insurance proceeds are payable — provides a juristic reason for Risa to retain those proceeds in light of Michelle's claim to the money. Put differently, the question can be framed as follows: is there any aspect of this statutory framework that justifies the fact that Risa was enriched *at Michelle's expense*? If so, Michelle's claim will necessarily fail.

[62] My colleagues dispute this proposition. In their view, it is sufficient to show that there is some juristic reason for the fact that the defendant was enriched, and there is thus no need to demonstrate that the enrichment *and the corresponding deprivation* occurred without a juristic reason. With respect, this proposition is at odds with the clear guidance provided by this Court in *Kerr* (para. 40, reproduced at para. 54 of these reasons) and disregards the work already done by the recognized categories of juristic reasons identified in *Garland*. Each of these categories points to a *relationship* between the plaintiff and the defendant that justifies the fact that a benefit passed from the former to the latter. To focus exclusively on the reason why the defendant was enriched is to ignore this key aspect of the law of unjust enrichment.

[63] Two categories of juristic reasons might be said to apply in the circumstances of this case: disposition of law and statutory obligations. Disposition of law is a broad category that applies in various circumstances, including "where the enrichment of the defendant at the plaintiff's expense is required by law, such as

where a valid statute denies recovery" (*Kerr*, at para. 41 (emphasis added)). The statutory obligations category operates in a substantially similar manner, precluding recovery where a legislative enactment expressly or implicitly mandates a transfer of wealth from the plaintiff to the defendant. Although there is undoubtedly a degree of overlap between these two distinct categories, what matters for the purposes of this appeal is that a plaintiff's claim will necessarily fail if a legislative enactment provides a reason for the enrichment and corresponding deprivation, so as to preclude recovery in unjust enrichment. As Professors Maddaugh and McCamus note in *The Law of Restitution*:

> . . . it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law. The payment of validly imposed taxes may be considered unjust by some but their payment gives rise to no restitutionary right of recovery. [Emphasis added; footnotes omitted; p. 3-28.]

[64] The jurisprudence provides ample support for this proposition. Among the issues in *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), was whether suppliers registered under the *Excise Tax Act*, R.S.C. 1985, c. E-15, that incurred costs in collecting the Goods and Services Tax on behalf of the federal government could recover those costs from the government on the basis of restitution. For a majority of this Court, Lamer C.J. answered this question in the negative:

> Under the GST Act the expenses involved in collecting and remitting the GST are borne by registered suppliers. This certainly constitutes a

> burden to these suppliers and a benefit to the federal government. However, this is precisely the burden contemplated by statute. Hence, a juridical reason for the retention of the benefit by the federal government exists unless the statute itself is *ultra vires*. [Emphasis added; p. 47.]

[65] A similar issue arose in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325. In that case, the respondents were charged under the *Fisheries Act*, R.S.C. 1970, c. F-14, for harvesting and attempting to sell large quantities of herring spawn. The Department of Fisheries and Oceans seized and sold the herring spawn, and the appellant Crown in Right of Canada held the proceeds pending the outcome of the proceedings. The proceedings were eventually stayed and the net proceeds paid to the respondents. Because the Crown refused to pay interest or any other additional amount, however, the respondents sought restitution in the amount of $132,000, on the ground that the Crown had been unjustly enriched by its retention of the proceeds during the time of seizure. Writing for a unanimous Court, Major J. denied that claim on the following basis:

> Here, Parliament has enacted a statutory regime to regulate the commercial fishery. It has provided an extensive framework dealing with the seizure and return of things seized. This regime specifically provides for the return of any fish, thing, or proceeds realized. This was followed. Interest or some other additional amount might have been gratuitously included, but it was not. The validity of the *Fisheries Act* was not, nor could have been, successfully challenged. Therefore, the Act provides a juristic reason for any incidental enrichment which may have occurred in its operation. As a result, the unjust enrichment claim fails. [para. 22]

In short, it was Major J.'s position that the statutory regime, by specifying what had to be returned, made it clear that anything falling outside of the specified categories

was to be retained by the Crown. In other words, the *Fisheries Act* stipulated that, in certain circumstances, a benefit would be retained by the Crown.

[66] These cases are examples of situations where a statute precluded recovery on the basis of unjust enrichment. It is to be noted that in each case, recovery was denied because the legislation in question expressly or implicitly required the transfer of wealth between the plaintiff and the defendant and therefore justified the defendant's retention of the benefit received at the plaintiff's expense. It is in this way that the applicable legislation can be understood as "denying" or "barring" recovery in restitution and therefore as supplying a juristic reason for the defendant's retention of the benefit.

[67] What, then, should we make of ss. 190(1) and 191(1) of the *Insurance Act*? The former permits the insured to identify the person to whom or for whose benefit the insurance money is payable when the insured passes away. Coupled with the insurance contract, it directs the insurer to pay the proceeds to the person so designated. The latter provides that such a designation may be made irrevocably.

[68] Given the fact that a statute will preclude recovery for unjust enrichment where it requires (either explicitly or by necessary implication) that the defendant be enriched to the detriment of the plaintiff, the provisions of the *Insurance Act* may therefore provide a juristic reason for the beneficiary's enrichment vis-à-vis any corresponding deprivation that may have been suffered *by the insurer* at the time the insurance money is eventually paid out. For this reason, an unjust enrichment claim

brought by the insurer against the designated beneficiary (revocable or irrevocable) would necessarily fail at this stage; the rights and obligations that exist in that context — both statutory and contractual — justify the beneficiary's enrichment at the insurer's expense (*Saskatchewan Crop Insurance Corp. v. Deck*, 2008 SKCA 21, 307 Sask. R. 206, at paras. 47-54).

[69] A valid beneficiary designation under the *Insurance Act* has also been found to constitute a juristic reason that defeats a third party's claim for the entirety of the death benefit in circumstances where that party paid some of the premiums under the erroneous belief that he or she was the named beneficiary. In *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, the deceased had maintained his first wife as the designated beneficiary under a life insurance policy. His second wife, who did not have a contractual right to be named as beneficiary, wrongly believed that he had executed a change of beneficiary designation in her favour, and paid some of the policy premiums — initially from a joint bank account she shared with the deceased and later from her own bank account. She sought the imposition of a constructive trust in her favour over the policy proceeds, arguing that there was no juristic reason for the first wife's enrichment. Even accepting that the second wife could be said to have suffered a corresponding deprivation, the Ontario Court of Appeal upheld the motion judge's finding that a valid beneficiary designation under the *Insurance Act* amounted to a juristic reason that defeated the second wife's claim for the insurance money that was payable to the first wife. I would observe that the claimant in that case sought a constructive trust over the entire

death benefit, and not merely the return of any payments made on the basis of her erroneous belief; the Court of Appeal did not decide whether she would be entitled to the return of those payments, and that question is not before us today.

[70] At issue in this case, however, is whether a designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides any reason in law or justice for Risa to retain the disputed benefit notwithstanding Michelle's prior contractual right to remain named as beneficiary and therefore to receive the policy proceeds. In other words, does the statute preclude recovery for a plaintiff, like Michelle, who stands deprived of the benefit of the insurance policy in circumstances such as these? In my view, it does not. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. As this Court explained in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at p. 90, the "legislature is presumed not to depart from prevailing law 'without expressing its intentions to do so with irresistible clearness'" (see also *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298). In *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273, for example, the British Columbia Court of Appeal found that the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, provided a "complete set of priority rules" that was "designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty" (paras. 21 and 27, citing *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3). In those circumstances, there was no "room for

priorities to be determined on the basis of common law or equitable principles" (para. 22). By contrast, while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.

[71] The reasoning put forward by McKinlay J. (as she then was) of the Ontario High Court of Justice in *Shannon v. Shannon* (1985), 50 O.R. (2d) 456, is particularly instructive in this regard. Like Michelle, the plaintiff in *Shannon* was the former spouse of an insured person who had contractually agreed to maintain the plaintiff as the sole beneficiary of the life insurance policy in his name and "not to revoke such beneficiary designation at any time in the future" (p. 458). Shortly thereafter, and in breach of his contractual obligation, the insured person surreptitiously changed the beneficiary designation in favour of his niece and nephew. He passed away several years later, and when the plaintiff discovered the change in beneficiary designation, she commenced an action asserting her entitlement to the proceeds of her former spouse's insurance policy. McKinlay J. found in her favour and made the following observations (at p. 461):

> It would appear from s. 167(2) [i.e. the predecessor of s. 190(2) of the *Insurance Act*] that the insured may at any time before the filing of an irrevocable declaration alter or revoke an existing designation by way of a declaration.

> The position of the defendant is that this is precisely what the insured did, and that any finding of the court of a trust in favour of the plaintiff would have the effect of the court's attempting to overrule a clear statutory provision.
>
> But the *Insurance Act* provides a statutory framework for the protection of the insured, the insurer and beneficiaries; equity imposes duties of conscience on parties based on their relationship and dealings one with another outside the purview of the statute. When he concluded the separation agreement with his wife, the deceased bound himself to maintain the policy in good standing, which he did; he also bound himself to maintain it for the benefit of his wife, which he did not. [Emphasis added.]

[72] *Shannon* therefore supports the proposition that while the *Insurance Act* may provide for the beneficiary's entitlement to payment of the proceeds, it "does not specifically preclude the existence of rights outside its provisions" (p. 461). Similarly, in *Chanowski v. Bauer*, 2010 MCBA 96, 258 Man. R. (2d) 244, the Manitoba Court of Appeal recognized that courts have readily accepted that contractual rights to policy proceeds may operate to the detriment of named beneficiaries:

> Generally, the courts have imposed remedial constructive trusts in factual circumstances where the deceased has breached an agreement regarding life insurance benefits. These have arisen most commonly in cases where the husband executed a separation agreement promising to retain his former wife as the beneficiary of his life insurance policy and, in contravention of that promise, before his death, the deceased changed the designation of his beneficiary to that of his present wife or another family member.

[73] Accepting that contractual rights to claim policy proceeds can exist outside of the *Insurance Act*, can an irrevocable designation under the *Insurance Act* nonetheless constitute a juristic reason for Michelle's deprivation? In my view, it

cannot. This is because the applicable statutory provisions do not require, either expressly or implicitly, that a beneficiary keep the proceeds *as against a plaintiff, in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death*. By not ousting prior contractual or equitable rights that third parties may have in such proceeds, the *Insurance Act* allows an irrevocable beneficiary to take insurance money that may be subject to prior rights and therefore does not give such a beneficiary any absolute entitlement to that money (*Shannon*, at p. 461). Put simply, the statute required that the Insurance Company pay Risa, but it did not give Risa a right to keep the proceeds as against Michelle, whose contract with Lawrence specifically provided that she would pay all of the premiums exclusively for her own benefit. Neither by direct reference nor by necessary implication does the statute either (a) foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary — whether revocable or irrevocable — or (b) preclude the imposition of a constructive trust in circumstances such as these (see *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (C.A.); see also *KBA Canada*).

[74] On this basis, the applicable *Insurance Act* provisions are distinguishable from other legislative enactments that have been found to preclude recovery, such as valid statutory provisions requiring the payment of taxes to the government (see *GST Reference*, at pp. 476-77; *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65

(C.A.), at p. 69, aff'd [1991] 3 S.C.R. 593). In that context, the plaintiff's unjust enrichment claim must fail because the legislation permits the defendant to be enriched even when the plaintiff suffers a corresponding deprivation. The same cannot be said about the statutory framework at issue in this case, however; there is nothing in the *Insurance Act* that justifies the fact that Michelle, who is contractually entitled to claim the policy proceeds, is nevertheless deprived of this entitlement for Risa's benefit.

[75] Moreover, in my view, the fact that *Shannon* was decided prior to *Soulos* and *Garland* is of no moment (Court of Appeal decision, at paras. 84 and 89). While those cases add to our understanding of the law on constructive trusts and unjust enrichment, they do not in any way undermine the holding in *Shannon* with respect to the effect of the *Insurance Act* in circumstances such as these.

[76] The majority below came to the opposite conclusion on this issue. Having considered the legislative regime governing beneficiary designations in Ontario, Blair J.A. held that the *Insurance Act* framework "lean[s] heavily in favour of payment of the proceeds of life insurance policies to those named as irrevocable beneficiaries, whereas it continues to recognize the right of an insured, at any time prior to such a designation, to alter or revoke a beneficiary who does not fall into that category" (para. 83). On this basis, he concluded that the legislative regime under which Risa had been designated as the irrevocable beneficiary of Lawrence's life

insurance policy supplied a juristic reason for her receipt of the proceeds, since it constituted both a disposition of law and a statutory obligation (para. 99).

[77] With respect, I disagree with two aspects of Blair J.A.'s reasons. First, he framed the issue as being whether the applicable *Insurance Act* provisions, pursuant to which Risa had been designated as irrevocable beneficiary, provided a juristic reason for her receipt of the insurance proceeds (paras. 26(iii) and 83). This, in my view, is the wrong perspective from which to approach this third stage of the unjust enrichment analysis. As stated above, the authorities indicate that the court's inquiry should focus not only on why the defendant received the benefit, but also on whether the statute gives the defendant the right to retain the benefit against a correspondingly deprived plaintiff — in this case, whether the *Insurance Act* extinguishes an unjust enrichment claim brought by a plaintiff at whose expense the named beneficiary was enriched (*GST Reference*, at p. 477; *Kerr*, at para. 31). And given the view expressed earlier in these reasons, it seems to me that the *Insurance Act* does not.

[78] Second, Blair J.A. placed a significant degree of emphasis on the distinction between revocable and irrevocable beneficiaries, and on the certainty and predictability associated with the statutory regime governing irrevocable designations. While it is clear that an irrevocably designated beneficiary has a "statutory right to remain as the named beneficiary" and is therefore "entitled to receive the insurance monies unless he or she consents to being removed" (para. 82), I am still not persuaded that s. 191 of the *Insurance Act* can be interpreted as barring

the possibility of restitution to a third party who establishes that this irrevocable beneficiary cannot, in good conscience, retain those monies in the face of that third party's unjust enrichment claim. To borrow the words of Professors Maddaugh and McCamus, "the fact that the insurer is directed by statute, implicitly if not directly, to pay the insurance monies to the irrevocable beneficiary, does not preclude recovery by the other intended beneficiary where retention of the monies by the irrevocable beneficiary would constitute an unjust enrichment" (*The Law of Restitution*, at p. 35-16). Therefore, the fact that Risa was designated pursuant to s. 191(1) of the *Insurance Act*, as opposed to s. 190(1), does not assist her against Michelle in the circumstances of this case.

[79] I would also observe that the majority below declined to "go so far as to say that the designation of a beneficiary as an irrevocable beneficiary under the *Insurance Act* invariably trumps a prior claimant" (para. 91), but nevertheless found that it did in this case. It is with this latter statement that I would disagree; as outlined above, my view is that the statutory scheme does not prevent a claimant with a prior contractual entitlement from succeeding in unjust enrichment against the designated beneficiary.

[80] My colleagues take the position that the *Insurance Act* provides a juristic reason for Risa's enrichment because it specifically provides that the proceeds, once paid to the irrevocable beneficiary, are immune from attack by the insured's creditors. They say that because "Michelle's rights are contractual in nature, she is a creditor of

Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds" (para. 122). While there is no dispute that Michelle may have a claim against Lawrence's estate, my view is that she is *also* a person at whose expense Risa has been enriched — and therefore a plaintiff with standing to claim against Risa in unjust enrichment. And while the *Insurance Act* specifically precludes claims by creditors suing on the basis of some obligation owed by the insured's estate, it does not state "with irresistible clearness" that a claim *in unjust enrichment* — i.e. a claim based on a different cause of action — brought by a plaintiff who also has a contractual entitlement to claim the insurance proceeds must necessarily fail as against the named beneficiary.

[81] For all of the foregoing reasons, I would echo the conclusion arrived at by Lauwers J.A., dissenting in the court below, that "[Michelle's] entitlement to the insurance proceeds as against [Risa] is neither precluded nor affected by the operation of the *Insurance Act*", with the result that this case "falls outside the category of disposition of law as a juristic reason to permit [Risa] to retain the life insurance proceeds" (para. 229).

[82] Since there is no suggestion that any other established category of juristic reason would apply in these circumstances, my conclusion at this first stage is that Michelle has made out a *prima facie* case.

(b) *Second Stage — Policy Reasons Militate in Favour of Michelle*

[83] The second stage of the juristic reason analysis affords the defendant an opportunity to rebut the plaintiff's *prima facie* case by establishing that there is some residual reason to deny recovery. At this stage, various other considerations come into play, like the parties' reasonable expectations and moral and policy-based arguments — including considerations relating to the way in which the parties organized their relationship (*Garland*, at paras. 45-46; *Pacific National Investments*, at para. 25; *Kerr*, at paras. 44-45).

[84] It is clear that both parties expected to receive the proceeds of the life insurance policy. Pursuant to the Oral Agreement, Michelle had a contractual right to remain designated as beneficiary so long as she continued to pay the premiums and kept the policy alive for the duration of Lawrence's life. Although she could have better safeguarded her interests by requiring Lawrence to designate her irrevocably, her expectation with respect to the insurance money — rooted in the Oral Agreement — is clearly reasonable and legitimate.

[85] Risa, by contrast, expected to receive the insurance money upon Lawrence's death by virtue of the fact that she had been validly designated as irrevocable beneficiary. Because Risa was designated after Lawrence and Michelle entered into the Oral Agreement, however, I am of the view that her expectation cannot take precedence over Michelle's *prior contractual right* to remain named as beneficiary, regardless of whether Risa knew that this was actually the case. To echo the findings of the application judge:

> While there is no evidence that [Risa] knew that [Michelle] was paying the premiums on the policy, she was aware that [Lawrence] was not in a position to do so. She says that she believed that [Lawrence's] brother was paying the premiums, but there is nothing in the record regarding the brother's motivation or intentions that would make [Risa's] belief in such action reasonable. [para. 49]

[86] Moreover, I am not persuaded that the oral nature of the agreement between Michelle and Lawrence undermines Michelle's expectation or serves as a public policy reason that favours Risa's retention of the proceeds. The legal force of unwritten agreements has long been recognized by common law courts. And while "kitchen table agreements" may in some cases result in situations where parties neither understand nor intend the legal significance of their agreement, this is not such a case; the parties do not dispute the finding that Michelle and Lawrence did in fact have an Oral Agreement that the former would pay the premiums on the policy and, in exchange, would be entitled to the proceeds of the policy upon the latter's death (Superior Court decision, at para. 17; Court of Appeal decision, at para. 22). Indeed, the existence of the Oral Agreement is quite clearly corroborated by Michelle's payment of the premiums following her separation from Lawrence.

[87] As a final point, it appears to me that the residual considerations that arise at this stage of the *Garland* analysis favour Michelle, given that her contribution towards the payment of the premiums actually kept the insurance policy alive and made Risa's entitlement to receive the proceeds upon Lawrence's death possible. Furthermore, it would be bad policy to ignore the fact that Michelle was effectively

tricked by Lawrence into paying the premiums of a policy for the benefit of some other person of his choosing.

[88] For the foregoing reasons, I would conclude that Risa has not met the burden of rebutting Michelle's *prima facie* case. It follows, therefore, that Michelle has made out each of the requisite elements of the cause of action in unjust enrichment.

B. *Appropriate Remedy: Imposition of a Constructive Trust*

[89] The remedy for unjust enrichment is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation — i.e. an order to pay damages — that may be enforced by the plaintiff against the defendant (*Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, at p. 47). In most cases, this remedy will be sufficient to achieve restitution, and it can therefore be viewed as the "default" remedy for unjust enrichment (*Lac Minerals*, at p. 678; *Kerr*, at para. 46).

[90] In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature — that is, an entitlement "to enforce rights against a particular piece of property" (McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 1295). The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust — a remedy which, according to Dickson J. (as he then was),

> is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement.
>
> (*Pettkus*, at pp. 843-44)

[91] While the constructive trust is a powerful remedial tool, it is not available in *all* circumstances where a plaintiff establishes his or her claim in unjust enrichment. Rather, courts will impress the disputed property with a constructive trust only if the plaintiff can establish two things: first, that a personal remedy would be inadequate; and second, that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed (*PIPSC*, at para. 149; *Kerr*, at paras. 50-51; *Peter*, at p. 988). And even where the court finds that a constructive trust would be an appropriate remedy, it will be imposed only to the extent of the plaintiff's proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property (*Kerr*, at para. 51; *Peter*, at pp. 997-98).

[92] The application judge concluded that Michelle had established an entitlement to the entirety of the proceeds of the life insurance policy on the basis of unjust enrichment, and he accordingly ordered that Risa held those proceeds on constructive trust for Michelle (para. 52). He specifically found that Michelle had

demonstrated a "clear 'link or causal connection' between her contributions and the proceeds of the Policy that continued for the entire duration of the Policy" (para. 50).

[93] While my analysis of Michelle's right to recover for unjust enrichment differs from that of the application judge, I see no reason to disturb his conclusion regarding the propriety of a remedial constructive trust in these circumstances. Ordinarily, a monetary award would be adequate in cases where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Furthermore, ordering that the money be paid out of court to Risa, and then requiring Michelle to enforce the judgment against Risa personally, would unnecessarily complicate the process through which Michelle can obtain the relief to which she is entitled. It would also create a risk that the money might be spent or accessed by other creditors in the interim.

[94] Moreover, the application judge found that Michelle's payment of the premiums was causally connected to the maintenance of the policy under which Risa was enriched. Because each of Michelle's payments kept the policy alive, and given that Risa's right as designated beneficiary necessarily deprived Michelle of her contractual entitlement to receive the entirety of the insurance proceeds, I would impose a constructive trust to the full extent of those proceeds in Michelle's favour.

[95] This disposition of the appeal renders it unnecessary to determine whether this Court's decision in *Soulos* should be interpreted as precluding the

availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty. Similarly, the extent to which this Court's decision in *Soulos* may have incorporated the "traditional English institutional trusts" into the remedial constructive trust framework is beyond the scope of this appeal. While recognizing that these remain open questions, I am of the view that they are best left for another day.

VI. Conclusion

[96] I would therefore allow the appeal without costs and order that the proceeds of the policy, with accrued interest, be impressed with a constructive trust in favour of Michelle and accordingly be paid out of court for her benefit.

The following are the reasons delivered by

GASCON AND ROWE JJ. —

I. Introduction

[97] This appeal is, without question, a difficult one. Michelle and Risa are both innocent victims of Lawrence's breach of contract and they equally invite substantial sympathy. Michelle paid approximately $7,000 to keep alive an insurance policy on the promise she would receive the proceeds if Lawrence died within its

TAB 14

Re Canwest Publishing Inc., 2010 ONSC 1328

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes and Alex Cobb* for the Canwest LP Entities
Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Hilary Clarke for the Bank of Nova Scotia, Administrative Agent for the Senior Secured Lenders' Syndicate
Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group
M. A. Church for the Communications, Energy and Paperworkers' Union
Anthony F. Dale for CAW-Canada
Deborah McPhail for the Financial Services Commission of Ontario

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried

employees or retirees including beneficiaries and surviving spouses (“the Salaried Employees and Retirees”). They also seek an order that Nelligan O’Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

[2] On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker’s Union of Canada (“CEP”) to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

[3] On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”) staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

[4] There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former

employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

[5] Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately $14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

[6] Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current services and special payments in respect of the active registered pension plan; and

(c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

[7] The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA

proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

[8] All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

[9] No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

[10] Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

> "The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee."

[11] The LP Administrative Agent does not consent to the funding request at this time.

[12] On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

[13] Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

[14] The issues on this motion are as follows:

(1) Should the Representatives be appointed?

(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?

(3) If so, should the request for funding be granted?

Positions of Parties

[15] In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

[16] The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

[17] Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

[18] The LP Senior Lenders support the position of the LP Entities.

[19] In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

[20] No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

[21] Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;

- any benefit to the companies under CCAA protection;

- any social benefit to be derived from representation of the group;

- the facilitation of the administration of the proceedings and efficiency;

- the avoidance of a multiplicity of legal retainers;

- the balance of convenience and whether it is fair and just including to the creditors of the Estate;

- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

- the position of other stakeholders and the Monitor.

[22] The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

[23] The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

[24] In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and

the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

[25] The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

[26] I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

[27] In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here

are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

[28] Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

Pepall J.

Released: March 5, 2010

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

REASONS FOR DECISION

Pepall J.

Released: March 5, 2010

TAB 15

Re Catalyst Paper Corporation, 2012 BCSC 451

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Catalyst Paper Corporation (Re),* 2012 BCSC 451

Date: 20120328
Docket: S120712
Registry: Vancouver

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

and

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

and

In the Matter of Catalyst Paper Corporation and the Petitioners Listed in Schedule "A"

Petitioners

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for Petitioners:	P.L. Rubin K. Burns A. Purgas
Counsel for Monitor:	K.M. Jackson
Counsel for A Representative Group of 2016 Noteholders:	J.R. Sandrelli S. Kukulowicz R. Jacobs
Counsel for Powell River Energy Inc., Quadrant Investments Ltd. and TimberWest Forest Corp.:	M. Buttery

Counsel for Catalyst TimberWest Retired Salaried Employees Association:	R.J. Kaardal A. Glen
Counsel for Wells Fargo Bank NA:	V. Sinha
Counsel for Representative Group of 2014 Unsecured Noteholders and Certain 2016 Noteholders:	T. Louman-Gardiner M. Wagner
Counsel for JPMorgan Chase Bank, N.A.:	J. Cockbill
Counsel for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2688:	S. Quelch
Counsel for Canexus Corp. and Casco Inc.	K. Esaw
Counsel for Wilmington Trust, National Association:	R. Patryluk G. Benchetrit
Counsel for Ad Hoc Committee of 2014 Noteholders:	D. McKinnon
Counsel for Catalyst Salaried Employees and Pensioner Committee:	A. Kaplan M. Prokosh D. Yiokaris J. Harnum
Counsel for CEP Unions - Locals 1, 76 (Powell River), 592, 686 (Port Alberni), 1132 (Crofton), 630, 1123 (Campbell River):	D. Bobert
Counsel for PPWC Local 2:	C. Gordon
Counsel for Superintendent of Pensions:	S. Wilkinson
Counsel for Board of Directors of Catalyst:	H. Ferris
Counsel for Perella Weinberg Partners LP:	K. McElcheran
Counsel for Wajax Industries:	K. Rowan Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. February 23, 2012
Place and Date of Judgment:	Vancouver, B.C. March 28, 2012

[1] On February 23, 2012, a group of current, former and retired employees of the Petitioners (the "CSE&P Committee") applied for an order amending the Amended and Restated Initial Order of February 3, 2012 (the "R.I.A.") by removing paragraph 84 of the R.I.A. and replacing it with the following:

> (a) Ronald Gary McCaig, Jeff Whittaker, Janice Young, Peter Flynn, Patricia Dwornik, and Francesca Pomeroy (the "CSE&P Committee"), acting on their own behalf and on behalf of the Catalyst Salaried Employees & Pensioners group are, until further Order of this Court, entitled to make representations to the Court as, and be, the authorized representatives of Canadian employed or resident persons, and in particular:
>
> (i) all current non-unionized employees of Catalyst Pulp Operations Limited, Catalyst Pulp Sales Inc., Pacifica Poplars Ltd., Catalyst Pulp and Paper Sales Inc., Elk Falls Pulp and Paper Limited, Catalyst Paper Energy Holdings Inc., 0606890 B.C. Ltd., Catalyst Paper Recycling Inc., Catalyst Paper Recycling Inc., Catalyst Paper (Snowflake) Inc., Catalyst Paper Holdings Inc., Pacific Papers U.S. Inc., Pacifica Poplars Inc., Pacifica Papers Sales Inc., Catalyst Paper (USA) Inc. or the Apache Railway Company (collectively "Catalyst") or any person claiming an interest under or on behalf of such employees;
>
> (ii) all active, deferred vested and retired members of the Catalyst Paper Corporation Retirement Plan for Salaried Employees (Reg. No. 85400-1), the Catalyst Paper Corporation Retirement Plan "A" (Reg. No. 85944-1) and/or the Catalyst Paper Corporation Retirement Plan "C" (Reg. No. 55234) (collectively, the "Catalyst Pension Plans"), or any person claiming an interest under the Catalyst Pension Plans; and
>
> (iii) all non-unionized current and former employees of Catalyst and its predecessors with an entitlement under any other unregistered supplementary pension benefit, post-retirement benefit, health and dental benefit, life insurance benefit, long term disability benefit, short term disability benefit, death and dismemberment benefit or any other employee benefit sponsored by Catalyst or one of its predecessors (collectively "OPEBs"), or any person claiming an interest under an OPEB under or on behalf of such employees and former employees.
>
> (collectively, the "Employee Creditors").
>
> (b) Counsel to the CSE&P Committee will be considered an "Assistant" pursuant to paragraph 8(c) of the Amended and Restated Initial Order.

[2] By memorandum dated March 5, 2012 I informed the parties that the application was dismissed with reasons to follow. These are those reasons.

Background

[3] On January 31, 2012 the Court granted protection (the Initial Order) to the Petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA")*. The Initial Order was applied for in some haste because until a few days prior to January 31 it appeared that the Petitioners would be able to reorganize their affairs by means of a plan of arrangement pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). However, certain conditions precedent to the proposed *CBCA* plan of arrangement were not met and these proceedings resulted.

[4] *The Initial Order was amended and restated by the R.I.A. Paragraph 12(c) of* the R.I.A. authorized and directed the Petitioners to make all normal employer cost contributions to defined benefit and defined contribution pension plans. Paragraph 12(d) authorized but did not require the Petitioners to make the special payments to pension plans set out in a letter from the Superintendant of Pensions (the "Superintendent") dated December 14, 2011 (the "Extension Letter") but prohibited the Petitioners from making any special or catch up payments on an accelerated basis without further court order made on notice to the D.I.P. Agent, to the Steering Committee for the 2016 Noteholders, and to counsel for the Ad Hoc Noteholders.(terms are as capitalized in R.I.A.)

[5] The Extension Letter authorized the Petitioners to fund solvency deficiencies in the Petitioners' defined benefit pension plans nos. P085400-1 and P085994-1 (the "Defined Benefit Plans") over a seven year period, thereby extending the five year period within which such solvency deficiencies would otherwise have had to be funded pursuant to requirements of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 (the *PBSA*). It was therefore of significant benefit to the Petitioners' liquidity. However, the Extension Letter contained a provision that if the Petitioners filed for protection under the *CCAA*, it would be rescinded and all contributions and

payments to the Defined Benefit Plans would be considered to be due and owing in accordance with s. 6 of the *PBSA*.

[6] At an early stage of these proceedings I was informed that the Petitioners, representatives of the 2016 noteholders, the Superintendant, the D.I.P. lender and the Catalyst Timberwest Retired Salaried Employees Association ("RSEA") as representative of pension beneficiaries of the Defined Benefits Plans were in discussions to address the consequences of the *CCAA* filing. I was not provided with details of those discussions but was informed that one of the topics under discussion was the applicability and implications to this proceeding of the Ontario Court of Appeal decision in *(Re) Indalex Ltd.*, 2011 ONCA 265 (*Indalex)*.

[7] On February 7, 2012, I was informed that the parties referred to in the preceding paragraph had reached an agreement to resolve these issues. The essential points of this agreement were that the Petitioners agreed to make additional payments of $550,000 on March 18 and April 15, 2012 to the trustees of the Defined Benefit Plans and the Superintendent waived her right to rescind the Extension Letter.

[8] By order dated the same date, on the application of the Petitioners I made an order amending the R.I.A. to give effect to the settlement. I recognized RSEA as authorized representative of pension beneficiaries under Pension Plan no. P085994-1. This is by far the larger of the Deferral Benefit Plans. At that time I proceeded on the basis that these arrangements were acceptable to the secured creditors, including the D.I.P. lenders and the 2016 noteholders, as well as the 2014 noteholders. It was implicit in that agreement that the pension beneficiaries agreed that the D.I.P. lender's security would rank in priority to any rights of the pension beneficiaries, including rights under the *PBSA* and under any fiduciary claim against the Petitioners and its management. Counsel for the applicants on this application attended that hearing by telephone and did not oppose the relief sought or seek to adjourn the application.

[9] On February 14, the Petitioners applied for a final order granting the D.I.P. financing a priority charge on the working capital assets of the Petitioners, and granting the D.I.P. lenders' charge priority over any deemed trust under the *PBSA*, any claim in respect of breach of fiduciary duty and any future charge that might arise under ss. 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (*B.I.A.*).

[10] The provision granting priority over any claim for breach of fiduciary duty was sought to address any issue that might arise pursuant to *Indalex.* Counsel for the applicants on this application attended that hearing and sought an order adjourning the application to February 23, the same date on which this application was heard.

[11] I granted the order sought on February 14, 2012 because of the critical importance to the Petitioners of being able to access additional credit under the D.I.P. facility without further delay. Pursuant to paragraph 42 of the R.I.A. the amount available to be drawn under the D.I.P. facility was limited to $40,000,000 until certain condition precedents were met, one such condition being the granting of super priority to the D.I.P. lenders' charge. I was also of the view that the concerns of pension beneficiaries had been addressed to the satisfaction of their representative by the February 7, 2012 Order, which, as I have indicated, was not opposed by any party, including the present applicants.

[12] I did, however, permit the applicants to make this application, which was heard on February 23, 2012.

[13] Counsel for the applicants began his submission by submitting that I should approach these applications as a hearing *de novo* of the representation issue notwithstanding the February 7, 2012 Order.

[14] Counsel then made seven points in support of the applications:

1. The applicants represent a ground up, grass roots group that is representative of a broad cross section of unorganized employees, former employees and persons with pension rights that had heretofore not been represented.

2. The relationship of the applicants and those they represent to the firm of Koskie Minsky is direct in that it is proposed that there be a direct solicitor client relationship between each member of the group and the firm.

3. Koskie Minsky has recognized experience and expertise in representing similar classes of creditors in other *CCAA* proceedings and with respect to pension issues generally.

4. The definition of persons interested in protecting pension rights contained in the February 7, 2012 Order was imprecise and ambiguous.

5. The proposed group for which representation was sought was a particularly vulnerable one.

6. There is a social benefit in having this group represented by counsel and by the efficiency of having one counsel represent it.

7. There was no prejudice to any one, and in particular no prejudice to RSEA, because RSEA could opt out of the representation order and had the resources to retain counsel to represent it.

[15] With regard to the nature of this application, I agree that the fact that RSEA was named as representative of pension beneficiaries in the February 7 order should not deprive the applicants of the ability to argue these applications on the merits. I therefore intend to approach the applications not on the basis that the applicants must show why RSEA should be displaced but on the basis of what order would be in the best interests of the affected group. However, in assessing this question I will have regard to what has transpired to date and in particular to whether RSEA has acted in an effective and efficient manner in representing the interests of pension beneficiaries to date. I also think it appropriate to take into account the additional cost of having a new firm familiarize itself with the circumstances of this proceeding.

[16] RSEA's position is that it represents a significant majority of pension beneficiaries, that it has expertise and experience both in financial matters and matters relating to the Petitioners and the British Columbia forest industry, that it has chosen capable counsel and that it has demonstrated the ability to effectively represent the interests of pension beneficiaries. It also submits that the group that the applicants propose to represent is overly broad and that there are actual and potential conflicts within that group that make it inappropriate for them to have a single representative.

[17] I do not think it is necessary to deal with each the seven points made by the applicants. In my view the critical issues are whether the orders sought are necessary to ensure fair and adequate representation of the group sought to be represented and whether the applicants had established that they have a mandate to represent the group as defined in the application.

[18] The applicants have failed to persuade me that they should be designated as the authorized representative of the groups identified in the notice of application. The most pressing and important issue facing this group at present is the protection of their position as beneficiaries of the Defined Benefit Plans. While it is clear that all salaried employees enrolled in the Defined Benefit Plans have an interest in their future, I am persuaded that it is the current pensioners that have the most pressing and immediate interest in that issue.

[19] The material filed on these applications shows that a significant majority of the current pensioners wish to have RSEA continue to represent their interests. The affidavit of Alan Statham states that as of February 21, 2012, 432 members and 4 non members of RSEA had delivered written authorizations to the board of RSEA authorizing it to represent their interests in this proceeding. While I agree that numbers alone should not be determinative of who is best placed to represent a group, the authorizations provided to RSEA do indicate a significant level of support for the actions it has taken to date.

[20] I also accept that RSEA has a long history of dealing with pension issues and with Catalyst and its predecessors and that the board of RSEA has substantial experience in the British Columbia forestry sector as well as in financial management.

[21] Given the substantial support that the board of RSEA has from its members it is likely that if I were to grant the applications there would be more affected retirees who opt out of the representation than remain within it.

[22] In his submissions the applicants' counsel was very critical of the amendments to paragraph 55 of the R.I.A. that were granted in the February 14, 2012 Order granting the charges priority over pension claims. The thrust of the submission was that the priority granted to the charges over deemed trusts and claims for claims for breach of fiduciary duty were extremely onerous and unfair to pension beneficiaries. The implication of this was that RSEA had not adequately or effectively represented the interests of pension beneficiaries in the proceedings leading up to the making of that order.

[23] I can see no basis for the criticism or the implication. The priority granted by paragraph 55 must be considered in the context of the overall objective of this proceeding; to permit the Petitioners to remain in business on a stable and sustainable financial foundation for the benefit of all stakeholders including pension beneficiaries. Nothing in the record of these proceedings leads to the conclusion that RSEA has not effectively and prudently represented the interests of pension beneficiaries.

[24] I have also been persuaded that the governance structure of RSEA and the arrangement whereby its counsel has a single instructing client is a more efficient and effective means of representation of pension beneficiaries than the ad hoc committee and direct individual representation model proposed by the applicants.

[25] I am satisfied that both law firms are well qualified to act in this matter. Koskie Minsky is well known for its expertise in *CCAA* and pension matters. However

Hunter Litigation is well known to this Court as respected counsel with considerable experience in matters involving the British Columbia forest industry. I also note that while the applicants seek an order appointing Koskie Minsky as representative counsel, the existing order leaves the choice of counsel in RSEA's hands. Generally, I think it preferable to leave the choice of counsel up to a representative group rather than having the Court impose one. RSEA's demonstrated ability to retain and instruct counsel of its choice is a factor that favours continuing its representation of pension beneficiaries.

[26] I am however satisfied the group which RSEA was authorized to represent was not adequately defined or inclusive of all pension beneficiaries. The group for which RSEA was entitled to make representations and be the authorized representative of in the February 7, 2012 Order was identified as "pension beneficiaries of the Company's Salaried Plan."

[27] In his submissions, counsel for RSEA confirmed that he did not purport to represent current salaried employees of the Petitioners who have rights under the Defined Benefit Plans.

[28] I agree that the group that RSEA represents does not capture all those persons who have a direct interest in the Defined Benefit Plans. It does not include current employees who have vested rights but are not yet receiving benefits from the plan. There are former salaried employees who have vested deferred rights under the Defined Benefit Plans who are not represented by RSEA.

[29] In the course of argument it also emerged that the descriptions of the various beneficiaries used by both parties were not consistent with the definitions contained in the *PBSA.* The *PBSA* defines such beneficiaries as follows:

> **"member"** means, in relation to a pension plan that has not been terminated, an employee, and in the case of a multi-employer plan includes a former employee,
>
> > (a) who has made contributions to the plan or on whose behalf an employer was required by the plan to make contributions, and

> (b) who has not terminated membership or begun receiving a pension;
>
> **"former member"** means, in relation to a pension plan, an employee or former employee
>
> (a) whose membership has been terminated,
>
> (b) who has begun receiving a pension, or
>
> (c) whose plan has been terminated,
>
> and who retains a present or future entitlement to receive a benefit under the plan.

[30] It can be seen from these definitions that RSEA considers that it represents plan former members but not plan members. Counsel for the applicants correctly points out that plan members have a real and substantial interest in the Defined Benefit Plans but do not have any authorized representative in these proceedings. He submits that it is unjust that they lack representation.

[31] I can see the force of the applicants' counsel's submission in this regard. However I must consider the application that is actually before me. That application seeks to displace RSEA as the authorized representative of pension beneficiaries which under the *PBSA* definitions include plan former members. It would not be appropriate for me to make a representation order for a smaller class than was applied for.

[32] When I was preparing these reasons, I had intended to indicate that I would consider a renewed application from the applicants to represent plan members. However, events have overtaken the necessity for such an application. On March 8, 2012, I made an order authorizing the Petitioners to make payments to the Catalyst Salaried Employees and Pensioners Group on account of their legal costs in *CCAA* matters in this proceeding. That order makes it unnecessary for me to consider a further application for representation of plan members.

[33] I am persuaded, however, by the submissions made by counsel for the Superintendant of Pensions that my order appointing RSEA should be amended to make it clear what group it is in fact representing. The definition of the group proposed by counsel is as follows:

> Plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.

[34] I accept that this is an accurate description of the group represented by RSEA, and is expressed in terms consistent with the definitions contained in the *PBSA*. I consider that I have the jurisdiction under s. 11 of the *CCAA* to make a remedial order clarifying the group that RSEA is authorized to represent. My order of February 7, 2012 is varied accordingly to substitute the above description for the words pension beneficiaries in paragraph 84(a) of the R.I.A.

[35] In all other respects the application is dismissed.

"Sewell J."

TAB 16

Re Fraser Papers Inc., 2009 CanLII 55115 (ON SC)

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20090917

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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 WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

BEFORE: PEPALL J.

COUNSEL: *M. Barrack and D.J. Miller* for the Applicants
R. Chadwick and C. Costa for the Monitor
D. Wray and J. Kugler for the Communications, Energy, and Paper Workers Union of Canada and as agent for Pink Larkin
C. Sinclair for the United Steelworkers
T. McRae and S. Levitt for the Steering Committee of Fraser Papers' Salaried Retirees Committee
M. P. Gottlieb and S. Campbell for the Committee for Salaried Employees and Retirees
M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Business of New Brunswick
Chris Burr for CIT Business Credit Canada Inc.
D. Chernos for Brookfield Asset Management Inc.

Pepall J.

ENDORSEMENT

Relief Requested

[1] There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel,

Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

[2] The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

[3] A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.[1] These retirees therefore would only be encompassed by the Davies proposed retainer.

Discussion

[4] The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

[5] On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

[6] Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD $171.5 million as at December 31, 2008.

[7] Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(a) USW and CEP Motions

[8] Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[2]. The evidence filed by the USW suggests that a labour organization that

[1] This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.
[2] 29 U.S.C.

negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the

bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

[9] In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

[10] Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) Nelligan/Shibley and Davies

[11] Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp. (Re)*[3], Morawetz J. applied the Court of Appeal's decision in *Re Stelco*[4] and the decision of *Re Canadian Airlines Corp.*[5] to enumerate the following principles applicable to an assessment of commonality of interest:

> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

[12] Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs.

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[3] [2009] O.J. No. 2166.
[4] 15 C.B.R. (5th) 307 (Ont. C.A.)
[5] (2000) 19 C.B.R. (4th) 12 Alta Q.B.

[13] Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

[14] I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

[15] Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

[16] In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

[17] In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

[18] Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

[19] The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

[20] In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

Pepall J.

TAB 17

Re Nortel Networks Corporation,
2009 CanLII 26603 (ON SC)

COURT FILE NO.: 09-CL-7950
DATE: 20090527

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

APPLICANTS

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Janice Payne, Steven Levitt and Arthur O. Jacques for the Steering Committee of Recently Severed Canadian Nortel Employees**

Barry Wadsworth for the CAW-Canada and George Borosh and Debra Connor

Lyndon Barnes and Adam Hirsh for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Alan Mersky and Derrick Tay for the Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz and Aaron Hershtal for the Steering Committee for The Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for the Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini and Chris Armstrong for Ernst & Young Inc., Monitor

Gail Misra for the Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler and S. Philpott for Certain Former Employees of Nortel

G. H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for the Unsecured Creditors' Committee (U.S.)

HEARD: **April 20, 2009**

E N D O R S E M E N T

[1] On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

[2] This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

[3] The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate

motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

[4] At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

[5] Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

[6] The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

[7] The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

[8] The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

[9] These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 – Representative Counsel and Funding Orders

[10] The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

[11] Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

[12] In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

[13] In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

[14] I am in agreement with these general submissions.

[15] The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

[16] In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 – Who Should be Appointed as Representative Counsel?

[17] The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

[18] The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:

(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

[19] Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

[20] Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

[21] J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

[22] Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

[23] The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay,

retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

[24] Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

[25] Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

[26] Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

[27] As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

[28] At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

[29] Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

[30] Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

[31] Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

[32] Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

[33] The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

[34] The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

[35] At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

[36] The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

[37] With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

[38] Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

[39] The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

[40] They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

[41] In the NS factum at paragraphs 44 – 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to

date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

[42] The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

[43] The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

[44] Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

[45] Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

[46] Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

[47] KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

[48] KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

[49] KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 – 21.

[50] KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

[51] Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

[52] With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

[53] To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be

accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

[54] It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

[55] A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

[56] In the responding factum at paragraphs 28 – 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

[57] The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

[58] In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

[59] Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be

charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

[60] Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

[61] In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

[62] Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Re Stelco Inc.*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Re Stelco*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Re Canadian Airlines Corp*. and articulated the following factors to be considered in the assessment of the "commonality of interest".

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.
>
> *Re Stelco Inc*., 15 C.B.R. 5th 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp*. (2000) 19 C.B.R. 4th 12 Alta. Q.B., para 31.

[63] I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

[64] As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

[65] The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

[66] The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

[67] I would ask that counsel prepare a form of order for my consideration.

MORAWETZ J.

DATE: May 27, 2009

TAB 18

Re Nortel Networks Corporation et al,
2017 ONSC 700

CITATION: Re Nortel Networks Corporation et al, 2017 ONSC 700
COURT FILE NO.: 09-CL-7950
DATE: 20170130

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

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

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett, Jay A. Carfagnini, Joseph Pasquariello and Christopher G. Armstrong*, for the Monitor

Jennifer Stam, for the Canadian Debtors

R. Paul Steep, for Morneau Sheppell and the Canadian Creditors Committee

Mark Ziegler and Barbara Walancik, representative counsel for the Canadian former employees and LTD beneficiaries

Barry E. Wadsworth, for active, retired and disabled employees represented by Unifor

Max Starnino, for the Pension Benefit Guarantee Fund

Matthew Urback, for the Canadian continuing employees

Scott Bomhof and Adam Slavens, for the U.S Debtors

R. Shayne Kukulowicz and M. Wunder, for the U.S. Unsecured Creditors' Committee

Michael E. Barrack and D.J. Miller, for the UKPC

Gavin H. Finlayson, for the Ad Hoc Bondholders Group

John Salmas, for Wilmington Trust, National Association, Trustee

Joseph Greg McAvoy, in person

Jennifer Holley, in person

HEARD: January 24, 2017

ENDORSEMENT

[1] On January 24, 2017, a joint hearing of this Court and the U.S. Bankruptcy Court for the District of Delaware was held to deal with motions for the sanctioning of plans of arrangement effecting a settlement by all major parties of the allocation dispute regarding the $7.3 billion held in escrow since the sale of the Nortel assets. At the conclusion of the hearing, I granted the motion of the Monitor to sanction the Canadian Debtors' Plan of Compromise and Arrangement (the "Plan") and to release the escrowed sale proceeds in accordance with the settlement, for reasons to follow[1]. These are my reasons.

Background

[2] The Canadian Nortel Debtors, along with the U.S. Nortel Debtors, EMEA Nortel Debtors, and certain of their respective key stakeholder groups were party to protracted litigation in the Canada and U.S. regarding the allocation of the $7.3 billion in sale proceeds (the "Sale Proceeds"). Following a 21-day cross-border trial, this Court and the U.S. Bankruptcy Court

[1] Judge Gross also sanctioned the U.S. plan of arrangement and signed at the hearing the necessary orders to effect the plan.

[21] It is argued by the LTD Rep that the *Charter* does not apply to the courts, reliance being placed on *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 at paras. 34 and 36. In that case, the SCC declined to set aside an injunction on the basis that a court order does not constitute governmental action for the purposes of the *Charter* and stated that the judicial branch is not an element of governmental action for the purposes of the *Charter*. It said that the word "government" in section 32 of the *Charter* referred to the legislative, executive, and administrative branches of government.

[22] However, there are other cases in the SCC that say otherwise. In *R. v. Rahey*, [1987] 1 S.C.R. 588, the SCC held that an unreasonable delay by the trial judge in deciding on an application for a directed verdict by the accused at the close of the Crown's case had denied to the accused the section 11(b) right to be tried within a reasonable time, and stayed the proceedings. In *Rahey*, of the four judges who wrote opinions, only La Forest J. averted to the point of the *Charter* applying to a court. He stated:

> 95 …it seems obvious to me that the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general.

[23] In *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, the SCC refused to set aside an injunction ordered by the Chief Justice of British Columbia against picketing outside the court that had been made without notice to the union because although the injunction contravened the section 2(b) right to freedom of expression, it was justified by section 1. Chief Justice Dickson distinguished *Dolphin* as follows:

> 56 As a preliminary matter, one must consider whether the order issued by McEachern C.J.S.C. is, or is not, subject to *Charter* scrutiny. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573, holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party.

> The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.

[24] In dealing with these three decisions, Professor Hogg has stated that while it is impossible to reconcile the definition of "government" in *Dolphin* with the decisions in *Rahey* and *BCGEU*, the cases can be accommodated. See Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. supplemented Thomson: Carswell, 2007 at § 37-22. He states:

> The *ratio decidendi* of Dolphin Delivery must be that a court order, when issued as a resolution of a dispute between private parties, and when based on the common law, is not governmental action to which the *Charter* applies. And the reason for the decision is that a contrary decision would have the effect of applying the *Charter* to the relationships of private parties that s. 32 intends to exclude from *Charter* coverage. Where, however a court order is issued on the court's own motion for a public purpose (as in *BCGEU*), or in a proceeding to which government is a party (as in any criminal case, such as *Rahey*), or in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order.

[25] In this case, the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute. While it is not strictly necessary for me to decide whether the *Charter* applies to such an order in light of the view that I take of the section 7 and 15 rights asserted by the LTD Objectors, I accept that any order I make to sanction the Plan may be subject to the *Charter*.

[26] There is another issue, however, regarding the right of the LTD Objectors to raise a *Charter* challenge. They were represented by competent counsel in 2010 on the motion to approve the Employee Settlement Agreement. They did not raise any *Charter* challenge to that agreement before Morawetz J. or in the Court of Appeal on their application to appeal from the Settlement Approval Order made by Morawetz J. So far as the LTD benefits are concerned, the Plan merely contains the provisions for them in the Employee Settlement Agreement. Issue estoppel prevents the LTD Objectors from now raising a *Charter* challenge to those provisions.

[27] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[28] What the LTD Objectors seek is to have the allocation proceeds re-allocated by providing that 100% of the claims of the LTD Beneficiaries will be paid from the Sale Proceeds at the expense of all other claimants. This involves their economic interests which are not protected by section 7 of the *Charter*. In *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R 6 Justice Major for the Court stated:

> 45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the Charter to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's Charter jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:
>
> > ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
>
> More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:
>
> > The prejudice to the respondent in this case ... is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to

> state interference with his security of the person would be to stretch the meaning of this right.

[29] Professor Hogg in *Constitutional Law of Canada* at §47.9 makes clear that purely economic interests are not protected by section 7. He states:

> Section 7 protects "life, liberty and security of the person". The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7. …
>
> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with no power over the purely economic interests of individuals or corporations. It also requires, as have noticed in the earlier discussion of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise property, having been shut out of the front door, would enter by the back.

[30] What is in play in this case are pure economic rights among the creditors of Nortel and the request of the LTD Objectors to be compensated by the other Nortel creditors. There is authority that a plan of compromise or arrangement is simply a contract between the debtor and its creditors. See *Olympia & York Developments Ltd. (Re)* at para. 74.

[31] Section 7 does not assist the LTD Objectors in their request for unequal treatment for unequal treatment.

[32] Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[33] In this case, it cannot be said that the LTD Objectors are being deprived of these section 15 rights because of discrimination based on physical disability. They are being treated like all creditors of Nortel. All unsecured creditors, be they bondholders, trade creditors, pensioners or LTD Beneficiaries, will receive the same *pari passu* treatment under the Plan. They are treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is the fundamental tenet of insolvency law. Except for the two LTD Objectors, all other LTD Beneficiaries, in excess of 300 in number, accept this equal treatment.

[34] LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, without discrimination. Pensioners, their beneficiaries, surviving spouses of deceased employees, Former Employees and LTD Beneficiaries are all unsecured creditors who are experiencing hardship due to lost income and benefits in the Nortel insolvency. All are disadvantaged to varying degrees, depending on personal circumstances and there is no basis for preferring one group above others. All have suffered losses in the Nortel insolvency. This was recognized by Justice Morawetz in 2010 when the Monitor applied for an order for distribution of the assets of the HWT (from which benefits were paid to beneficiaries, including the LTD Beneficiaries), on a *pari passu* basis. That was opposed by the LTD Objectors. In his decision of November 9, 2010 accepting the position of the Monitor at *Nortel Networks Corp., Re*, 2010 ONSC 5584, Justice Morawetz said:

> 110 As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need.[2]

[2] Leave to appeal to the C of A denied 2011 ONCA 10; leave to appeal to the SCC [2011] S.C.C.A. No. 124.

[35] In the circumstances, I cannot find any breach of section 15 of the *Charter*.

Conclusion

[36] For the foregoing reasons, I have sanctioned the Plan and made an order authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated by the Settlement and Support Agreement.

"F.J.C. Newbould J."
Newbould J.

Date: January 30, 2017

TAB 19

Re Target Canada Co., 2015 ONSC 303

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

    a) Should the stay be extended to the Partnerships?

    b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

    c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

    d) Should the Court approve protections for employees?

    e) Is it appropriate to allow payment of certain pre-filing amounts?

    f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

    g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

    h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund*, 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 20

Re Target Canada Co., 2015 ONSC 1028

CITATION: Target Canada Co. (Re), 2015 ONSC 1028
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-02-18

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, John MacDonald* and *Shawn Irving,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

William Sasso, Sharon Strosberg and *Jacqueline Horvat*, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

HEARD: February 11, 2015

RELEASED: February 18, 2015

ENDORSEMENT

[1] The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");

b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");

c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;

d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;

e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;

f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and

g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

[2] On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

[3] The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

[4] Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

[5] The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

[6] The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

[7] There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

[8] The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

[9] The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

[10] The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

> **Factors to be considered** – 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.

[11] The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

[12] Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

[13] It is in this context that the issue of the disclaimer has to be considered.

[14] Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

> 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
>
> 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. …
>
> 53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. …
>
> 55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

[15] It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

[16] With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement.

[17] However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

[18] The Monitor has made reference to the issues affecting the pharmacies in its Reports.

[19] The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 – 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

[20] The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

[21] I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

[22] With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

[23] The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

[24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd., Re*, 2012 ONSC 4471 at paragraph 62 as follows:

> [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

[26] The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

> 27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

[27] In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

[28] The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

[29] The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

> 64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy

businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.

64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.

66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to win down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

[30] In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

[31] Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancilliary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

[32] I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

[33] In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

[34] In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

[35] The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

[36] The funding of this representational role is to be limited. The Applicants are to make available up to $100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

[37] Such assistance is to be limited to:

a. corresponding with the regulators concerning the wind-down process and the relocation process;

b. return of inventory; and

c. participating in the claims process.

[38] If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

[39] In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

[40] Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

[41] In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

R.S.J. Geoffrey Morawetz

Date: February 18, 2015

TAB 21

Re Timminco Limited, 2012 ONSC 4471

CITATION: Timminco Limited (Re), 2012 ONSC 4471
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120803

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Maria Konyukhova, for the Applicants**

Robin B. Schwill, for J. Thomas Timmins

Steven J. Weisz, for the Monitor

Debra McPhail, for the Superintendent of Financial Services

Thomas McRae, for B51 Non-Union Employee Pension Committee and B51 Union Employee Pension Committee

Charles Sinclair, for the United Steelworkers

James Harnum, for Mercer Canada

HEARD: **JUNE 4, 2012**

ENDORSEMENT

OVERVIEW

[1] Mr. J. Thomas Timmins, a former Chief Executive Officer ("CEO") of Timminco Limited ("Timminco") moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the "1996 Agreement") and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

[2] In response, Timminco brought a cross-motion for an order declaring that Timminco's obligations under the 1996 Agreement, as amended by letter agreement effective May 28, 2011 (the "Letter Agreement" and, together with the 1996 Agreement, the "Agreement"), constitute pre-filing obligations which are stayed by the Initial Order granted in these proceedings on January 3, 2012.

[3] Alternative positions have also been presented by the parties.

[4] Timminco puts forth the alternative that, if Mr. Timmins' motion is granted, Timminco seeks an order that the 1996 Agreement be disclaimed in accordance with section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and that the effective date of the disclaimer of the Agreement (if such a disclaimer is held to be required) should be April 30, 2012.

[5] In response to this alternative position, Mr. Timmins seeks an order that the court deny Timminco's request to have the 1996 Agreement disclaimed and, in any event, if the 1996 Agreement is disclaimed, Timminco should not be relieved of its obligation to pay the monthly fees that have and continue to accrue from the date Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

[6] Mr. Timmins asks that the court deny Timminco's request to have the 1996 Agreement disclaimed in accordance with section 32 of the CCAA as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of Timminco, and would objectively result in significant financial hardship to Mr. Timmins.

FACTS

[7] Mr. Timmins resigned from his position as CEO on May 28, 2001, but remained a director of Timminco until mid-2007, at which time he resigned from the board and sold all of his remaining equity interests.

[8] The preamble to the 1996 Agreement provides:

> The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.

[9] The 1996 Agreement provides that Timminco agreed to pay Mr. Timmins a monthly amount by which $29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins] retirement under any pension or retirement plans of [Timminco].

[10] The monthly payments were to commence on the first day of the month following Mr. Timmins retirement and terminate only on Mr. Timmins death (subject to earlier termination due

to any breach of obligations by Mr. Timmins). There has been no alleged breach on the part of Mr. Timmins of any such obligations.

[11] Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the time limits from time to time of his physical and other abilities…; provided, however, that consultation and advice shall never occupy [Mr. Timmins] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

[12] At the time of his resignation as CEO, the 1996 Agreement was amended by the Letter Agreement.

[13] Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of $20,833.33 without further deduction except as may be required by law, commencing on July 1, 2001.

[14] The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001.

[15] In connection with the Letter Agreement, Mr. Timmins executed a release and indemnity which provides, in part, as follows:

> Whereas I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately.
>
> And whereas I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;…I understand and agree that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the *Employment Standards Act (Ontario)* and the *Human Rights Code (Ontario)*. For the said consideration, I covenant that I will not file any claims or complaints under the *Employment Standards Act (Ontario)* or the *Human Rights Code (Ontario)*.

[16] Following his retirement in 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the strategic committee of the board from June 2003 until October 2007. He received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

[17] Mr. Timmins states that he has fulfilled all contractual obligations imposed on him by the 1996 Agreement and that he has always been prepared to provide his consulting services to Timminco, as required by the 1996 Agreement, whenever from time to time requested by Timminco.

[18] The evidence of Mr. Kalins, President, General Counsel and Corporate Secretary of Timmins, is that Timminco has not sought or received any consulting services from Mr. Timmins following his retirement.

[19] Mr. Timmins has a different view. His evidence is that he provided consulting services during the early period of Dr. Schimmelbuch's term as CEO.

[20] Since the execution of the Letter Agreement, Timminco has paid Mr. Timmins approximately $2.625 million. Mr. Kalins states that the payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement.

[21] Timminco has filed statements of pension, retirement, annuity and other income ("T4A Forms") and/or statements of amounts paid or credited to non-residents of Canada ("NR4 Forms") with the Canada Revenue Agency in connection with payments made by Timminco to Mr. Timmins in each year from 2002 to 2011. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "retiring allowances". Mr. Kalins deposed that Timminco is not aware of any requests from Mr. Timmins to amend or refile any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

[22] Timminco complied with its obligations to pay the monthly consulting fee to Mr. Timmins until December 2011.

[23] Payment was due on January 1, 2012, which was not made. The Initial Order was granted on Tuesday, January 3, 2012.

[24] On February 8, 2012, a debtor-in-possession financing agreement (the "DIP Agreement") between Timminco and QSI Partners Ltd. ("QSI" or the "DIP Lender") was approved. Mr. Timmins was not served with notice of the motion to approve the DIP Agreement.

[25] On March 30, 2012, counsel for Timminco sent a letter to counsel for Mr. Timmins enclosing a formal notice of disclaimer of the 1996 Agreement pursuant to section 32 of the CCAA. According to the correspondence, the 1996 Agreement was to be disclaimed effective April 30, 2012.

ANALYSIS

[26] Counsel to Mr. Timmins set out four issues:

(a) Was Timminco entitled to stop paying the monthly consulting fee to Mr. Timmins, notwithstanding Mr. Timmins' position that these payments are post-filing obligations under the 1996 Agreement between the parties?

(b) Should Timminco be entitled to disclaim the 1996 Agreement notwithstanding that:

(i) the company's ongoing obligations under the 1996 Agreement have not impeded its ability to effect a successful sale of its assets; and

(ii) the disclaimer would result in significant financial hardship to Mr. Timmins.

(c) In the event that Timminco was not entitled to stop paying the monthly consulting fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up to the effective date (if any) of the disclaimer?

(d) In the event that Timminco is entitled to disclaim the 1996 Agreement, what should the effective date of that disclaimer be?

[27] Counsel to Timminco set forth the issue as being whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

[28] In a supplementary factum, counsel to Timminco broadened the issue to read as follows:

(a) Should Mr. Timmins' motion for an order that the 1996 Agreement is not to be disclaimed or resiliated be granted; and

(b) If Mr. Timmins' motion referenced in (a) above be granted, should the effective date of the disclaimer of the 1996 Agreement be extended past April 30, 2012 (the day that was 30 days after the day on which Timminco gave notice of the disclaimer to Mr. Timmins).

[29] Counsel to Mr. Timmins submits that the 1996 Agreement is clear and unambiguous and that Timminco's attempts to describe the unpaid monthly consulting fees as a pre-filing claim inappropriately mischaracterizes the nature of the 1996 Agreement. Counsel submits that the unpaid amounts can only be characterized as the pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco (which amount was then to be paid out to him over time after the termination of his employment), without further obligations owing from Mr. Timmins to Timminco. Counsel to Mr. Timmins submits that clearly is not the case as the monthly consulting fees do not constitute compensation deferred from a prior employment agreement between the parties and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

[30] Mr. Timmins takes the position that, while the Letter Agreement dealt with a number of termination of employment issues, it specifically did not amend the 1996 Agreement other than to fix the monthly consulting fee and, in other respects, the 1996 Agreement was to remain in full force and effect.

[31] Specifically, from Mr. Timmins standpoint, there were no pension or retirement benefits to forego at the time he entered into the Letter Agreement as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

[32] Counsel for Mr. Timmins goes on to submit that the purpose and effect of the 1996 Agreement is clear and unambiguous on its face – (i) to ensure that Mr. Timmins advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information.

[33] Counsel submits that Mr. Timmins' and Timminco's obligations under the 1996 Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

[34] In my opinion, the arguments of Mr. Timmins are flawed.

[35] It seems to me that the benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement are, in substance, termination and/or retirement benefits. These are unsecured claims. Counsel to the Applicant has summarized the following attributes or characteristics of the Agreement in support of the Applicant's position that the claim of Mr. Timmins is, in substance, for termination and/or retirement benefits:

(a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefit that Mr. Timmins would receive from Timminco;

(b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;

(c) under the Agreement, Mr. Timmins is not entitled to any retirement or pension benefits from Timminco following his retirement other than the payments;

(d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments;

(e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and

(f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as CEO.

[36] From the standpoint of Timminco, for all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

[37] In addition, in connection with the Letter Agreement and his retirement, Mr. Timmins also executed a release in indemnity wherein he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all of the obligations of Timminco arising from or out of his employment with Timminco or the termination of his employment.

[38] It is especially significant that the release and indemnity specifically references both the 1996 Agreement and the Letter Agreement.

[39] Further, the filings made by Timminco with the Canada Revenue Agency constitute further evidence of the payments made to Mr. Timmins under the Agreement are, in substance, unsecured termination and/or retirement benefits. Mr. Timmins discounts this point indicating that it is the responsibility of Timminco to issue the tax forms. However, it is the responsibility of Mr. Timmins to file the return and to ensure its accuracy.

[40] In my view, the inescapable conclusion is that when the 1996 Agreement is considered together with the amendments set out in the Letter Agreement, in substance, the parties entered into an arrangement that addressed termination and/or retirement benefits.

[41] The law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings. See *Indalex Limited (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J.), *Re Nortel Networks Corporation, Re* [Recommencement of Benefit Motion] (2009) 55 C.B.R. (5th) 68 [Nortel] and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217.

[42] Further, the debtor company's obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees have been held to be pre-filing obligations. See Nortel, paras. 10, 12, 67. At para. 67, I stated:

> …The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [of the CCAA]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[43] It is clear in this case that Mr. Timmins did not provide any services after the date of the Initial Order.

[44] The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive an enhanced priority over other unsecured creditors, which would be contrary to the scheme and purpose of the CCAA. In this respect, it is noted that the position of the Applicant on this motion was supported by counsel to FSCO, both the Non-Union and Union Employee Pension Committee, the United Steelworkers and Mercer Canada.

[45] The Monitor expressed no view on whether the monthly payment obligations were a pre-filing or a post-filing obligation. The Monitor did, however, approve of the proposed disclaimer (see below).

[46] In my view, it is necessary to briefly address the submission made by counsel to Mr. Timmins that the CCAA order does not preclude Mr. Timmins' claim for the unpaid monthly consulting fees and the related submission that the CCAA order does not stay pre-filing obligations. Paragraph 11 of the CCAA clearly provides that the Timminco Entities are directed to make no payments of principal, interest or otherwise on account of monies owing by the Timminco Entities to any of their creditors as of January 3, 2012. Having made the determination that the obligation of Timminco to Mr. Timmins under the Agreement constitutes a pre-filing claim, this provision is broad enough to cover any and all pre-filing obligations owing to Mr. Timmins.

[47] The foregoing is sufficient to dispose of the issues raised in the motion and cross-motion. However, in the event that I am in error in my conclusion, the secondary issue has to be addressed; namely, whether Timminco should be entitled to disclaim the 1996 Agreement and, if so, what should be the effective date of the disclaimer.

[48] Section 32 of the CCAA permits a counter-party to a contract disclaimed by the debtor company to apply to court for an order that the agreement is not to be disclaimed or resiliated.

[49] Section 32(4) sets out factors to be considered by the court, among other things, in deciding whether to make the order:

(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.

[50] In alternative submissions, counsel to Timminco takes the position that the motion of Mr. Timmins should be dismissed because:

(a) the Monitor has approved the proposed disclaimer;

(b) the disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco;

(c) the disclaimer is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders;

(d) the disclaimer will not cause any significant financial hardship to Mr. Timmins; and

(e) prohibiting Timminco from disclaiming the Agreement will result in a windfall to Mr. Timmins at the expense of the other unsecured creditors of the Timminco Entities.

[51] In analyzing this aspect of the motion, I accept the submission of counsel to Timminco that the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity. The Court of Appeal for Ontario stated in *Nortel (Re)* 2009 ONCA 833, there is "no reason…why the same analysis cannot apply during a sale process that requires the business to be carried as a going concern".

[52] In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute.

[53] In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.

[54] Similar views were expressed by the court in *Homberg Invest Inc. (Arrangement Relatif á*), 2011 QCCS 6376 where the Quebec Superior Court held, among other things, that it is not necessary to demonstrate that a proposed disclaimer is essential for the restructuring period. It merely has to be advantageous and beneficial.

[55] It is also noted that counsel to the Applicants submitted that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets. The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, counsel contends that disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities' cash flows and their ability to continue implementing a sales process with respect to their assets.

[56] Counsel to Timminco also points out that under the DIP Agreement, approved on February 8, 2012, the Timminco Entities are restricted to use the proceeds of the DIP Facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections. Although the DIP Agreement does not prohibit the payment of amounts akin to the amounts owing under the Agreement, the cash flow projections approved by the DIP Lender do not provide for a payment of the monthly payments under the Agreement; making such payments would accordingly result in an event of default under the DIP Agreement. Further, counsel adds that without access to the DIP Facility, the Timminco Entities would have been unable to implement a sales process designed to maximize the benefits to their stakeholders.

[57] I am satisfied that, in the context of this alternative argument, the disclaimer of the Agreement, if necessary, is fair, reasonable, advantageous and beneficial to the Timminco Entities' restructuring process.

[58] Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

[59] However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

[60] I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

[61] Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[63] For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

[64] The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

[65] On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

[66] The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco's unsecured pre-filing obligations which

were stayed by Initial Order and that Timminco was authorized to stop making the payments under the Agreement without being required to disclaim the Agreement. Consequently, counsel submits that the Timminco Entities only delivered a notice of disclaimer in response to correspondence with Mr. Timmins' counsel and did so expressly without prejudice to their position that the obligations under the Agreement were pre-filing obligations.

[67] Counsel to Timminco acknowledged that, if the court found that Timminco's obligations did not constitute pre-filing obligations and the Agreement needed to be disclaimed prior to Timminco being entitled to cease making payments, Timminco would be obligated to make the payments that became due prior to the effective day of the disclaimer, namely, April 30, 2012.

[68] I am satisfied that the delay between the commencement of this motion by Mr. Timmins and its hearing was attributable to scheduling issues and the demands on Timminco's management and counsel's time placed by the Timminco Entities' CCAA Proceedings, including the sales process being undertaken by the Timminco Entities for the benefit of their stakeholders. Given these competing priorities, it seems to me that it would be unfair to extend the effective date of the disclaimer, if necessary, beyond April 30, 2012.

[69] As noted, my comments with respect to the disclaimer issue are for the assistance of the parties, in the event that my determination of the pre-filing issue is found to be in error.

DISPOSITION

[70] In the result, the motion of Mr. Timmins is dismissed. The relief requested by Timminco in the cross-motion is granted.

MORAWETZ J.

Date: August 3, 2012

TAB 22

Re United Air Lines Inc. (Bankruptcy),
2005 CanLII 7258 (ON SC)

COURT FILE NO.: 03-CL-5003
DATE: 20050226

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

RE: IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36, as amended

AND IN THE MATTER OF UNITED AIR LINES, INC. of the State of Delaware, in the United States of America and the other entities listed on Schedule "A"

APPLICATION UNDER section 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

BEFORE: FARLEY J.

COUNSEL: *Scott A. Bomhof* and *Marc Lavigne*, for United Air Lines, Inc.

Hugh M.B. O'Reilly, for the International Association of Machinists and Aerospace Workers ("IAMAW")

Barry Wadsworth, for the CAW-Canada

Ian Dick, for the Attorney General of Canada representing the Office of the Superintendent of Financial Institutions ("OSFI")

HEARD: February 10, 2005

E N D O R S E M E N T

[1] United Air Lines, Inc. (UAL) moved for an order authorizing it to cease making contributions to its Canadian funded pension plans. It had originally brought on its motion on September 16, 2004 as to which there had been some advance preliminary discussion as to the "necessity" for it having to obtain some relief. The somewhat chaotic circumstances surrounding UAL and its insolvency proceedings in the U.S.A. and elsewhere in all probability contributed to its haste in bringing on the September motion and most certainly with respect to its method of giving notice to its two Canadian unions, the CAW and IAMAW, as well as OSFI. Given the exigencies of the circumstances, while unfortunate that there was not an appropriate length of and "proper" notice, one cannot be too critical of UAL as to providing something better. The CAW and OSFI attended at the September hearing; IAMAW did not in the relative confusion.

There was then negotiated among UAL, CAW and OSFI a form of interim order granted by Pepall J. on September 16, 2004. This consent order, as is not uncommon with courtroom-drafted orders, is a little "awkward". It provided that pending the return of the motion, UAL could cease making pension plan funding payments notwithstanding the terms of any previous order or any direction of OSFI. I am of the view that, given that this motion was not brought back on until February 10, 2005, this shows that OSFI and the unions (IAMAW being cognizant of the September 16, 2004 order shortly thereafter) are quite understanding of the financial predicament in which UAL finds itself - and continues to find itself given a number of setbacks especially in its U.S. proceedings situation.

[2] UAL as an airline has fallen on hard times. In this regard it is like a number of airlines worldwide both in recent times and at various stages in the past. The unions recognize that they have both long-term and short-term objectives in dealing with an employer - essentially they want a long term stable employer who is able to employ their workers at a fair wage and for this the company must remain in business and be competitive, but also in the short run, they do not wish to see a situation where commitments related to the employment arrangement are neglected. In the latter case, if matters take a turn for the worse, in this subject case, there would be relatively significant pension deficiencies (relative to the size of the Canadian workforce) which would be unsecured claims. In this regard "cash in the bank" is always better than an IOU. At the present time, UAL is no golden goose; indeed it is a rather bald bird (keeping in mind the taxation principle of plucking the squawking taxpayer) - but it is a bird which the unions have no interest in killing.

[3] Allow me to observe a number of practical elements in this situation. UAL is in very intensive discussions/negotiations in the U.S.A. with its American workforce unions and it is continuing to deal with the morass its insolvency proceedings have become over the time since it commenced its Chapter 11 proceedings in December 2002. It has an international workforce, including that in Canada, of significantly less magnitude. It has in all countries except for the U.S.A. and Canada kept up its pension funding commitments because under the pension and legal structures of those other countries, it had no choice but to do so. UAL has it would seem devoted most of its time and energy to attempting to solve its U.S. based problems. It seems that it has taken the approach as to Canada, both in terms of the pension arrangements - but also with respect to discussions/negotiations as to concessions with its Canadian workforce (e.g. wage cuts or productivity improvement commitments), that this will and must await the outcome of the U.S. situation. On a functional basis, I do not criticize UAL for that approach. Indeed it may be the only practical one available to it. However, the unfortunate outcome of such an approach is that in essence Canada is ignored in the interim. This is contrary to the philosophy of our insolvency proceedings approach which encompasses and balances the many elements including labour relations and balances the competing aspects of those elements - the key to which as to the labour relations element is that the company and the unions actively engage in a dialogue to see if the particular difficulty(ies) may be worked out and the aims of each side be accommodated with some give and take on a rational basis.

[4] UAL has not run out of money nor of liquidity, albeit that it must husband its available funds and liquidity in a very prudent manner. However, there is no evidence before me that UAL either (i) does not have sufficient funds to make the pension funding payments or (ii) that

its DIP arrangements are such that it cannot make such payments (in this latter (ii) situation, neither is there any evidence that even if it were up against the ceiling of its DIP requirements, that an application was made to the DIP lenders for consent to make such payments).

[5] In other situations where a company has been in dire circumstances, it is not uncommon for a union to consent to a deferral of pension funding in order to facilitate the *bona fide* restructuring efforts of an employer (eg. the USWA in Ivaco). However, this is achieved on a consensual basis after negotiation; it is not a "given right" of the company. In the present case, the CAW and IAMAW have attempted to engage UAL in such discussions, but while UAL attended a meeting, it said it could not make any commitment. As UAL put it in its factum when speaking generally of its situation in Canada vis-à-vis the U.S.A.:

> 36. United has also commenced discussions with representatives of its unionized workforce in Canada and OSFI with respect to United's Canadian labour issues and pension obligations. However, United has not been in a position to determine its course of action in Canada at this time given that its Chapter 11 emergence business plan, and any further cost cutting measures required thereunder, cannot be finalized until its substantial U.S. labour and pension issues are resolved.

As discussed above, fair enough, the tail cannot be expected to wag to dog. But the dog must appreciate that it has a tail.

[6] Allow me to make a further observation as to the difference between Canada and the U.S.A. In the U.S.A., the parties are dealing under an umbrella which most significantly includes the Pension Benefits Guarantee Corp. which generally protects the workforce/pensioner side in an insolvency where there is a pension deficit. In Canada, in this federally regulated situation, there is no such backstop; the workforce/pensioners are naked. While I appreciate that as UAL points out, the pensioners in Canada continue to receive their pension cheques, that is as it should be. However, the result of that equation is that with all outflow from the fund and no inflow, it is not realistic to think that the investment income side will radically improve so that the pension deficit does not become larger with every pension cheque mailed, thereby weakening the pension fund to the detriment of future calls on it by existing pensioners and new pensioners upon retirement from the active workforce.

[7] As discussed above, the relative size of the Canadian problems vis-à-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).

[8] In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.

[9] I would also note that OSFI is at liberty to, if it feels it necessary, request a lift of stay so that it may issue a direction if it thinks that warranted (as opposed to the mere demand of September 3, 2004; the direction having a legal consequence).

[10] I recognize that with the effluxion of time, the pension funding arrears have mounted up and therefore are greater than the interim payments at any one time which you would have in a pay as you go situation. It may therefore be desirable for UAL and its unions (with or without the assistance of OSFI) to have discussions about the mechanics of such payment regarding funding of arrears; including a schedule if necessary or desirable and the question of future obligation payments. However, recognizing the dog and its tail problem, it is conceivable that UAL would continue to conclude that it would not be practicably feasible to do so. Thus if no such arrangement is put in place by March 31, 2005, all arrears are to be paid up by April 1, 2005. I would note the definite difference between "suspend" and "cease".

[11] What then of the s. 8(2) *Pension Benefits Standards Act*, R.S.C. 1985, c.32 (2nd Supp)? It provides as follows:

> 8(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

I agree with the submissions of UAL as set out in its factum at para. 85:

> 85. Also, United submits that there are a number of issues which raise doubts about the application of the deemed trust set out in subsection 8(2) of the PBSA to the current situation. In particular, subsection 8(2) states that a deemed trust arises where there is a "liquidation, assignment or bankruptcy" of an employer. None of the parties to this motion have provided any evidence that United (the employer) is in liquidation, has made an assignment or is in bankruptcy.

However, UAL should also keep in mind the provisions of s.8(1):

> 8(1) An employer shall ensure, with respect to its pension plan, that
>
> (a) the moneys in the pension fund,

> (b) an amount equal to the aggregate of the prescribed payments that have accrued to date, and
>
> (c) all
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

This of course may have fall out for officers and directors as to whom no stay protection is available.

[12] In the end result, I dismiss the UAL motion to cease making contributions to its pension plans involving its Canadian workforce but rather to make good on its arrears unless otherwise agreed between its unions (who will have to keep in mind that UAL at some stage will come calling for concessions if it gets its U.S.A. house in order) and OSFI.

[13] OSFI itself did not request a lift of stay vis-a-vis itself and so I do not find it appropriate to deal with the unions' request that I do so. OSFI is well able to speak for itself in this regard. It made no such motion; nor did it refer to same in its factum.

[14] Orders accordingly (this endorsement also deals with the motions of the CAW and IAMAW).

[15] All parties to this motion - UAL, the unions and OSFI - are labouring under the difficulties of fulfilling their valid legitimate mandates at a time where functionally there are pressing financial problems, compounded by UAL's being functionally distracted from Canada (and elsewhere) by the necessity of having to deal with its U.S.A. problems on a prioritized basis. I appreciate their difficulties. I would also wish to express my appreciation for the thorough and helpful submissions I received from counsel as they attempted to deal with their own clients' difficulties in dealing effectively with this situation on both a legal and functional basis.

J.M. Farley

DATE: February 26, 2005

TAB 23

Re U.S. Steel Canada Inc., 2014 ONSC 6145

CITATION: U.S. Steel Canada Inc. (Re), 2014 ONSC 6145
COURT FILE NO.: CV-14-10695-00CL
DATE: 20141022

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *R. Paul Steep, Jamey Gage and Heather Meredith*, for the Applicant

Kevin Zych, for the Monitor

Michael Barrack, Robert Thornton and Grant Moffat, for United States Steel Corporation and the proposed DIP Lender

Gale Rubenstein, Robert J. Chadwick and Logan Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Ken Rosenberg and Lily Harmer, for the United Steelworkers International Union and the United Steelworkers Union, Local 8782

Sharon L.C. White, for the United Steelworkers Union, Local 1005

Shayne Kukulowicz and Larry Ellis, for the City of Hamilton

Steve Weisz and Arjo Shalviri, for Caterpillar Financial Services Limited

S. Michael Citak, for various trade creditors

Kathryn Esaw and Patrick Corney, for the Independent Electricity System Operator

Andrew Hatnay, for certain retirees and for the proposed representative counsel

HEARD AND ENDORSED: October 8, 2014
RELEASED: October 22, 2014

ENDORSEMENT

[1] U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated

September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

[2] The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

[3] In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

[4] The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

[5] The Term Sheet contemplates a DIP Loan in the maximum amount of $185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of $5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of $3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

[6] The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

[7] A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

[8] The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

[9] The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

[10] The Monitor, who was present during the negotiations regarding the terms of the DIL Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

[11] The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

[12] The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 at paras. 32-34 (S.C.), [2009] O.J. No. 4286 [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

[13] First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

[14] Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

[15] Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

[16] Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

[17] Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

[18] Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd. (Re)*, 2012 ONSC 948 at paras. 46-47, [2012] O.J. No. 596 [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

[19] The Initial Order provides for an Administration Charge (Part I) to the maximum amount of $6.5 million, a Director's Charge to a maximum amount of $39 million, and an Administration Charge (Part II) to a maximum amount of $5.5 million plus $1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

[20] The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a

similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

[21] As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

[22] It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

[23] In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

[24] In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

[25] The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

[26] The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

[27] The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

[28] First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

[29] Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

[30] Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

[31] Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd. (Re)*, 2012 ONSC 506 at para.73, [2012] O.J. No. 472. In addition, USS, the only secured creditor of the Applicant, supports the KERP.

[32] Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

[33] Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

[34] The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

[35] The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

[36] In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing (Re)*, 2010 ONSC 1328, [2010] O.J. No. 943. In this regard, the following considerations are relevant.

[37] The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

[38] Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

[39] Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note tha,t at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3028 at para. 62 (S.C.), [2009] O.J. No. 3280 [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

[40] Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

[41] Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

[42] Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

[43] Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

[44] First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

[45] Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

[46] Third, the Monitor and the CRO support the extension.

[47] Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

[48] Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

Wilton-Siegel J.

Date: October 22, 2014

TAB 24

Re U.S. Steel Canada Inc. 2015 ONSC 5990

CITATION: U.S. Steel Canada Inc. (Re), 2015 ONSC 5990
COURT FILE NO.: CV-14-10695-00CL
DATE: 20150928

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *A. Scotchmer* and *B. Walancik*, in their capacity as Representative Counsel on behalf of the non-unionized active employees and retirees, for the Applicants James Newton, Laurie Saunders and Robert Cernick

S. Kour and *R. Paul Steep*, for the Respondent U.S. Steel Canada Inc.

R. Sahni, for the Monitor Ernst & Young Inc.

HEARD: September 18, 2015

ENDORSEMENT

[1] On these motions, Representative Counsel for the non-USW active employees and retirees seeks an order directing U.S. Steel Canada Inc. ("USSC") to pay amounts to each of James Newton ("Newton"), Laurie Saunders ("Saunders") and Robert Cernick ("Cernick") (collectively, the "Applicants"), pursuant to severance agreements entered into between each of these individuals and USSC as described below. The amounts at issue on these motions total $184,485.

Background

[2] The following summarizes the undisputed facts concerning the termination of employment arrangements of each of the Applicants.

Newton and Saunders

[3] Each of Newton and Saunders were advised by USSC on February 5, 2014 that their employment would be terminated on February 5, 2016. Each was provided with, and signed back, a letter dated February 5, 2014 (respectively, the "Newton Severance Agreement" and the "Saunders Severance Agreement") that provided that each individual was "required to report to work, unless otherwise required by [USSC]," during the period from February 5, 2014 until February 5, 2016. Each Severance Agreement also stated that, if they remained employed and

actively at work on that date, they would be entitled to merit pay and performance bonuses in the ordinary course.

[4] The Newton Severance Agreement and the Saunders Severance Agreement further provided that:

> The Company may advise you prior to the end of the Notice Period, you are no longer required to report for work ("the End of the Working Notice Period"). Should that occur, your current salary shall continue to be paid as though you were continuing to report for work and subject to the same conditions as set out above but you will not be eligible to receive merit pay and performance bonuses, or a portion thereof.

[5] Subsequently, each of these Severance Agreements was amended by letters dated August 15, 2014 from USSC, which were executed in September 2014 by each of Newton and Saunders, which added the following provision:

> Further to your letter dated February 5, 2014, please accept this letter as confirmation of our discussions that should you elect to remain actively at work until December 31, 2014, the Company will agree to pay out fifty percent (50%) of the remaining work notice period as a lump sum retention bonus rather than having you continue to work the remainder of the notice period. This would equate to six and a half (6½) months base pay. All other terms and conditions of the original letter dated February 5, 2014 will remain in effect excluding the provisions of paragraph 1 "Financial Assistance" which are amended by this letter.
>
> If you elect to terminate your employment prior to December 31, 2014 or if you remain at work beyond the December 31, 2014 date, the terms and conditions of the original letter will remain in effect. ...

[6] Each of Newton and Saunders also signed a full and final release in favour of USSC after executing the amendments to their respective Severance Agreements.

[7] Each of Newton and Saunders worked for USSC until December 31, 2014 and retired on that date.

Cernick

[8] Cernick was advised by USSC on February 3, 2014 that his employment would be terminated on February 3, 2016. He was provided with, and signed back, a letter dated February 3, 2014, substantially in the same form as the Newton Severance Agreement and the Saunders Severance Agreement (the "Cernick Severance Agreement"). However, the Cernick Severance Agreement also contained an early retirement option in the following terms:

> Should you make an irrevocable application to retire in writing, and cease employment by reason of your retirement with your last day worked being

> within thirty (30) days of the date of this letter, you will receive 50% of the balance of the payments remaining in the Notice Period as a lump sum payment, less applicable statutory deductions.

Cernick did not accept this early retirement option. Cernick also signed a full and final release in favour of USSC on February 24, 2014.

[9] The Cernick Severance Agreement was subsequently amended as follows by a letter dated May 21, 2014, which Cernick executed on May 28, 2014, to provide for a retiring allowance:

> This letter confirms our discussion of May 16, 2014 in which I advised that you had the opportunity to replace/substitute the last 26 weeks of your working notice period with a lump sum cash payment equal to 26 weeks of base salary in the form of a retiring allowance less deductions required by law.
>
> If you elect to replace the last 26 weeks of working notice with the retiring allowance set out above, the following conditions apply.
>
> 1. You will not accrue credited service for pension purposes on or after August 5, 2015 [for the 26 weeks of your working notice period.] If applicable, there will be no contributions to the RRSP (Opportunity Plan) in the period on or after August 5, 2015.
>
> 2. You will not accrue vacation pay on or after August 5, 2015 [for the last 26 weeks of your working notice period.]
>
> 3. Your current coverage under the Company's health plan and dental plan and life insurance plan will cease on the date your working notice period ends by reason of your election to take a lump sum payment. In addition, you will not be eligible to receive merit pay and performance bonuses, or a portion thereof.
>
> 4. All other terms and conditions of your termination letter dated February 3, 2014 shall continue to apply with this letter as an addendum to that letter dated February 3, 2014.

[10] The Cernick Severance Agreement, as amended, therefore contemplated a period of working notice until August 5, 2015. However, on May 30, 2014, two days after he accepted the amendment to the Cernick Severance Agreement, Cernick was advised by his superior at USSC that USSC directed him to no longer report to work.

[11] USSC paid Cernick his monthly salary in accordance with the Cernick Severance Agreement to August 5, 2015.

[12] In this Endorsement, the Newton Severance Agreement, the Saunders Severance Agreement and the Cernick Severance Agreement are collectively referred to as the "Severance Agreements" and are individually referred to as a "Severance Agreement".

The Circumstances Giving Rise to this Proceeding

[13] USSC commenced legal proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, by order of Morawetz R.S.J. (as subsequently amended, the "Initial Order").

[14] Section 13 of the Initial Order prohibits payments on account of pre-filing obligations:

> THIS COURT ORDERS that, except as specifically permitted or required herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

[15] Section 9 of the Initial Order also permits, but does not mandate, payment of certain employment-related amounts payable on or after the date of the Initial Order.

> THIS COURT ORDERS that the Applicant shall be entitled but not required, subject to the mandatory payment requirements in paragraph 11 below, to pay the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee and retiree medical, dental and similar benefit plans or arrangements, employee assistance programs, and other retirement benefits and related contributions), compensation (including bonuses and salary continuation or other severance payments), vacation pay and expenses (including, without limitation, in respect of expenses charged by employees to corporate credit cards) 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 arrangement; …

[16] On November 27, 2014, each of Newton and Saunders was advised by USSC that it did not intend to pay the lump sum retention bonuses contemplated by the Newton Severance Agreement, as amended, and the Saunders Severance Agreement, as amended, respectively. The parties dispute whether each of Newton and Saunders were advised that they could cancel their intended retirement on December 31, 2014 and continue working until February 5, 2016 if they wished to receive the salary contemplated in the original forms of the Newton Severance Agreement and the Saunders Severance Agreement. Given the determination below, this factual issue is not relevant. As mentioned, however, each of Newton and Saunders chose to retire at December 31, 2014. Each individual now seeks payment of the lump sum retention bonuses contemplated by their respective Severance Agreements, as amended.

[17] By letter dated April 8, 2014, USSC advised Cernick that the Monitor in these CCAA proceedings, Ernst & Young Inc., "had determined that [USSC] may not issue the lump sum

payments [sic] set out in the [Cernick Severance Agreement as amended]." Cernick has not been offered an opportunity to return to work for the remainder of his period of working notice, nor the opportunity to rescind the amendment to the Cernick Severance Agreement, both of which he says he would have accepted.

Analysis and Conclusion

[18] The Applicants make four arguments in support of their position that USSC is, or should be, required to pay the lump sum retention bonuses contemplated under the Severance Agreements. Given the determination below, it is only necessary to address their two principal arguments.

[19] First, the Applicants argue that s. 32 of the CCAA applies to the present circumstances. This submission proceeds on the basis: (1) that USSC's refusal to pay the lump sum retention bonuses under the Severance Agreements constitutes a "resiliation" or a "repudiation" of such agreements; and (2) that the acknowledged failure of USSC to comply with the provisions of s. 32 has the result that the lump sum retention bonuses are payable. In effect, the Applicants say that s. 32 is a mandatory provision in respect of the proposed termination of any agreement to which an insolvent corporation is a party.

[20] USSC says that it has not terminated the Severance Agreements. USSC says that, while payment of the lump sum retention bonuses might otherwise be permitted under paragraph 9 of the Initial Order, payment is prohibited by virtue of the provisions of paragraph 13(a), as the lump sum retention bonuses constitute amounts owing by USSC to creditors as of the date of the Initial Order. It says that the Applicants are entitled to submit a claim for such amounts in the claims process in this CCAA proceeding.

[21] The Applicants' argument assumes that non-performance of any provision of a contract for any reason whatsoever constitutes a "resiliation" or a "repudiation" of a contract requiring compliance with s. 32 of the CCAA to be effective. I think this interpretation of s. 32 implies a scope of operation that was not intended by Parliament.

[22] As Mongeon, J.C.S. noted in *Re Hart Stores Inc*. 2012 QCCS 1094, [2012] J.Q. no. 2469, at paras. 20 and 30, s. 32 is properly applicable only to contracts that are not otherwise terminable. In *Hart Stores*, Mongeon, J.C.S. found that s. 32 did not apply to oral employment contracts of indefinite duration that could be unilaterally terminated by the employer under ordinary rules of common law (in this case under the *Civil Code of Quebec*). In any event, given the determination below, it is not necessary to decide the motions on this basis, and I therefore decline to do so.

[23] The Applicants' alternative argument is that payment of the lump sum retention bonuses is not caught by paragraph 13 of the Initial Order, and that the Court should exercise its discretion under section 11 of the CCAA to order such payment on the grounds of fairness.

[24] The Applicants acknowledge that the lump sum payments fall within the language of "compensation (including bonuses and salary continuation or other severance payments)" for the purposes of paragraph 9 of the Initial Order. However, as mentioned, they submit that the

lump sum retention bonuses were accrued as contingent liabilities as of the date of the Initial Order and, as such, constituted amounts payable as of that date which are therefore caught by the language of paragraph 13(a) of the Initial Order. USSC also relies on certain decisions that have found that termination and severance payments are pre-filing obligations: in particular, see *Timminco Ltd*. (*Re*), 2012 ONSC 4471, [2012] O.J. No. 4008, at paras. 41-42, *Nortel Networks Corp., (Re)*, [2009 O.J. No. 2558 (S.C.) and *Windsor Machine & Stamping Ltd*., [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611 (S.C.).

[25] Implicit in this dispute is the issue of the proper characterization of the lump sum retention bonuses at issue. USSC characterizes these lump sum payments as "termination or severance payments", which they say were contingent liabilities or obligations at the date of the Initial Order. The Applicants characterize the lump sum retention bonuses as additional compensation for post-filing services. On balance, I think these payments are properly characterized as compensation for post-filing services which are not subject to the stay in paragraph 13(a) of the Initial Order for the following reasons.

[26] The Severance Agreements constituted an agreement between USSC and each of the Applicants for the payment of certain amounts to each of them for their agreement to make themselves available to USSC during the periods contemplated by their respective agreements. It is my understanding that USSC does not dispute this characterization of the Severance Agreements, at least insofar as it pertains to the monthly salary continuation payments made thereunder. Implicit in this characterization, however, is the fact that such monthly continuation payments were made for the provision of post-filing services by each of the Applicants.

[27] On these motions, USSC distinguishes between such monthly payments and the lump sum retention bonuses, treating the latter as termination or severance payments. I do not think that this is correct in the particular circumstances of this case. Regardless of the treatment of such payment for tax or other purposes, as between USSC and the Applicants I think such payments must be regarded as an additional payment for the provision of post-filing services, i.e., their availability to USSC. In each case, the lump sum retention bonus constitutes an acceleration and compromise of certain monthly salary continuation payments otherwise payable over a further twelve-month period of working notice for the continued provision of post-filing services. I do not think that such compromise, in the form of a lump sum payment, should change the fundamental nature of the payments. In addition, while it is not determinative of this issue, USSC itself referred to the payments in the letters amending the Newton Severance Agreement and the Saunders Severance Agreement as "lump sum retention bonuses", which is more reflective of compensation for post-agreement services than of termination or severance payments. While the Cernick Severance Agreement refers to the lump sum payment as a “retiring allowance”, I do not think this terminology, which appears to have a tax-related purpose, is of any significance for the present motions.

[28] I also do not think that the case law referred to by USSC, or the fact that such lump sum payments may have been treated as contingent liabilities by USSC at the time of the Initial Order, assists USSC.

[29] In *Nortel*, while the exact nature and timing of the payments at issue is not detailed in the decision, there is an important difference from the present circumstances. It is clear, both from the fact that the issue in *Nortel* pertained principally to the application of the *Employment Standards Act*, R.S.O. 1990, c. E.14, as well as from the language of paragraphs 67 and 86 of the decision, that the termination and severance payments at issue related to pre-filing services. This consideration grounded the decision of Morawetz J. (as he then was) that the termination payments were, in substance, pre-filing obligations of the debtor that were subject to a stay. In *Timminco*, it is clear from paragraph 43 of that decision that the applicant did not provide any post-filing services and that the payments at issue constituted classic termination and/or retirement benefits. Similarly, in *Canwest Global Communications Corp*., 2010 ONSC 1746, 321 D.L.R. (4d) 561 and *Windsor Machine*, the termination and severance pay obligations were also stated to be "for the most part based on services that were provided pre-filing": see *Canwest*, at para. 24, per Pepall J. (as she then was).

[30] Given this factual basis for the decisions in *Nortel*, *Timminco*, *Windsor Machine* and *Canwest*, I do not read any of these decisions as standing for the more general proposition that all termination or severance payments, whether arising before or after the date of commencement of proceedings under the CCAA, are to be treated as pre-filing obligations.

[31] I also do not find the argument that the lump sum retention bonuses constituted accrued liabilities at the date of the Initial Order to be persuasive. Even assuming that USSC did, in fact, accrue the payment obligations as contingent liabilities in its accounting records, for which there is no evidence before the Court, the fundamental reality is that the payment obligations were contingent upon the Applicants' performance of post-filing services. The obligation to pay the lump sum retention bonuses did not become absolute until the completion of performance of these services, that is, upon expiry of the relevant period of working notice.

[32] Accordingly, I conclude that paragraph 13(a) of the Initial Order does not mandate a stay of payment of the lump sum retention bonuses due under the Severance Agreements. In these circumstances, paragraph 9(a) of the Initial Order permits USSC to make such payments. As USSC has chosen not to make such payments, however, the Applicants seek an order of the Court requiring USSC to make such payments on the grounds that it would be fair and equitable to do so.

[33] In this regard, the basis for the Monitor's position when this issue first arose in or about November 2014 is important. The Court understands that there were approximately 175 additional former employees of USSC whose employment was terminated on or about February 5, 2014, and who did not accept, or were not offered, a lump sum retention bonus option in return for a shortened period of working notice. The Monitor considered that it would be unfair and inequitable to these other former employees for USSC to pay the lump sum retention bonuses under the Severance Agreements. The Monitor reasoned that, in the absence of a claims process and a crystallization of any claims of these other employees, there was a significant likelihood that the Applicants would obtain an unintended priority. This is an important consideration that was also present in *Timminco*.

[34] However, circumstances have changed since November 2014 as a result of the continuation of the working notice period for such other employees. As of the date of hearing of the present motions, it is the Court's understanding that such employees have continued to be paid their working notice to date and that, at most, a period of five months working notice remains to be paid to such other employees.

[35] The Applicants argue that it would be unfair to treat them differently from the other terminated employees of USSC merely because they opted for a lump-sum retention bonus while the other employees are being paid in respect of working notice arrangements. I am not persuaded that this fact alone would justify an order in their favour. However, I think that it would be fair to grant the order requested for such reason together with the additional facts that: (1) as of the date of hearing of these motions, there does not appear to be any issue of an unfair priority in favour of the Applicants if such an order were granted; and (2) the amounts are *de minimus* and accordingly payment will not affect the ability of USSC to propose a plan of arrangement or compromise. Even if USSC were to stop paying the remaining working notice period payments payable to the other terminated employees until February 2016, it would appear that, as of the date of the hearing of these motions, the Applicants and such other terminated employees will have received roughly equal amounts in respect of the termination of their employment after payment of the lump sum retention bonuses.

[36] I would also note that USSC raised the possibility that payment of the lump sum retention bonuses could breach the terms of a term sheet dated July 16, 2015 between USSC and Brookfield Capital Partners Ltd. ("Brookfield") (the "Current DIP Loan"). However, Brookfield did not appear on this motion or otherwise oppose the relief sought. In any event, for the reasons set out above, I do not think that the lump sum payments that are the subject of this motion constitute either payments in respect of pre-filing obligations or non-ordinary course payments. As such, I am of the opinion that payment of these amounts would not breach the terms of the Current DIP Loan.

[37] Based on the foregoing determinations, the Applicants are entitled to an order directing USSC to pay the lump sum retention bonuses contemplated by the Severance Agreements to the Applicants in the amounts set out in the Motion Record.

Wilton-Siegel J.

Date: September , 2015

TAB 25

RJR Macdonald Inc. v. Canada,
1994 CanLII 117 (SCC)

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, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

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, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

INDEXED AS: RJR — MACDONALD INC. v. CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

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 disposi-

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion 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

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac.*

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada.*

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

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

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou

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.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la prépondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

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

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

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et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

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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 Lebœuf*, 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.

The judgment of the Court on the applications for interlocutory relief was delivered by

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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 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et *Yves Lebœuf*, pour l'intimé.

W. Ian C. Binnie, *c.r.*, et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

I. Factual Background

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.

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.

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.

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.

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

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementante que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1er janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)*b*) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

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

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.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.

2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.

3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.

4. Les critères applicables à une suspension d'instance sont satisfaits:

   (i) Il existe une question constitutionnelle sérieuse à juger.

   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(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

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*

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.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

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

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

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?

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.

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.

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.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

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.

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.

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.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

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.

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.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

> [TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

> [TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

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."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

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.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

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

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

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.

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:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la 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.]

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.

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.

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.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

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.

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*

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,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

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.

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.

"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.)).

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.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

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*

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.

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.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

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."

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

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

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

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.

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.]

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

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

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.

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 pub-

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal . . . .

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.

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.

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*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

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.

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

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*

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

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.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. Le statu quo

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

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.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

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.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

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

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

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.

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*

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

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du

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*

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.

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*

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.

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

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

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.

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" (p. 147).

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 demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-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.]

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.

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.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

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.

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.

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 pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du

vention of the widespread and serious medical problems directly attributable to smoking.

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.

Applications dismissed.

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 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: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.

TAB 26

Sproule v. Nortel Networks Corporation,
2009 ONCA 833

CITATION: Sproule v. Nortel Networks Corporation, 2009 ONCA 833
DATE: 20091126
DOCKET: C50986 and C50988

COURT OF APPEAL FOR ONTARIO

Goudge, Feldman and Blair JJ.A.

BETWEEN:

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

C50986

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

C50988

AND BETWEEN:

National Automobile, Aerospace, Transportation and General Workers Union of Canada

(CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915

George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

Mark Zigler, Andrew Hatnay and Andrea McKinnon, for the appellants Nortel Networks Former Employees

Barry E. Wadsworth, for the appellant CAW-Canada

Suzanne Wood and Alan Mersky, for the respondents Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Lyndon A.J. Barnes and Adam Hirsh, for the respondents Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Benjamin Zarnett, for the monitor Ernst & Young Inc.

Gavin H. Finlayson, for the Informal Nortel Noteholder Group

Thomas McRae, for the Nortel Canadian Continuing Employees

Massimo Starnino, for the Superintendent of Financial Services

Alex MacFarlane and Jane Dietrich, for the Official Committee of Unsecured Creditors

Heard: October 1, 2009

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated June 18, 2009, with reasons reported at (2009), 55 C.B.R. (5th) 68.

Goudge and Feldman JJ.A.:

[1] On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

[2] In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

[3] The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order

granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

[4] The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

[5] We will address each of the two appeals in turn.

THE UNION APPEAL

Background

[6] The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to

unionized employees who have been terminated or who have severed their employment at Nortel.

[7] Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

[8] The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

> 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.

[9] The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the

[1] The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

CCAA.

[10] The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[11] The Union challenges this conclusion.

[12] In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

[13] Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

[14] Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

[15] In our opinion, this argument must fail.

Analysis

[16] Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* 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. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

[17] Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

[18] Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

[19] What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

[20] Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

[21] The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al.* (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

[22] Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services

being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

[23] In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

[24] The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

[25] The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not

dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a “Me too motion.”

[26] After he dismissed the union motion, the motion judge turned to the “me too” motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees’ motion was also dismissed.

[27] For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

[28] Neither the provincial nor the federal governments responded to the notice on this appeal.

[29] Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> …
>
> (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court*.
>
> …
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business. [Emphasis added.]

[30] Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

[31] As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

[32] Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

> 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 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; [the Bankruptcy and Insolvency Act and the Winding Up Act]

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

[33] As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 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…

[34] Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination

and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

[35] As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd*., [2004] 1 S.C.R. 60 at para. 43.

[36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R.161:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

[2] The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd. (Re)* [2009] O.J. No. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

[37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

[38] Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

[39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past

services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[40] The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

[41] In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been

considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

[42] While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

[43] The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need.

This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

[44] However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

[45] Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

[46] Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the

CCAA process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[47] The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

[48] We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

[49] The appeal by the former employees is also dismissed.

RELEASED: November 26, 2009 (“S.T.G.”)

“S.T. Goudge J.A.”
“K.N. Feldman J.A.”
“I agree. R.A. Blair J.A.”

TAB 27

Sun Indalex Finance, LLC v. United Steelworkers,
2013 SCC 6

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

Sun Indalex Finance, LLC *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 *Appelant*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

Syndicat des Métallos *Appelant*

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

Indexed as: Sun Indalex Finance, LLC *v.* United Steelworkers

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

c.

Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers *Intimés*

et

Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

Répertorié : Sun Indalex Finance, LLC *c.* Syndicat des Métallos

2013 CSC 6

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1er février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Moldaver.

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

Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1)a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from Indalex's alleged breaches

Pensions — Fiducies — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la LACC — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — La société a-t-elle manqué à ses obligations fiduciaires d'administrateur des régimes? — Les participants des régimes de retraite ont-ils droit à une fiducie par interprétation?

Procédure civile — Dépens — Appels — Norme de contrôle — La décision de la Cour d'appel sur les dépens d'une partie est-elle erronée?

Indalex Limited (« Indalex »), le promoteur et l'administrateur de deux régimes de retraite, l'un pour les salariés, l'autre pour les cadres, est devenue insolvable. Elle a demandé la protection contre ses créanciers sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Le régime des salariés était en cours de liquidation lorsque la procédure fondée sur la *LACC* a été engagée. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. Les deux régimes accusaient un déficit de liquidation.

Une série de mesures avalisées par le tribunal a permis à la société d'obtenir un financement de débiteur-exploitant (« DE ») et de poursuivre ses activités. Le tribunal chargé de l'application de la *LACC* a accordé aux prêteurs DE, un consortium composé de créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure, une priorité sur tous les autres créanciers. Le remboursement des sommes empruntées était garanti par Indalex É.-U.

Finalement, sur approbation du tribunal appliquant la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, Indalex É.-U., à titre de caution, a payé la différence et a acquis de ce fait la créance prioritaire des prêteurs DE. Le tribunal a autorisé le paiement conformément à l'ordre de priorité, mais il a également ordonné la retenue de fonds en réserve, remettant à plus tard l'examen de l'argumentation des participants relative à leur droit au produit de la vente.

Les participants des régimes ont contesté la priorité accordée dans le cadre de la procédure fondée sur la *LACC*. Ils ont fait valoir qu'ils avaient priorité pour le montant du déficit de liquidation en raison de la fiducie réputée créée par le par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et de la fiducie

of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of

par interprétation résultant de manquements allégués d'Indalex à son obligation fiduciaire d'administrateur des régimes. En première instance, le juge a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation. Il a conclu que, pour ce qui était du déficit de liquidation, les participants étaient des créanciers chirographaires. La Cour d'appel a infirmé la décision et statué que les déficits de liquidation des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant la créance des prêteurs DE bénéficiant d'une priorité et celles des autres créanciers garantis. En outre, elle a rejeté la prétention du Syndicat des Métallos, qui représentait quelques-uns des participants du régime des salariés, à savoir qu'il avait droit au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés.

Arrêt (les juges LeBel et Abella sont dissidents) : Les pourvois interjetés par Sun Indalex Finance, George L. Miller et FTI Consulting sont accueillis.

Arrêt : Le pourvoi interjeté par le Syndicat des Métallos est rejeté.

(1) *La fiducie réputée d'origine législative*

Les juges Deschamps et Moldaver : Il est bien établi que la fiducie réputée créée par le par. 57(4) de la *LRR* s'applique aux cotisations visées à l'al. 75(1)a) de la *LRR*. La seule question est de savoir si cette fiducie réputée d'origine législative s'applique aussi aux paiements au titre du déficit de liquidation exigés par l'al. 75(1)b). Dans le cas des salariés, la réponse est oui, compte tenu du texte, du contexte et de l'objet par. 57(4). Il n'en va pas de même pour le régime des cadres étant donné que cette disposition prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

Le paragraphe 57(4) de la *LRR*, qui crée la fiducie réputée en cas de liquidation, ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots

s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable

employés au par. 57(4) de la *LRR* : « montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

La date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

L'historique législatif montre que la protection, qui couvrait d'abord (1) uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation. L'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue.

La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée. En l'espèce, c'est à bon droit que la Cour d'appel a jugé qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la question de la fiducie réputée d'origine législative.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Étant donné qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, celui-ci n'ayant pas été liquidé à la date considérée, il s'agit donc essentiellement — pour ce qui concerne le régime des salariés — d'interpréter une disposition de la loi et de déterminer si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation » comme l'exige le par. 57(4) de la *LRR*.

Lorsque le terme « accumulé » [et plus encore son équivalent anglais « *accrued* »] est employé de pair avec une somme, il renvoie généralement à un élément

but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed

dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû. Dans la présente affaire, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ». Suivant le sens ordinaire du mot « accumulé », on ne peut considérer que le déficit l'était à la date de la liquidation. Le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation. Le déficit de liquidation n'est donc ni déterminé ni déterminable à la date de liquidation prévue.

Le contexte législatif général appuie la thèse que, suivant leur sens ordinaire et grammatical le plus plausible, les mots « accumulées à la date de la liquidation » renvoient aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Qui plus est, il appert de l'évolution et de l'historique des dispositions en cause que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative. Ils confirment en fait l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation.

La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir ceux qui sont dus ou accumulés, mais qui n'ont pas été versés. D'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures éventuelles de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

En l'espèce, la fiducie réputée du par. 57(4) ne vise pas le déficit de liquidation. Pareille exclusion est conforme aux objectifs généraux de la loi. Le législateur a créé des fiducies à l'égard des cotisations qui étaient dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y

trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust as a Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs

inclure le déficit de liquidation. La protection des régimes de retraite constitue certes un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite sous le régime de la *LRR*.

(2) *Priorité de rang*

Les juges Deschamps et Moldaver : Une fiducie réputée établie par une loi provinciale comme la *LRR* continue de s'appliquer dans les instances régies par la *LACC*, relevant de la compétence fédérale, sous réserve de la doctrine de la prépondérance fédérale. En l'espèce, accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Malgré le désaccord avec la juge Deschamps sur la portée de la fiducie réputée du par. 57(4), si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la priorité de rang déterminée par application du principe de la prépondérance fédérale.

(3) *La fiducie par interprétation comme réparation du manquement à l'obligation fiduciaire*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il ne saurait y avoir conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires du régime de retraite qu'il administre. Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction d'employeur et d'administrateur de régime exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne

when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in

d'exercer les deux fonctions. Il y a en fait conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime.

À elle seule, la demande initiale de protection de la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations. De même, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire d'éviter tout conflit d'intérêts. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux participants plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant.

C'est lors de la demande et de l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que de la demande et de l'obtention de l'approbation de la vente que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite. Cependant, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

L'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être. En conséquence, Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

Indépendamment de ce manquement, l'imposition d'une fiducie par interprétation ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Aucun élément de preuve n'appuie la prétention qu'un tel actif a résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels a donné lieu

response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per Deschamps and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

la procédure fondée sur la *LACC*. Qui plus est, imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes jouissent de garanties procédurales, alors qu'ils en ont joui dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

Les juges Deschamps et Moldaver : L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une obligation fiduciaire envers la société, l'employeur doit être prêt à résoudre les conflits lorsqu'ils surgissent. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administratrice des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Plus précisément, en demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants.

En ce qui concerne la fiducie par interprétation, il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Il y a accord avec le juge Cromwell sur le fait que cette condition n'était pas remplie en l'espèce et il a été souscrit à ses motifs sur cette question. En outre, il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité.

Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be

Les juges LeBel et Abella (dissidents) : Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. Par conséquent, avant d'analyser les obligations fiduciaires de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation et les caractéristiques des bénéficiaires du régime. En l'espèce, les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex.

Rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir.

Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

En l'occurrence, l'employeur a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation.

(4) *Dépens dans le pourvoi du Syndicat des Métallos*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il n'y a en l'espèce aucune raison de revenir sur la décision de la Cour d'appel relative aux dépens en ce qui concerne le Syndicat des Métallos. L'instance engagée portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel a opiné essentiellement que, représentant seulement 7 des 169 participants du régime des salariés, le syndicat ne devait pas être en

able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

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mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'en étaient pas membres, les risques inhérents au litige sans les consulter. Il n'y a aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour.

Les juges Deschamps et Moldaver : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Les juges LeBel et Abella : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

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APPEALS from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, setting aside a decision of Campbell J., 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Appeals allowed, LeBel and Abella JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, *Ashley John Taylor* and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

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POURVOIS contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, qui a infirmé une décision du juge Campbell, 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Pourvois accueillis, les juges LeBel et Abella sont dissidents.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Pourvoi rejeté.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* et *Peter Kolla*, pour l'appelante Sun Indalex Finance, LLC.

Harvey G. Chaiton et *George Benchetrit*, pour l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7.

David R. Byers, *Ashley John Taylor* et *Nicholas Peter McHaffie*, pour l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited.

Darrell L. Brown, pour l'appelant/intimé le Syndicat des Métallos.

Andrew J. Hatnay et *Demetrios Yiokaris*, pour les intimés Keith Carruthers, et autres.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir*, for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

[1] Deschamps J. — Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy; and FTI Consulting Canada ULC.

Hugh O'Reilly et *Amanda Darrach*, pour l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite).

Mark Bailey, *Leonard Marsello* et *William MacLarkey*, pour l'intimé/intervenant le Surintendant des services financiers.

Robert I. Thornton et *D. J. Miller*, pour l'intervenant l'Institut d'insolvabilité du Canada.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Kenneth T. Rosenberg, *Andrew K. Lokan* et *Massimo Starnino*, pour l'intervenante la Fédération canadienne des retraités.

Éric Vallières, *Alexandre Forest* et *Yoine Goldstein*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Mahmud Jamal, *Jeremy Dacks* et *Tony Devir*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement des juges Deschamps et Moldaver rendu par

[1] La juge Deschamps — L'insolvabilité peut entraîner des conséquences catastrophiques. Les créanciers ordinaires sont souvent laissés impayés. En situation d'insolvabilité, les prestations déterminées promises aux employés pendant leur emploi sont mises en péril. Les présents pourvois illustrent ce qui peut se produire lorsque ce péril se matérialise. Bien que l'employeur en l'espèce ait manqué à son obligation fiduciaire envers les participants aux régimes de retraite, le préjudice qu'ils subissent ne résulte pas de son manquement, mais de son insolvabilité. Pour les motifs qui suivent, je suis d'avis d'accueillir les appels de Sun Indalex Finance, LLC; George L. Miller, syndic de faillite d'Indalex É.-U.; et FTI Consulting Canada ULC.

lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve

Arrangement Act (2007), p. 97). La dure réalité est que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite. Les motifs exposés par le juge Morawetz lorsque, le 12 juin 2009, les participants au régime des cadres ont demandé pour la première fois que leurs droits soient réservés sont révélateurs. Selon lui, toute incertitude quant à savoir si les prêteurs refuseraient de consentir des avances ou s'ils auraient priorité dans le cas où des avances seraient consenties [TRADUCTION] « n'améliorerait pas la situation ». Il a conclu qu'en l'absence de solution de rechange la réparation demandée était « nécessaire et appropriée » (2009 CanLII 37906, par. 7-8).

[60] En l'occurrence, le respect du droit provincial implique nécessairement le non-respect de l'ordonnance rendue en vertu du droit fédéral. D'un côté, le par. 30(7) de la *LSM* exige qu'une partie du produit de la vente lié aux biens décrits dans la loi provinciale soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. D'un autre côté, l'ordonnance initiale modifiée accorde à la charge DE priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (par. 45). Accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

C. *Indalex avait-elle des obligations fiduciaires envers les participants?*

[61] Le fait que la charge DE ait préséance sur la fiducie réputée ou que les intérêts des participants au régime des cadres ne soient pas protégés par la fiducie réputée ne signifient pas que les participants n'ont pas le droit de recevoir un montant prélevé

fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

[64] Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator

sur le fonds de réserve. Il faut encore examiner s'il est possible et s'il y a lieu d'imposer une réparation en equity — pouvant avoir préséance sur toutes les priorités — pour manquement par Indalex à une obligation fiduciaire.

[62] La première étape de l'analyse relative à une obligation fiduciaire consiste à déterminer si de telles obligations existent et dans quel contexte elles s'appliquent. La Cour a reconnu que, dans certaines circonstances, l'administrateur d'un régime de retraite a des obligations fiduciaires envers les participants en vertu tant de la common law que de la législation (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41). Il est clair que la relation entre les participants et Indalex, en sa qualité d'administrateur des régimes, présente les caractéristiques d'une relation fiduciaire. Ni Sun Indalex ni le contrôleur ne le contestent.

[63] Sun Indalex et le contrôleur font cependant valoir que l'employeur n'est tenu à une obligation fiduciaire que lorsqu'il agit en qualité d'administrateur des régimes — lorsqu'il porte son « chapeau » d'administrateur des régimes. Hors du contexte de l'administration des régimes, lorsque le conseil d'administration prend des décisions dans l'intérêt supérieur de la société, il porte uniquement son « chapeau » de gestionnaire de la société. Selon cette optique, les décisions de l'employeur concernant la gestion de l'entreprise ne sont pas assujetties aux obligations fiduciaires de la société envers les participants à son régime de retraite et, par conséquent, ne peuvent entrer en conflit avec les intérêts des participants. Je ne puis accepter cette interprétation lorsqu'il s'agit de déterminer la portée des obligations fiduciaires qui incombent à un employeur en sa qualité d'administrateur d'un régime de retraite.

[64] Seules peuvent administrer un régime de retraite les personnes ou entités qui y sont autorisées par la *LRR* (par. 1(1) et al. 8(1)a)). L'employeur fait partie de ces personnes ou entités. L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une

of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

[65] Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

[66] When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or

obligation fiduciaire envers la société, le fait que l'employeur puisse agir en qualité d'administrateur d'un régime de retraite signifie que l'al. 8(1)a) de la *LRR* repose sur la prémisse que les décisions de gestion de l'entreprise prises par les administrateurs n'engendreront pas toujours un conflit avec les obligations de la société envers les participants au régime de retraite. L'employeur doit toutefois être prêt à résoudre les conflits lorsqu'ils surgissent. Une procédure de réorganisation impose inévitablement un poids à un débiteur, mais ce fardeau ne libère pas l'employeur qui agit en qualité d'administrateur d'un régime de retraite de ses obligations fiduciaires.

[65] Le paragraphe 22(4) de la *LRR* interdit expressément à l'administrateur d'un régime de permettre que son intérêt entre en conflit avec ses obligations à l'égard du régime de retraite. Par conséquent, l'employeur dont le propre intérêt ne coïncide pas avec celui des participants au régime doit se demander si cette divergence d'intérêts peut susciter un conflit et, le cas échéant, ce qu'il faut faire pour le résoudre. Lorsqu'il y a effectivement conflit, la métaphore des deux « chapeaux » n'est selon moi d'aucun secours. La solution ne consiste pas à déterminer si une décision peut être classifiée comme se rattachant à la gestion de la société ou à l'administration du régime de retraite. L'employeur peut très bien prendre une décision judicieuse concernant la gestion de la société et, néanmoins, porter préjudice aux intérêts des participants au régime. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

[66] Lorsque les intérêts de la société que l'employeur tente de servir se heurtent à ceux que l'employeur a le devoir de protéger en qualité d'administrateur du régime, il faut trouver une façon de veiller sur les intérêts des participants. Cela peut vouloir dire que la société les tiendra informés, qu'elle trouvera un administrateur substitut pour le régime, qu'elle nommera un avocat

finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

[67] In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4) *PBA*).

[69] Since the Plan Members seek an equitable remedy, it is important to identify the point at

pour représenter les participants ou qu'elle résoudra le conflit par un autre moyen. La solution doit être adaptée au problème, et une solution donnée ne vaudra pas nécessairement pour tous les cas.

[67] En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Indalex avait certaines responsabilités en sa qualité d'administrateur des régimes. Par exemple, le par. 56(1) de la *LRR* l'obligeait à veiller à ce que les cotisations soient payées à leur date d'exigibilité et, si elles ne l'étaient pas, le par. 56(2) exigeait qu'elle en avise le surintendant. Il incombait également à Indalex, aux termes de l'art. 59, d'introduire une instance devant un tribunal compétent pour obtenir le paiement des cotisations dues, mais impayées. Indalex, en tant qu'employeur, a acquitté toutes les cotisations dues. Son insolvabilité compromettait toutefois le paiement des cotisations accumulées à la date de la liquidation. En cas d'insolvabilité, la créance de l'administrateur d'un régime à l'égard des cotisations accumulées constitue une réclamation prouvable.

[68] Dans le contexte de la présente affaire, le fait qu'Indalex pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie réputée. Cet exemple démontre qu'il existait manifestement un conflit entre les intérêts d'Indalex et ceux des participants. Indalex aurait dû prendre des mesures pour assurer la protection des intérêts des participants dès qu'elle a constaté, ou qu'elle aurait dû constater, l'existence d'un conflit potentiel. Elle ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants. Elle a donc, à tout le moins, manqué à son obligation d'éviter les conflits d'intérêts (par. 22(4) *LRR*).

[69] Comme les participants demandent une réparation en equity, il importe d'établir à quel moment

which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

[70] As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

[71] First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the

Indalex aurait dû prendre des mesures pour veiller à ce que leurs intérêts soient protégés. Soulignons au préalable que l'analyse d'un conflit d'intérêts doit s'appuyer sur un contexte factuel et qu'il n'est ni nécessaire ni utile de tenter de décrire toutes les situations dans lesquelles un conflit est susceptible de surgir.

[70] L'insolvabilité, comme je l'ai déjà mentionné, met en péril les cotisations de l'employeur. Cela ne signifie pas pour autant que la seule décision d'engager une procédure en matière d'insolvabilité constitue un manquement à une obligation fiduciaire. Le président d'Indalex à l'époque, M. Timothy R. J. Stubbs, a expliqué pourquoi une procédure en matière d'insolvabilité avait été engagée, le 3 avril 2009, dans une situation d'urgence. La dette d'Indalex envers son prêteur était en souffrance, la société s'exposait à des poursuites pour factures impayées, elle avait reçu un avis de résiliation de son assureur qui prenait effet le 6 avril et ses fournisseurs ne lui faisaient plus crédit. Indalex devait donc agir de toute urgence, avant qu'un créancier n'entame une procédure de mise en faillite, ce qui aurait compromis la poursuite de l'exploitation de l'entreprise et le maintien des emplois. Plusieurs raisons m'amènent à conclure que la suspension demandée en l'espèce n'a pas en elle-même placé Indalex en conflit d'intérêts.

[71] Premièrement, la suspension ne fait que figer les droits des parties. La plupart du temps, elle s'obtient *ex parte*. C'est notamment pour éviter que les créanciers se ruent devant les tribunaux pour tenter d'obtenir des avantages que les procédures en matière d'insolvabilité ne leur procureraient pas qu'on s'abstient de donner avis de la motion initiale en suspension. Il semble plus équitable d'appliquer un processus unique au plus grand nombre possible de créanciers. Dans ce contexte, les participants sont sur le même pied que les autres créanciers, et ils ne bénéficient d'aucun droit spécial de recevoir un avis. Deuxièmement, l'une des conclusions de l'ordonnance demandée par Indalex exigeait que, sous réserve de quelques exceptions, tous les créanciers reçoivent signification de l'ordonnance dans un délai de 10 jours. L'avis permettait à tout intéressé de demander une modification de l'ordonnance.

merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty

Troisièmement, Indalex était autorisée à verser toutes les prestations de retraite. Même si l'ordonnance excluait les paiements spéciaux de solvabilité, elle ne réglait pas les droits concurrents des créanciers, et la suspension permettait aux participants de présenter leurs arguments au sujet de la fiducie réputée, alors qu'ils en auraient tout simplement perdu le bénéfice dans le contexte d'une faillite, qui était la solution de rechange.

[72] Bien que la suspension en elle-même n'ait pas placé Indalex en situation de conflit d'intérêts, les procédures qui ont suivi ont eu des conséquences négatives. Le 8 avril 2009, Indalex a déposé une motion en modification et reformulation de l'ordonnance initiale pour demander un financement DE. Cette motion avait été prévue. M. Stubbs avait mentionné dans son affidavit à l'appui de la demande d'ordonnance initiale que les prêteurs avaient consenti au financement, mais qu'Indalex devrait être autorisée à obtenir le financement pour poursuivre ses activités. Toutefois, le 8 avril, l'ordonnance initiale n'avait pas encore été signifiée aux participants. Un court préavis avait été donné au Syndicat, plutôt qu'à chacun des participants, mais le Syndicat n'a pas comparu. Les participants n'étaient tout simplement pas représentés lors de l'examen de la motion en modification de l'ordonnance initiale de suspension et en autorisation d'accorder la charge DE.

[73] En demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. Il s'agit d'un cas où les administrateurs d'Indalex ont permis que les intérêts de la société l'emportent sur ceux des participants. Ce faisant, ils ont peut-être rempli leurs obligations fiduciaires envers Indalex, mais ils ont fait en sorte qu'Indalex a manqué à ses obligations en tant qu'administrateur des régimes. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus

meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[75] The Monitor and George L. Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order.

particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants. Étant donné qu'Indalex soutenait la motion visant l'octroi d'une priorité à son prêteur, elle ne pouvait pas simultanément défendre l'existence d'une priorité fondée sur la fiducie réputée.

[74] La Cour d'appel a constaté d'autres manquements. Je partage l'opinion du juge Cromwell qu'aucune des procédures subséquentes n'a porté atteinte aux droits des participants. La suite des événements, notamment la deuxième motion en approbation du financement DE et le processus de vente, était prévisible et, à cet égard, typique des réorganisations. Dans tous les cas, des avis ont été donnés. Les participants ont été représentés par des avocats compétents. Fait plus important, le tribunal a ordonné que des fonds soient réservés et qu'une audience soit tenue pour que les questions en litige soient pleinement débattues.

[75] Le contrôleur et George L. Miller, le syndic de faillite d'Indalex É.-U., soutiennent que les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE. Ils plaident que la règle interdisant les contestations indirectes empêche les participants de contester l'ordonnance autorisant le financement DE. Cet argument n'est pas convaincant. Les participants n'ont pas reçu avis de la motion demandant au tribunal d'autoriser le financement DE. L'avocat des participants au régime des cadres a défendu leur position dès qu'il a pu le faire et l'a réitérée chaque fois qu'il en a eu l'occasion. À l'audition de la motion visant l'augmentation du prêt DE, il n'a retiré leur opposition que lorsqu'on lui a dit que son seul objet était d'augmenter le montant du prêt autorisé. Le juge chargé d'appliquer la *LACC* a fixé une date d'audience expressément pour la présentation des arguments qu'Indalex aurait pu faire valoir, en qualité d'administrateur des régimes, lorsqu'elle a demandé la modification de l'ordonnance initiale.

Court File No. CV-19-616077-00CL

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 IMPERIAL TOBACCO CANADA LIMITED, *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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