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 APPLICANTS
(Comeback Hearing Issues and Response to Quebec Class Action Plaintiffs' Motion to Vary Initial Order)

April 3, 2019

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Global Legal Editor

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TAB 1

2003 FCT 707, 2003 CFPI 707
Federal Court of Canada, Trial Division

Always Travel Inc. v. Air Canada

2003 CarswellNat 1763, 2003 CarswellNat 4358, 2003 FCT 707, 2003 CFPI 707,
[2003] F.C.J. No. 933, 124 A.C.W.S. (3d) 27, 235 F.T.R. 142, 43 C.B.R. (4th) 163

Always Travel Inc., Highbourne Enterprises Inc. and Canadian Standard Travel Agent Registry (CSTAR), Plaintiffs and Air Canada, American Airlines Inc., United Airlines Inc., Delta Airlines Inc., Continental Airlines Inc., Northwest Airlines Inc. and International Air Transport Association (IATA), Defendants

Hugessen J.

Heard: May 30, 2003
Judgment: May 30, 2003
Docket: T-757-02

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Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Plaintiffs proposed to bring class action and sought to represent class of Canadian travel agencies in claim against defendants — One defendant, AC, had obtained order under Companies' Creditors Arrangement Act (CCAA) protecting it against proceedings and second defendant, U Inc., was in Chapter 11 Bankruptcy in United States — AC brought motion to stay proceedings against it — Motion granted — Order of Ontario Superior Court specifically requested that Federal Court lend its aid to order staying proceedings in spirit of comity — Stay granted in comity does not need to meet traditional requirements for stay of proceedings — In virtually every case where order is made by provincial superior court in exercise of its CCAA jurisdiction and that order requests Federal Court's aid, Federal Court will give such aid on proper application being made — Burden is on party seeking to avoid consequences of court acting in aid of provincial superior court exercising its jurisdiction under CCAA to show that proceedings ought not to be stayed — Proper court to decide whether these proceedings should go forward notwithstanding CCAA proceedings was Ontario Superior Court of Justice — Considerations involved were considerations relating to administration of insolvent companies.

Judges and courts --- Exchequer and Federal Courts — Jurisdiction — Concurrent jurisdiction — Comity

Plaintiffs proposed to bring class action and sought to represent class of Canadian travel agencies in claim against defendants — One defendant, AC, had obtained order under Companies' Creditors Arrangement Act (CCAA) protecting it against proceedings and second defendant, U Inc., was in Chapter 11 Bankruptcy in United States — AC brought motion to stay proceedings against it — Motion granted — Order of Ontario Superior Court specifically requested that Federal Court lend its aid to order staying proceedings in spirit of comity — Stay granted in comity does not need to meet traditional requirements for stay of proceedings — In virtually every case where order is made by provincial superior court in exercise of its CCAA jurisdiction and that order requests Federal Court's aid, Federal Court will give such aid on proper application being made — Burden is on party seeking to avoid consequences of court acting in aid of provincial superior court exercising its jurisdiction under CCAA to show that proceedings ought not to be stayed — Proper court to

decide whether these proceedings should go forward notwithstanding CCAA proceedings was Ontario Superior Court of Justice — Considerations involved were considerations relating to administration of insolvent companies.

***Hugessen J.*:**

1 These are proceedings in a proposed class action brought by the plaintiffs who seek to represent a class of some 3,700 or 3,800 travel agencies in Canada against a number of airlines and the IATA (International Aviation Transport Association) as defendants. The action is based on an alleged conspiracy in breach of the *Competition Act* [1], and is a civil claim based on section 36 of that statute.

2 The proposed class action is in its infancy and the plaintiffs have not yet obtained certification. Pursuant to an order which I have given, no statements of defence are required until certification has been decided upon.

3 The defendants, as I say, are a number of airlines but two of them are the reasons for our being here today, namely Air Canada, which obtained, on April 1 st last from Justice Farley of the Ontario Superior Court of Justice, an order under the *Companies' Creditors Arrangement Act* [2],("CCAA") protecting it against proceedings and United Airlines which has been under Chapter 11 Bankruptcy Protection in United States since last December.

4 The matters before me today arise from a number of motions, first a motion brought by Air Canada seeking to have me stay these proceedings, second, a responsive motion brought by the plaintiffs seeking to have me declare that the order of the Ontario Superior Court of Justice does not have an impact on these proceedings so as to stay them and third, a similar motion by the plaintiffs in respect of another order made by Justice Farley in the Ontario Superior Court of Justice recognizing the Chapter 11 proceedings in the United States relating to United Airlines and giving an order under section 18.6 of the CCAA. The present reasons and the order which will follow dispose of all of those motions.

5 First, let me say that in my view, an order made under sections 11.3 and 11.4 of the CCAA does not have the effect of automatically staying proceedings in this Court. More particularly, the order made by Justice Farley on April 1 st, 2003 and subsequently extended, does not have that effect. I draw that conclusion primarily from a reading of the CCAA, sections 11.3 and 11.4 and section 16 and from a reading of paragraphs 3 and 70 of Justice Farley's order in the case of Air Canada and from a reading of the equivalent paragraphs of his recognition order in the case of United Airlines.

6 The relevant CCAA provisions are as follows:

11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days, ... (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;	11. (3) Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours: ... b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;
11. (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose, ... (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;	11. (4) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée: ... b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;
16. Every order made by the court in any province in the exercise of jurisdiction conferred by this	16. Toute ordonnance rendue par le tribunal d'une province dans l'exercice de la juridiction conférée

Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it. 18.6 (2) The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.	par la présente loi à l'égard de quelque transaction ou arrangement a pleine vigueur et effet dans les autres provinces, et elle est appliquée devant le tribunal de chacune des autres provinces de la même manière, à tous égards, que si elle avait été rendue par le tribunal la faisant ainsi exécuter. 18.6 (2) En vue de faciliter, d'approuver ou de mettre en oeuvre les arrangements permettant de coordonner les procédures visées par la présente loi et les procédures intentées à l'étranger, le tribunal peut, à l'égard de la compagnie débitrice, rendre les ordonnances et accorder les redressements qu'il estime indiqués.

7 In section 2 of the CCAA, "court" is defined with reference exclusively to provincial and territorial courts.

8 The relevant sections from Mr. Justice Farley's Initial Order, dated April 1 st , 2003 are as follows:

> 3. THIS COURT ORDERS that, until and including May 1, 2003, or such later date as the Court may order (the "Stay Period"), (a) no suit, action, enforcement process, extra-judicial proceeding or other proceeding (including a proceeding in any court, statutory or otherwise) (a "Proceeding") against or in respect of an Applicant or any present or future property, rights, assets or undertaking of an Applicant wheresoever located, and whether held by an Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise, and without limiting the generality of the foregoing, including the leasehold interests of the Applicants in any aircraft leased by an Applicant, whether in the possession of an Applicant, or subleased to another entity, any and all real property, personal property and intellectual property of an Applicant, and any and all securities, instruments, debentures, notes or bonds issued to, or held by or on behalf of an Applicant (the "Applicants' Property") shall be commenced and any and all Proceedings against or in respect of an Applicant or the Applicants' Property already commenced be and are hereby stayed and suspended, and (b) all persons are enjoined and restrained from realizing upon or enforcing by court proceedings, private seizure or otherwise, any security of any nature or description held by that person on the Applicants' Property or from otherwise seizing or retaining possession of the Applicants' Property, or from seizing or retaining aircraft operated by the Applicants.
>
> . . . . .
>
> 70. THIS COURT REQUESTS the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any courts of Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States of America and the states or other subdivisions of the United States and any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this order.

9 It seems to me to be quite clear from the statutory provisions that Parliament did not intend that orders made by the superior courts of the provinces in the exercise of their CCAA jurisdiction should extend so as to oblige this Court to suspend its proceedings in any matter properly belonging to its jurisdiction. There are examples, and section 16 of the CCAA is one of them, where Parliament has given specific jurisdiction to one superior court to stay proceedings in another superior court. In my view, such a disposition requires express language.

10 Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty [3] . In Canada, superior courts do not compete with one

another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye* [4], and repeated in the Brussel decisions [5]. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.

11 It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832* [6], and subsequently in *RJR-MacDonald Inc. v. Canada (Attorney General)* [7]. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court=s aid, this Court will give such aid on proper application being made.

12 That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.

13 That said, however, I have some difficulty seeing on what basis plaintiffs might persuade me that I am the right person to decide that these proceedings should go forward notwithstanding the CCAA proceedings. Certainly, in so far as the considerations involved are considerations relating to the administration of the insolvent companies, the proper court to make that determination is the Ontario Superior Court of Justice. Some argument was addressed to me this morning on the alleged impropriety of the order of May 16, 2003, the recognition order in the United Airlines case. I reject that argument not on its merits or on its substance as to which I make no comment, but simply on the basis that I am not the right person to decide whether or not Justice Farley made a mistake. I note that his order was given *ex parte*. I also note that the plaintiffs had notice of it but chose, for reasons of their own, not to appear. It is still, as I understand the terms of that order and the "comeback" clause in it, open to the plaintiffs to make an application to Justice Farley and to urge before him various grounds upon which they think it is wrong and unjust that they should be obliged to submit their claims against United Airlines to the Bankruptcy Court in the United States. Those arguments will no doubt, if they get made, receive the consideration that they deserve.

14 I think it is likewise with respect to the case of Air Canada. Air Canada is under the protection of the CCAA. The stay order's purpose is, of course, to permit a structured environment in which the company can attempt to reorganize and go forward with its business in possession of its assets [8].

15 In the exercise of a restructuring, the company has to be left in possession of its assets and those assets have to be protected against creditors. The reality is that this action being in its early stages and being a proposed class action is unlikely to get anywhere near to a point where it would have any impact on Air Canada=s assets before the end of the CCAA proceedings and on that basis, it may be possible to persuade Justice Farley that this action should be allowed to go forward.

16 There is, however, one matter on which I think that only Justice Farley can decide and that is the third basis for the stay order which is to allow the company to concentrate its efforts on the reorganization and not to be distracted by the defence of other claims. That is a matter on which I have no information at all and on which I suspect Justice Farley has or will have in due course ample information. Personally, it would seem to me that the impact on Air Canada=s efforts at reorganization of having to file materials in the certification application would be minimal and I also would have thought that the likelihood of Air Canada not emerging from the reorganization procedures would be pretty minimal as well but those are not matters which I can really deal with.

17 I granted an interim stay on May 2, 2003 of my scheduling order dated February 21, 2003 with respect to the exchange of materials on the application for certification and by the order which I make today, I am going to extend that stay for a further period of 3 months unless Justice Farley should, in the interim, lift the underlying stays in the Ontario Superior Court of Justice and therefore, the reasons for this stay. I will give counsel a date which, as it happens is the date that we had already reserved for this case. We had thought it was going to be the date on which we would argue the certification motion, September 3, 2003. A stay order will go in this action effective until September 3, 2003 or until the stay orders issued by Justice Farley of the Ontario Superior Court of Justice are lifted, which ever shall first occur.

18 Plaintiffs have leave, if they so desire, to move this Court to lift the stay order. It has been given without evidence and solely on the basis of this Court's duty to act in aid of the Ontario Superior Court of Justice. If plaintiffs, upon reflection, decide that this is what they want to do, they should take an appointment with the registrar and we would conduct a quick telephone conference to set a time table and we would all meet again.

19 That really concludes what I have to say with this exception, both parties have sought costs. Costs are not normally granted in class action proceedings. The rule is quite clear that exceptional circumstances are required and unless counsel can persuade me that there are such exceptional circumstances, I do not propose to grant costs.

Motion granted.

Footnotes

1 R.S. 1985, c. C-34.

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

3 A classic example is the unfortunate plight of the Sheriff of Middlesex reported in the companion cases of *Stockdale v. Handsard* (1840), 11 Ad. & El. 253, 113 E.R. 411 (Eng. C.A.), and *Sheriff of Middlesex, Re* (1840), 11 Ad. & El. 273, 113 E.R. 419 (Eng. C.A.), wherein the poor sheriff was imprisoned by the House of Commons for attempting to execute an order of the Court.

4 [1990] 3 S.C.R. 1077 (S.C.C.).

5 *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 (S.C.C.) and *Antwerp Bulkcarriers, N.V., Re*, [2001] 3 S.C.R. 951 (S.C.C.).

6 [1987] 1 S.C.R. 110 (S.C.C.).

7 [1994] 1 S.C.R. 311 (S.C.C.).

8 See *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

TAB 2

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

File: No: 500-11-048114-157

S U P E R I O R C O U R T
Commercial Division

Montreal, January 27, 2015

Present: The Honourable
Mr. Justice Martin Castonguay, J.S.C.

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 AND CLIFFS QUÉBEC IRON MINING ULC.

Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

- and -

FTI CONSULTING CANADA INC.

Monitor

INITIAL ORDER

ON READING Petitioners' petition for an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36 (as amended the "**CCAA**") and the exhibits, the affidavit of Clifford Smith sworn on January 26, 2015 filed in support thereof (the "**Petition**"), the

JC00C9

consent of FTI Consulting Canada Inc. to act as monitor (the "**Monitor**"), relying upon the submissions of counsel for the Petitioners and the Mises-en-cause, the proposed Monitor and being advised that all of the parties listed in the Initial Service List attached hereto were given prior notice of the presentation of the Petition;

GIVEN the provisions of the CCAA;

WHEREFORE, THE COURT:

1. **GRANTS** the Petition.

2. **ISSUES** an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

    - Service
    - Application of the CCAA
    - Effective Time
    - Plan of Arrangement
    - Procedural Consolidation
    - Stay of Proceedings against CCAA Parties and the Property
    - Stay of Proceedings against the Directors and Officers
    - Possession of Property and Operations
    - No Exercise of Rights or Remedies;
    - No Interference with Rights
    - Continuation of Services
    - Non-Derogation of Rights
    - Directors' and Officers' Indemnification and Charge
    - Restructuring
    - Powers of the Monitor
    - Priorities and General Provisions Relating to CCAA Charges
    - General

Service

3. **DECLARES** that sufficient prior notice of the presentation of this Petition has been given by the Petitioners to all of the parties listed in the Initial Service List attached hereto.

Application of the CCAA

4. **DECLARES** that the Petitioners are debtor companies to which the CCAA applies and although not Petitioners, the Mises-en-cause shall enjoy the protections and authorizations provided by this Order.

Effective time

5. **DECLARES** that this Order and all of its provisions are effective as of 12:01 a.m. Montreal time, province of Quebec, on the date of this Order (the "**Effective Time**").

Plan of Arrangement

6. **DECLARES** that the Petitioners and the Mises-en-cause (collectively hereinafter referred to as the "**CCAA Parties**") shall have the authority to file with this Court and to submit to their creditors one or more plans of compromise or arrangement (collectively, the "**Plan**") in accordance with the CCAA.

Procedural Consolidation

7. **ORDERS** that the consolidation of these CCAA proceedings in respect of the CCAA Parties shall be for administrative purposes only and shall not effect a consolidation of the assets and property of each of the CCAA Parties and the including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the CCAA Parties and the Property

8. **ORDERS** that, until and including February 26, 2015**,** or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the CCAA Parties, or affecting the business operations and activities of the CCAA Parties (the "**Business**") or the Property (as defined herein below), including as provided in paragraph 11 hereinbelow except with leave of this Court. Any and all Proceedings currently under way against or in respect of the CCAA Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

8.1 The rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of subsection 11.09 CCAA.

Stay of Proceedings against the Directors and Officers

9. **ORDERS** that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the CCAA Parties nor against any person deemed to be a director or an officer of any of the CCAA Parties under subsection 11.03(3) CCAA (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the CCAA Parties where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

10. **ORDERS** that the CCAA Parties shall remain in possession and control of their present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (collectively the "**Property**"), the whole in accordance with the terms and conditions of this order including, but not limited, to paragraph 33 hereof.

11. **ORDERS** that the CCAA Parties shall be entitled to continue to utilize the central cash management system currently in place as described in the Petition or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the CCAA Parties of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined herein below) other than the CCAA Parties, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

12. **ORDERS** that each of the CCAA Parties are authorized to complete outstanding transactions and engage in new transactions with other CCAA Parties, and to continue, on and after the date of this Order, to buy and sell goods and services, including, without limitation head office and shared services, and allocate, collect and pay costs, expenses and other amounts from and to the other CCAA Parties, or any of them (collectively, together with the Cash Management System and all transactions, inter-company funding and other processes and services among any of the CCAA Parties, the "**Intercompany Transactions**") in the ordinary course of business. All ordinary course Intercompany Transactions among the CCAA Parties shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to further Order of this Court.

13. **ORDERS** that the CCAA Parties shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

a. all outstanding and future wages, salaries, bonuses, employee and current service pension contributions, expenses, benefits, vacation pay and termination and severance obligations payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

b. the fees and disbursements of any agents retained or employed by the CCAA Parties in respect of these proceedings, at their standard rates and charges.

14. **ORDERS** that, except as otherwise provided to the contrary herein, the CCAA Parties shall be entitled but not required to pay all reasonable expenses incurred by the CCAA Parties in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including Directors and Officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the CCAA Parties following the date of this Order.

15. **ORDERS** that the CCAA Parties shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes; and

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the CCAA Parties and the in connection with the sale of goods and services by the CCAA Parties, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.

16. […]

No Exercise of Rights or Remedies

17. **ORDERS** that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the CCAA Parties is a party as a result of the insolvency of the CCAA Parties and/or these CCAA proceedings, any events of default or non-performance by the CCAA Parties or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the CCAA Parties, or affecting the Business, the Property or any part thereof are hereby stayed and suspended except with leave of this Court.

18. **DECLARES** that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating to the CCAA Parties, or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the CCAA Parties, or any of them become(s) bankrupt or a receiver as defined in subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") is appointed in respect of the CCAA Parties, the

period between the date of the Order and the day on which the Stay Period ends shall not be calculated in respect of the CCAA Parties in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

No Interference with Rights

19. **ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the CCAA Parties, including, without limitation, the amended and restated partnership agreement entered into among Bloom Lake General Partner Limited, as general partner (the "**General Partner"**), Cliffs Québec Iron Mining Limited, by its successor in interest, Consolidated Thompson Iron Mines Limited and Wugang Canada Resources Investment Limited (the "**LP Agreement**"), except with the written consent of the CCAA Parties, as applicable, and the Monitor, or with leave of this Court. Without limitation to the foregoing, the operation of any provision in the LP Agreement, or any other agreement, that purports to effect or cause a resignation of the General Partner, as general partner or accelerate, terminate, discontinue, alter, interfere with, repudiate, cancel, suspend or modify such agreement or arrangement as a result of the occurrence of any default or non-performance by or the insolvency of the CCAA Parties, or any one of them, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings is hereby stayed and restrained and under no circumstances shall the General Partner cease to be, or be replaced as, general partner of Bloom Lake Iron Ore Mine Limited Partnership absent consent of all the limited partners or further Order of this Court.

Continuation of Services

20. **ORDERS** that during the Stay Period and subject to paragraph 22 hereof and subsection 11.01 CCAA, all Persons having verbal or written agreements with the CCAA Parties or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data

services, centralized banking services, payroll services, insurance, transportation, utility, fuel or other goods or services made available to the CCAA Parties, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the CCAA Parties, and that the CCAA Parties shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of the Order are paid by the CCAA Parties, without having to provide any security deposit or any other security, in accordance with normal payment practices of the CCAA Parties or such other practices as may be agreed upon by the supplier or service provider and the CCAA Parties, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

21. **ORDERS** that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the CCAA Parties on or after the date of this Order, nor shall any Person be under any obligation on or after the date of the Order to make further advance of money or otherwise extend any credit to the CCAA Parties.

22. **ORDERS** that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by any CCAA Parties with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing or accruing to such Person or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by any of the CCAA Parties and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into a CCAA Party's account or the account of any of the CCAA Parties until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

Non-Derogation of Rights

23. **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of the CCAA Parties shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of the Order, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

Directors' and Officers' Indemnification and Charge

30. **ORDERS** that the CCAA Parties shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the CCAA Parties after the Effective Time, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

31. **ORDERS** that the Directors of the CCAA Parties shall be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $3.5 million (the "**Directors' Charge**"), as security for the indemnity provided in paragraph 30 of this Order as it relates to obligations and liabilities that the Directors may incur in such capacity after the Effective Time. The Directors' Charge shall have the priority set out in paragraphs 46 and 47 of this Order.

32. **ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay

amounts for which the Directors are entitled to be indemnified in accordance with paragraph 30 of this Order.

Restructuring

33. **DECLARES** that, to facilitate the orderly restructuring of its business and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the CCAA Parties shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, provided that the price in each case does not exceed $100,000 or $1,000,000 in the aggregate except that this amount shall not include amounts with respect to the sale or other disposition of employee homes by the CCAA Parties and any employee homes may be sold or otherwise disposed of by the CCAA Parties upon approval of the Monitor;

(d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the CCAA Parties, as applicable, and such employee, or failing such agreement, make provision to

deal with, any consequences thereof in the Plan, as the CCAA Parties the may determine;

(e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of their agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the CCAA Parties, as applicable, and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

(f) subject to section 11.3 CCAA, assign any rights and obligations of CCAA Parties.

34. **DECLARES** that, if a notice of disclaimer or resiliation is given to a landlord of any of the CCAA Parties pursuant to section 33 of the CCAA and subsection 33(e) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such CCAA Party and the Monitor 24 hours prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the CCAA Party, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

35. **ORDERS** that the CCAA Parties, as applicable, shall provide to any relevant landlord notice of the intention of any of the CCAA Parties to remove any fittings, fixtures, installations or leasehold improvements at least seven (7) days in advance. If a CCAA Party has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between such CCAA Party and the landlord.

36. **DECLARES** that, in order to facilitate the Restructuring, the CCAA Parties may, subject to the approval of the Monitor, or further order of the Court, settle claims of customers and suppliers that are in dispute.

37. **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the CCAA Parties are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for the sale of Property, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the CCAA Parties binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the CCAA Parties or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the CCAA Parties.

38. **ORDERS** that pursuant to clause 3(c)(i) of the *Electronic Commerce Protection Regulations*, made under *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reilance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23, the CCAA Parties and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective purchasers or bidders and to their

advisors but only to the extent desirable or required to provide information with respect to any sales process in these CCAA proceedings.

Powers of the Monitor

39. **ORDERS** that FTI Consulting Canada Inc. is hereby appointed to monitor the business and financial affairs of the CCAA Parties as an officer of this Court (the "**Monitor**") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks, or as otherwise directed by the Court, in La Presse and the Globe & Mail National Edition and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "**Website**") a notice containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the CCAA Parties of more than $1,000, advising them that the Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

(b) shall monitor the receipts and disbursements of the CCAA Parties;

(c) shall assist the CCAA Parties, to the extent required by the CCAA Parties, in dealing with their creditors and other interested Persons during the Stay Period;

(d) shall assist the CCAA Parties, to the extent required by the CCAA Parties, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(e) shall advise and assist the CCAA Parties, to the extent required by the CCAA Parties, to review the CCAA Parties' businesses and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(f) shall assist the CCAA Parties, to the extent required by the CCAA Parties, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(g) shall report to the Court on the state of the business and financial affairs of the CCAA Parties or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated Reports for the CCAA Parties;

(h) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(i) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(j) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under the Order or under the CCAA;

(k) may act as a "foreign representative" of any of the CCAA Parties or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

(l) may give any consent or approval as may be contemplated by the Order or the CCAA;

(m) may hold and administer funds in connection with arrangements made among the CCAA Parties, any counter-parties and the Monitor, or by Order of this Court;

(n) may, to the extent to which the Monitor considers it necessary or desirable to do so, develop, in consultation with the CCAA Parties, such principles, policies and procedures as are satisfactory to the Monitor to govern anyor all category of Intercompany Transactions (the "**Intercompany Transaction Policies**");

(o) may review and monitor all Intercompany Transactions, including compliance with any Intercompany Transaction Policies that are applicable in the circumstances, in such manner as the Monitor, in consultation with the CCAA Parties, considers appropriate; and

(p) may perform such other duties as are required by the Order or the CCAA or by this Court from time to time.

Unless expressly authorized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the CCAA Parties, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the CCAA Parties nor shall the Monitor be deemed to have done so.

40. **ORDERS** that the CCAA Parties and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of the Order shall forthwith

provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the CCAA Parties in connection with the Monitor's duties and responsibilities hereunder.

41. **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the CCAA Parties with information in response to requests made by them in writing addressed to the Monitor and copied to the counsel for the CCAA Parties. In the case of information that the Monitor has been advised by the CCAA Parties is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the CCAA Parties unless otherwise directed by this Court.

42. **DECLARES** that if the Monitor, in its capacity as Monitor, carries on the business of the CCAA Parties or continues the employment of employees of the CCAA Parties, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

43. **DECLARES** that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least seven days notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph 39(i) hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

44. **ORDERS** that CCAA Parties shall pay weekly the reasonable fees and disbursements of the Monitor, the Monitor's legal counsel, counsel for the CCAA Parties, independent counsel to the Directors, and other advisers directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after the Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

45. **DECLARES** that the Monitor, the Monitor's legal counsel, legal counsel for the CCAA Parties, independent counsel to the Directors, and the Monitor and the CCAA Parties' respective advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $2,500,000 (the "**Administration Charge**"), having the priority established by paragraphs 46 and 47 hereof.

Priorities and General Provisions Relating to CCAA Charges

46. **DECLARES** that the priorities of the Administration Charge and the Directors' Charge (collectively, the "**CCAA Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge; and

(b) second, the Directors' Charge;

47. **DECLARES** that each of the CCAA Charges shall rank behind any and all other existing hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property charged by such Encumbrances, in favour of any Persons that have not been served with notice of this Motion. The CCAA Parties and the beneficiaries of the CCAA Charges shall be entitled to seek priority ahead of the Encumbrances on notice to those parties likely to be affected by such priority (it being the intention of the CCAA Parties to seek priority for the Adminstration Charge and the Directors` Charge ahead of all Encumbrances at the Comeback Hearing (as defined below)).

48. **ORDERS** that, except as otherwise expressly provided for herein, the CCAA Parties shall not grant any Encumbrances in or against any Property that rank in priority to, or

pari passu with, any of the CCAA Charges unless the CCAA Parties, as applicable, obtain the prior written consent of the Monitor and the prior approval of the Court.

49. **DECLARES** that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the CCAA Parties, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

50. **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) filed pursuant to the BIA or any bankruptcy order made pursuant to such applications or any assignments in bankruptcy made or deemed to be made in respect of any of the CCAA Parties; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the CCAA Parties (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach by the CCAA Parties of any Third Party Agreement to which any CCAA Party is a party; and

(b) the beneficiaries of the CCAA Charges shall not have any liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

51. **DECLARES** that notwithstanding: (i) these proceedings and the declarations of insolvency made herein, (ii) any application(s) for bankruptcy order(s) issued pursuant to the BIA or any bankruptcy order made pursuant to such applications or any assignments in bankruptcy made or deemed to be made in respect of any CCAA Party, and (iii) the provisions of any federal or provincial statute, the payments or disposition

of Property made by the CCAA Parties pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

52. **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property of the CCAA Parties and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the CCAA Parties.

General

53. **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisers of the CCAA Parties or of the Monitor in relation to the Business or Property of the CCAA Parties, without first obtaining leave of this Court, upon ten (10) days written notice to counsel for the CCAA Parties, the Monitor's counsel and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

54. **ORDERS** that, subject to further Order of this Court, all motions in these CCAA proceedings are to be brought on not less than ten (10) calendar days' notice to all Persons on the service list. Each Motion shall specify a date (the "**Initial Return Date**") and time (the **"Initial Return Time**") for the hearing.

55. **ORDERS** that any Person wishing to object to the relief sought on a motion in these CCAA proceedings must serve responding motion materials or a notice stating the objection to the motion and the grounds for such objection (a "**Notice of Objection**") in writing to the moving party, the CCAA Parties and the Monitor, with a copy to all Persons on the service list, no later than 5 p.m. Montreal Time on the date that is four (4) calendar days prior to the Initial Return Date (the "**Objection Deadline**").

56. **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Judge having carriage of the motion (the "**Presiding Judge**") may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in person, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

57. **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concering the Hearing Details. The Monitor shall thereafter advise the service list of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in these proceedings.

58. **ORDERS** that, if a Notice of Objection is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Return Date at the Initial Return Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Return Date and at the Initial Return Time; or (b) establish a schedule for the delivery of materials and the hearing of the contested motion and such other matters, including interim relief, as the Court may direct.

59. **DECLARES** that the Order and any proceeding or affidavit leading to the Order, shall not, in and of themselves, constitute a default or failure to comply by the CCAA Parties under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

60. **DECLARES** that, except as otherwise specified herein, the CCAA Parties and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of

the CCAA Parties and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

61. **DECLARES** that the CCAA Parties and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the CCAA Parties shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

62. **DECLARES** that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the CCAA Parties and the Monitor and has filed such notice with this Court, or appears on the service list prepared by the monitor or its attorneys, save and except when an order is sought against a Person not previously involved in these proceedings;

63. **DECLARES** that the CCAA Parties or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice only to each other.

64. **DECLARES** that any interested Person may apply to this Court to vary or rescind this Order or seek other relief at the comeback hearing scheduled for February 19 and 20, 2015 (the **"Comeback Hearing"**) upon five (5) days notice to the CCAA Parties, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order;

65. **DECLARES** that the Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

66. **DECLARES** that the Monitor or an authorized representative of the CCAA Parties, and in the case of the Monitor, with the prior consent of the CCAA Parties, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the *U.S. Bankruptcy Code*, including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the CCAA Parties, shall be the foreign representative of the CCAA Parties. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

67. **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the CCAA Parties in any foreign proceeding, to assist the CCAA Parties and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

68. **ORDERS** the provisional execution of the Order notwithstanding any appeal.

January 27, 2015

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Honourable Mr. Justice Martin Castonguay, J.S.C.

TAB 3

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-054564-188

DATE: July 18, 2018

PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

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

BIOAMBER CANADA INC.

BIOAMBER SARNIA INC.

BIOAMBER INC.

Petitioners

-and-

PRICEWATERHOUSECOOPERS INC.

Monitor

SECOND AMENDED AND RESTATED INITIAL ORDER

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[1] **THE COURT**, upon reading the Petitioners' *Motion for (I) the Approval of a Key Employee Retention Program, (II) the Granting of a KERP Charge, and (III) the Issuance of a Second Amended and Restated Initial Order* (the "**Third Petition**") pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**"), having examined the proceeding, the affidavits and the exhibits;

[2] **GIVEN** the Initial Order issued herein on May 24, 2018 (the "**Initial Order**"), and the Petitioners' *Motion for (I) the Continuance of Proceedings Commenced under Part III of the Bankruptcy Act, (II) the Issuance of an Initial Order under the Companies' Creditors Arrangement Act, and (III) Ancillary Relief* (the "**Initial Petition**") and the affidavit and exhibits in support thereof;

[3] **GIVEN** the Amended and Restated Initial Order issued herein on June 15, 2018 (the "**Initial Order**"), and the Petitioners' *Motion for (I) the Approval of Interim Financing and the Creation of an Interim Financing Charge, (II) the Extension of the Stay of Proceedings, and (III) the Issuance of an Amended and Restated Initial Order* (the "**Second Petition**") and the affidavit and exhibits in support thereof;

[4] **GIVEN** the representations by counsel for the Petitioners, the Monitor, the secured creditors and other parties;

[5] **GIVEN** the provisions of the CCAA;

FOR THESE REASONS, THE COURT HEREBY:

[6] **GRANTS** the present Third Petition pursuant to the CCAA;

[7] **AMENDS** and **RESTATES** the Amended and Restated Initial Order in accordance with the relief sought in the Third Petition;

[8] **ISSUES** an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

a) Service;

b) Application of the CCAA, Continuation of the BIA Proceedings under the CCAA and Procedural Consolidation;

c) Effective Time;

d) Plan of Arrangement;

e) Stay of Proceedings against the Petitioners and the Property;

f) Stay of Proceedings against the Directors and Officers;

g) Possession of Property and Operations;

h) No Exercise of Rights or Remedies;

i) No Interference with Rights;

j) Continuation of Services;

k) Non-Derogation of Rights;

l) Interim Financing;

m) Directors' and Officers' Indemnification and Charge;

n) Key Employee Retention Program

o) Restructuring;

p) SISP;

q) Powers of the Monitor;

r) Priorities and General Provisions Relating to CCAA Charges;

s) General.

A. Service

[9] **ORDERS** that any prior delay for the presentation of the Third Petition is hereby abridged and validated so that the Third Petition is properly returnable today and hereby dispenses with further service thereof.

[10] **DECLARES** that sufficient prior notice of the presentation of the Third Petition has been given by the Petitioners to interested parties, including the secured creditors who are likely to be affected by the charges created herein.

B. Application of the CCAA, Continuation of BIA Proceedings under the CCAA and Procedural Consolidation

[11] **DECLARES** that the Petitioners are debtor companies to which the CCAA applies.

[12] **ORDERS** that the proceedings commenced by Petitioner BioAmber Canada Inc. and the Petitioner BioAmber Sarnia Inc. pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") in court files 500-11-054564-188 and 500-11-054563-180, respectively, be continued under the CCAA in the present court file.

[13] **ORDERS** that the consolidation of these CCAA proceedings in respect of the Petitioners shall be for administrative purposes only and shall not effect a consolidation of the assets and property of each of the Petitioners including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

C. Effective Time

[14] **DECLARES** that this Order and all of its provisions are effective as of 12:01 a.m. Montreal time, province of Quebec, on the date of this Order (the "**Effective Time**").

D. Plan of Arrangement

[15] **DECLARES** that the Petitioners shall have the authority to file with this Court and to submit to its creditors one or more plans of compromise or arrangement (collectively, the "**Plan**") in accordance with the CCAA.

E. Stay of Proceedings against the Petitioners and the Property

[16] **ORDERS** that, until and including July 31, 2018, or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Petitioners, or affecting the Petitioners' business operations and activities (the "**Business**") or the Property (as defined herein), including as provided in paragraph [26] herein except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

[16].1 **ORDERS** that the rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of subsection 11.09 CCAA.

F. Stay of Proceedings against Directors and Officers

[17] **ORDERS** that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Petitioners nor against any person deemed to be a director or an officer of any of the Petitioners under subsection 11.03(3) CCAA (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Petitioners where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

G. Possession of Property and Operations

[18] **ORDERS** that the Petitioners shall remain in possession and control of their present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof

(collectively the "**Property**"), the whole in accordance with the terms and conditions of this order including, but not limited, to paragraph [48] hereof.

[19] **ORDERS** that, for greater certainty, the Petitioners shall be permitted to resume production and operations at the Sarnia Facility (as defined in the Initial Petition), and further **ORDERS** that the Petitioners shall immediately suspend production and operations at the Sarnia Facility upon confirmation by the Monitor that no LOIs (as defined in the SISP) have been received from any Qualified Bidder (as defined in the SISP) in accordance with the terms of the SISP (as defined below), other than a party who is a liquidator, auctioneer or other Qualified Bidder in a similar business to a liquidator or auctioneer.

[20] **ORDERS** that each of the Petitioners are authorized to complete outstanding transactions and engage in new transactions with other Petitioners, and to continue, on and after the date of this Order, to buy and sell goods and services, and allocate, collect and pay costs, expenses and other amounts from and to the other Petitioners, or any of them (collectively, the "**Intercompany Transactions**") in the ordinary course of business. All ordinary course Intercompany Transactions among the Petitioners shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to further Order of this Court. Without limiting the generality of the foregoing, the Petitioner BioAmber Inc. is hereby permitted to pay amounts becoming due to the Petitioner BioAmber Canada Inc. on and after May 4, 2018 for services provided by BioAmber Canada Inc. pursuant to the Management Services Agreement filed in support of the Initial Petition as Exhibit R-8.

[21] **ORDERS** that, without limiting the generality of paragraph [20] hereof, for the purpose of meeting their respective post-filing obligations provided for pursuant to the Cash Flow Forecast filed in support of the Initial Petition as Exhibit R-12 or making any other payments they are authorized and permitted to make pursuant to the present Order, the Petitioners are permitted (i) to borrow, repay and re-borrow from each other from time to time, by way of intercompany advances pursuant to promissory notes bearing interest at a rate of 5% *per annum* (the "**Post-Filing Intercompany Advances**"), and (ii) to operate set-off of such Post-Filing Intercompany Advances, as applicable, such that the net aggregate outstanding amount of such Post-Filing Intercompany Advances shall not be more than $750,000 (the "**Net Post-Filing Intercompany Advances**").

[22] **DECLARES** that all of the Property of each of the Petitioners (excluding the sum of $375,000 held in escrow by Boivin Desbiens Senécal LLP to secure the obligations of BioAmber Sarnia Inc. to Arlanxeo Canada Inc. pursuant to a steam supply agreement dated as of May 12, 2012 (as amended) (the "**Arlanxeo Escrowed Funds**")) is hereby subject to charges and security for an aggregate amount of $750,000 in favour of the other Petitioners (the "**Post-Filing**

Intercompany Advance Charges") to secure the Net Post-Filing Intercompany Advances owing after the Petitioners have operated set-off of Post-Filing Intercompany Advances amongst themselves. The Post-Filing Intercompany Advance Charges shall have the priority established at paragraphs [64] and [65] of this Order.

[23] **ORDERS** that the Petitioners shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

a) all outstanding and future wages, salaries, bonuses, employee and current service pension contributions, expenses, benefits and vacation pay payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

b) the fees and disbursements of any agents retained or employed by the Petitioners in respect of these proceedings, at their standard rates and charges; and

c) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Petitioners prior to the date of this Order by third party suppliers up to a maximum aggregate amount of $500,000, if, in the opinion of the Petitioners, the supplier is critical to the business and ongoing operations of the Petitioners.

[24] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners shall be entitled but not required to pay all reasonable expenses incurred by the Petitioners in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business; and

b) payment for goods or services actually supplied to the Petitioners following the date of this Order.

[25] **ORDERS** that the Petitioners shall remit, in accordance with legal requirements, or pay:

a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes, or, in the

case of BioAmber Inc., any similar amounts payable pursuant to applicable United States federal and state law; and

b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners and in connection with the sale of goods and services by the Petitioners, or, in the case of BioAmber Inc., any similar amounts payable pursuant to applicable United States federal and state law, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.

H. No Exercise of Rights of Remedies

[26] **ORDERS** that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Petitioners is a party as a result of the insolvency of the Petitioners and/or these CCAA proceedings, any events of default or non-performance by the Petitioners or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners, or affecting the Business, the Property or any part thereof are hereby stayed and suspended except with leave of this Court.

[27] **DECLARES** that, to the extent any rights, obligations, or prescription, time or limitation periods including, without limitation, to file grievances relating to the Petitioners or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioners, or any of them, become(s) bankrupt or a receiver as defined in subsection 243(2) of the BIA is appointed in respect of the Petitioners, the period between the date of the Order and the day on which the Stay Period ends shall not be calculated in respect of the Petitioners in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

I. No Interference with Rights

[28] **ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the

Petitioners except with the written consent of the Petitioners, as applicable, and the Monitor, or with leave of this Court.

J. Continuation of Services

[29] **ORDERS** that during the Stay Period and subject to paragraph [31] hereof and subsection 11.01 CCAA, all Persons having verbal or written agreements with the Petitioners or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Petitioners, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Petitioners, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of the Order are paid by the Petitioners, without having to provide any security deposit or any other security, in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[30] **ORDERS** that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Petitioners on or after the date of this Order, nor shall any Person be under any obligation on or after the date of the Order to make further advance of money or otherwise extend any credit to the Petitioners.

[31] **ORDERS** that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by any Petitioner with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by a Petitioner and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into a Petitioner's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

K. Non-Derogation of Rights

[32] **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of the Petitioners shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of the Order, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

L. Interim Financing (DIP)

[33] **ORDERS** that BioAmber Canada Inc. and BioAmber Sarnia Inc. (collectively, the "**Canadian Petitioners**") be and are hereby authorized to borrow, repay and reborrow from Maynbridge Capital Inc. (the "**Interim Lender**") such amounts from time to time as Petitioners may consider necessary or desirable, up to a maximum principal amount of $3,045,000 outstanding at any time, on the terms and conditions as set forth in the DIP Credit Facility Agreement and the First Amendment to the DIP Credit Facility Agreement attached hereto *en liasse* as Schedule **A** (collectively, the "**Interim Financing Agreement**") and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of Petitioners and to pay such other amounts as are permitted by the terms of the Order and the Interim Financing Documents (as defined hereinafter) (the "**Interim Facility**").

[34] **ORDERS** that, notwithstanding the foregoing paragraph [33]:

a) at any time on or before July 31, 2018, the Canadian Petitioners are authorized to draw up to a maximum aggregate amount of $2,045,000 under the Interim Facility; and

b) subsequent to July 31, 2018, the Canadian Petitioners are authorized to draw an additional amount of up to $1,000,000 under the Interim Facility, upon written confirmation by the Monitor that, pursuant to the terms of the SISP, the Petitioners have received at least one LOI from a Qualified Bidder that is not a liquidator, auctioneer or other Qualified Bidder in a similar business to a liquidator or auctioneer.

[35] **ORDERS** that Canadian Petitioners are hereby authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the "**Interim Financing Documents**") as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Agreement, and Petitioners are hereby authorized to perform all of their obligations under the Interim Financing Documents.

[36] **ORDERS** that Canadian Petitioners shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the "**Interim Lender Expenses**")) under the Interim Financing Documents and shall perform all of its other obligations to the Interim Lender pursuant to the Interim Financing Agreement, the Interim Financing Documents and the Order.

[37] **DECLARES** that all of the existing and after-acquired real and personal, movable and immovable, tangible and intangible, corporeal and incorporeal, property, assets and undertaking of the Canadian Petitioners is hereby subject to a charge and security for an aggregate amount of $3,600,000 (such charge and security is referred to herein as the "**Interim Lender Charge**") in favour of the Interim Lender as security for all obligations of the Canadian Petitioners to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing Agreement and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs [64] and [65] of this Order.

[38] **ORDERS** that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan;

[39] **ORDERS** that the Interim Lender may:

a) notwithstanding any other provision of the Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to the Canadian Petitioners if the Canadian Petitioners fail to meet the provisions of the Interim Financing Agreement and the Interim Financing Documents.

[40] **ORDERS** that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least five (5) business days' written notice (the "**Notice Period**") of a default thereunder to the Petitioners, the Monitor and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim

Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA;

[41] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs [33] to [40] hereof unless either (a) notice of a motion for such order is served on the Interim Lender by the moving party within seven (7) days after that party was served with the Order or (b) the Interim Lender applies for or consents to such order;

M. Directors' and Officers' Indemnification and Charge

[42] **ORDERS** that the Petitioners shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued as of May 4, 2018 by reason of or in relation to their respective capacities as directors or officers of the Petitioners after the Effective Time, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

[43] **ORDERS** that the Directors of the Petitioners shall be entitled to the benefit of and are hereby granted a charge and security in the Property (excluding the Arlanxeo Escrowed Funds) to the extent of the aggregate amount of $500,000 (the "**Directors' Charge**"), as security for the indemnity provided in paragraph [42] of this Order as it relates to obligations and liabilities that the Directors may incur in such capacity after May 4, 2018. The Directors' Charge shall have the priority set out in paragraphs [64] and [65] of this Order.

[44] **ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the Directors are entitled to be indemnified in accordance with paragraph [42] of this Order.

N. Key Employee Retention Program

[45] **ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as reflected in the KERP Summary (as defined in the Third Petition) filed in support of the Third Petition as Exhibit R-11A (the "**KERP Summary**"), is hereby approved, and that the Petitioners are authorized and directed to make payments in accordance with the terms thereof, up to a maximum aggregate amount of $1,289,478.

[46] **ORDERS**, notwithstanding paragraph [45] of this Order and the provisions of the KERP Summary, that no amount earned by Key Employees (as defined in the Third Petition) pursuant to the KERP will be payable unless and until the Interim

Lender, Comerica Bank acting in its capacity as agent for the Senior Secured Lenders (as defined in the Initial Petition), Mitsui & Co. Ltd., Her Majesty the Queen in Right of Ontario as represented by the Minister of Economic Development and Growth and BDC Capital Inc. have been paid in full in cash.

[47] **ORDERS** that the Key Employees (as defined in the Third Petition) shall be entitled to the benefit of and are hereby granted a charge and security in the Property (excluding the Arlanxeo Escrowed Funds) to the extent of the aggregate amount of $1,289,478 (the "**KERP Charge**"), to secure the amounts payable to the Key Employees pursuant to the KERP pursuant to paragraph [45] of this Order, having the priority established by paragraph [66] of this Order.

O. Restructuring

[48] **DECLARES** that, to facilitate the orderly restructuring of their business and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Petitioners shall have the right, subject to approval of the Monitor or further order of the Court, to:

a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

c) subject to prior written consent from the Interim Lender, Comerica Bank acting in its capacity as agent for the Senior Secured Lenders (as defined in the Initial Petition), Her Majesty the Queen in Right of Ontario as represented by the Minister of Economic Development and Growth and BDC Capital Inc., convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, and that the price and value in each case does not exceed $200,000 or $2,000,000 in the aggregate;

d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Petitioners, as applicable, and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Petitioners may determine;

e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of their agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Petitioners, as applicable, and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

f) subject to section 11.3 CCAA, assign any rights and obligations of Petitioners.

[49] **DECLARES** that, if a notice of disclaimer or resiliation is given to a landlord of any of a Petitioner pursuant to section 33 of the CCAA and subsection 57(e) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such Petitioner and the Monitor 24 hours prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioners, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

[50] **ORDERS** that the Petitioners, as applicable, shall provide to any relevant landlord notice of the intention of any of the Petitioners to remove any fittings, fixtures, installations or leasehold improvements at least seven (7) days in advance. If a Petitioner has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between such Petitioner and the landlord.

[51] **DECLARES** that, in order to facilitate the Restructuring, the Petitioners may, subject to the approval of the Monitor, or further order of the Court, settle claims of customers and suppliers that are in dispute.

[52] **ORDERS** that all meetings of the shareholders of Petitioners be postponed and extended pending further order of this Court.

[53] **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Petitioners are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the

Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Petitioners or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners.

[54] **ORDERS** that pursuant to clause 3(c)(i) of the *Electronic Commerce Protection Regulations,* made under *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act,* S.C. 2010, c. 23, the Petitioners and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective purchasers or bidders and to their advisors but only to the extent desirable or required to provide information with respect to any sales process in these CCAA proceedings.

P. SISP

[55] **APPROVES** the sale and investor solicitation process ("**SISP**") filed in support of the Initial Petition as Exhibit R-4C.

[56] **AUTHORIZES** and **DIRECTS** the Petitioners and the Monitor to take such steps as they consider necessary and desirable in carrying out the SISP in accordance with its terms.

Q. Powers of the Monitor

[57] **ORDERS** that PricewaterhouseCoopers Inc. is hereby appointed to monitor the business and financial affairs of the Petitioners as an officer of this Court (the "**Monitor**") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks or as otherwise directed by the Court, in La Presse+, the Sarnia Observer, the Globe & Mail National Edition and the Star Tribune (Minnesota) and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "**Website**") a notice

containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against a Petitioner of more than $1,000, advising them that the Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

b) shall monitor the Petitioners' receipts and disbursements;

c) shall assist the Petitioners, to the extent required by the Petitioners, in dealing with their creditors and other interested Persons during the Stay Period;

d) shall assist the Petitioners, to the extent required by the Petitioners, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

e) shall advise and assist the Petitioners, to the extent required by the Petitioners, to review the Petitioners' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

f) shall take whatever steps necessary or desirable to carry out the SISP;

g) shall assist the Petitioners, to the extent required by the Petitioners, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

h) shall report to the Court on the state of the business and financial affairs of the Petitioners or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated Reports for the Petitioners;

i) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

j) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

k) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of their powers or the discharge of their obligations in these proceedings and any related proceeding, under this Order or under the CCAA;

l) may act as a "foreign representative" of any of the Petitioners or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

m) may give any consent or approval as may be contemplated by this Order or the CCAA;

n) may hold and administer funds in connection with arrangements made among the Petitioners, any counter-parties and the Monitor, or by Order of this Court; and

o) may perform such other duties as are required by this Order or the CCAA or by this Court from time to time.

Unless expressly authorized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Petitioners, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Petitioners.

[58] **ORDERS** that the Petitioners and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of the Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Petitioners in connection with the Monitor's duties and responsibilities hereunder.

[59] **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Petitioners with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioners' counsel. In the case of information that the Monitor has been advised by the Petitioners is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioners unless otherwise directed by this Court.

[60] **DECLARES** that if the Monitor, in its capacity as Monitor, carries on the business of the Petitioners or continues the employment of the Petitioners' employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[61] **DECLARES** that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on

at least seven days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph [57]j)] hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[62] **ORDERS** that the Petitioners shall pay the reasonable fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after this Order.

[63] **DECLARES** that the Monitor, the Monitor's legal counsel (Borden Ladner Gervais LLP), the Petitioners' legal counsel (Blake, Cassels & Graydon LLP as insolvency counsel and DSL, LLP as general counsel), the Monitor's and the Petitioners' respective advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge and security in the Property (excluding the Arlanxeo Escrowed Funds), to the extent of the aggregate amount of $300,000 (the "**Administration Charge**"), having the priority established by paragraphs [64] and [65] of this Order.

R. Priorities and General Provisions Relating to CCAA Charges

[64] **DECLARES** that the priorities of the Administration Charge, the Interim Lender Charge, the Post-Filing Intercompany Advance Charges and the Directors' Charge (collectively, the "**CCAA Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

a) first, the Administration Charge;

b) second, the Interim Lender Charge;

c) third, the Post-Filing Intercompany Advance Charges; and

d) fourth, the Directors' Charge.

[65] **DECLARES** that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, options, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property whether or not charged by such Encumbrances.

[66] **DECLARES** that the KERP Charge shall rank behind the CCAA Charges and any and all other Encumbrances affecting the Property charged by such Encumbrances.

[67] **ORDERS** that, except as otherwise expressly provided for herein, the Petitioners shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioners, as applicable, obtain the prior written consent of the Monitor and the prior approval of the Court.

[68] **DECLARES** that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Petitioners, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[69] **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and not otherwise be limited or impaired in any way by (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications or any assignments in bankruptcy made or deemed to be made in respect of any Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease or other arrangement which binds the Petitioners (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of any of the CCAA Charges shall not create nor be deemed to constitute a breach by the Petitioners of any Third Party Agreement to which any Petitioner is a party; and

b) the beneficiaries of the CCAA Charges shall not have any liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[70] **DECLARES** that notwithstanding: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications or any assignments in bankruptcy made or deemed to be made in respect of any Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by any Petitioner pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[71] **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property of the Petitioners and against all Persons, including, without limitation,

any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners.

S. General

[72] **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisers of the Petitioners or of the Monitor in relation to the Business or Property of the Petitioners, without first obtaining leave of this Court, upon five (5) calendar days' written notice to the Petitioners' counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[73] **ORDERS** that, subject to further Order of this Court, all motions in these CCAA proceedings are to be brought on not less than five (5) calendar days' notice to all Persons on the service list. Each motion shall specify a date (the "**Initial Return Date**") and time (the "**Initial Return Time**") for the hearing.

[74] **ORDERS** that any Person wishing to object to the relief sought on a motion in these CCAA proceedings must serve responding motion materials or a notice stating the objection to the motion and the grounds for such objection (a "**Notice of Objection**") in writing to the moving party, the Petitioners and the Monitor, with a copy to all Persons on the service list, no later than 5 p.m. Montreal Time on the date that is three (3) calendar days prior to the Initial Return Date (the "**Objection Deadline**").

[75] **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Judge having carriage of the motion (the "**Presiding Judge**") may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in person, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

[76] **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the service list of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in these proceedings.

[77] **ORDERS** that, if a Notice of Objection is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Return Date at the Initial Return Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Return Date and at the Initial Return Time; or (b) establish a schedule for the

delivery of materials and the hearing of the contested motion and such other matters, including interim relief, as the Court may direct.

[78] **DECLARES** that this Order and any proceeding or affidavit leading to the Order, shall not, in and of themselves, constitute a default or failure to comply by the Petitioners under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[79] **DECLARES** that, except as otherwise specified herein, the Petitioners and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioners and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[80] **DECLARES** that the Petitioners and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioners shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

[81] **ORDERS** that the summary of the DIP financing solicitation process produced under seal of confidentiality as Exhibit R-14 to the Initial Petition and as Exhibit R-12 to the Second Petition, the summary of the LOIs produced under seal of confidentiality as Exhibit R-8 to the Third Petition, the Letters of Intent produced under seal of confidentiality as Exhibit R-9 to the Third Petition, the Key Employee Summary produced under seal of confidentiality as Exhibit R-10 to the Third Petition and the KERP Summaries produced under seal of confidentiality as Exhibits R-11 and R-11A to the Third Petition shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

[82] **DECLARES** that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioners and the Monitor and has filed such notice with this Court, or appears on the service list prepared by the Monitor, the Petitioner or their respective attorneys, save and except when an order is sought against a Person not previously involved in these proceedings.

[83] **DECLARES** that the Petitioners or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice only to each other.

[84] **DECLARES** that the Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[85] **AUTHORIZES** the Monitor or any of the Petitioners, and in the case of the Monitor, with the prior consent of the Petitioners, to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under chapter 15 of title 11 of the United States Code, 11 U.S.C. § 101-1532, including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America (the "**Chapter 15 Relief**"), and for which the Monitor or any of the Petitioners shall be the foreign representative of the Petitioners (in such capacity, the "**Foreign Representative**"). All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor and the Petitioners as may be deemed necessary or appropriate for that purpose.

[86] **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the Petitioners, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and the Monitor as may be necessary or desirable to give effect to this Order, including by recognizing the present CCAA proceedings as "Foreign Main Proceedings" for the purpose of the Chapter 15 Relief, to grant representative status to the Foreign Representative in any foreign proceeding, to assist the Petitioners and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

[87] **DECLARES** that, for the purposes of the Chapter 15 Relief and/or any applications authorized by paragraphs [85] and [86], Petitioners' centre of main interest is located in the province of Québec, Canada.

[88] **ORDERS** the provisional execution of the Order notwithstanding any appeal.

The Honourable Michel A. Pinsonnault, J.S.C.

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Date of hearing: July 17, 2018

Schedule A – Interim Financing Agreement

See attached.

TAB 4

2008 CarswellOnt 2652
Ontario Superior Court of Justice [Commercial List]

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 2652, [2008] O.J. No. 1818, 168 A.C.W.S. (3d) 245, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201

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

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP.,METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP.,METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 6932819 CANADA INC. AND 4446372 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents)

C. Campbell J.

Heard: March 17, 2008
Judgment: April 8, 2008
Docket: 08-CL-7440

Counsel: B. Zarnett, F. Myers, B. Empey for Applicants
R.S. Harrison for Metcalfe & Mansfield Alternative Investments II Corps.
Scott Bomhof, John Laskin for National Bank of Canada
Peter Howard, William Scott for Asset Providers/Liquidity Providers
Jeff Carhart, Joe Marin, Jay Hoffman for Ad Hoc Committee of ABCP Holders
T. Sutton for Securitus
Jay Swartz, Nastasha MacParland for New Shore Conduits
Aubrey Kaufmann for 4446372 Canada Inc.
Stuart Brotman for 6932819 Canada Inc.
Robin B. Schwill, James Rumball for Coventree Captial Inc., Coventree Administration Corp., Nereus Financial Inc.
Ian D. Collins for Desjardins Group
Harvey Chaiton for CIBC
Kevin McEicheran, Geoff R. Hall for Bank of Montreal, Bank of Nova Scotia, CIBC, Royal Bank of Canada, Toronto Dominion Bank
Marc S. Wasserman for Blackrock Financial
S. Richard Orzy for CIBC Mellon, Computershare, Bank of New York as Indenture Trustee
Dan Macdonald, Andrew Kent for Bank of Nova Scotia
Virginie Gauthier, Mario Forte for Caisse de Dépôt
Junior Sirivar for Navcan

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Each debtor was corporation that was trustee of one or more conduits, was legal owner of assets held for each series in conduit of which it was trustee, and was debtor with respect to Asset Backed Commercial Paper ("ABCP") issued by trustee of conduit — Creditors held more than $21 billion of approximately $32 billion of ABCP at issue in proceeding — Each debtor was insolvent — Original trustees that were trust companies were replaced by certain of debtors to facilitate application under Companies' Creditors Arrangement Act ("CCAA") — Creditors brought application for initial order under CCAA — Application granted — Application complied with requirements of CCAA — Replacement of trust entities that did not qualify as "companies" under CCAA by debtors that did was appropriate exercise of legally available rights to satisfy threshold requirements of CCAA — Debtors were "debtor companies" within meaning of CCAA — Joining of claims in one proceeding promoted convenient administration of justice — Relief sought was available under, and was consistent with purpose and policy of, CCAA — Failure of plan would cause far-reaching negative consequences to investors — Classification of creditors set out in plan for voting and distribution purposes, involving single class of creditors, was appropriate — Plan treated all ABCP holders equitably — Fragmentation of classes would render it excessively difficult to obtain approval of plan and so was contrary to purpose of CCAA.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

***C. Campbell J.*:**

1 These are the reasons for this Court having granted on March 17, 2008 an Initial Order under the *Companies Creditors Arrangement Act* ("CCAA") in respect of various corporate trustees in respect of what is known as Asset Backed Commercial Paper ("ABCP.")

2 This highly unusual and hopefully not to be repeated procedure (given its magnitude and implications) represents the culmination of a great deal of work and effort on the part of the Applicants known informally as the Investors' Committee under the leadership of a leading Canadian lawyer and businessman, Purdy Crawford.

3 Assuming approval of the proposed Plan under the CCAA, the process will result in the successful restructuring of the ABCP market in Canada and avoid a liquidity crisis that would result in certain loss to many of the various participants in the ABCP market.

4 It is neither necessary nor appropriate in these Reasons to describe in detail just what is involved in the products and operation of the ABCP market.

5 The Information Circular that is part of the Application and will be sent to each of the affected Noteholders (and is also found on the website of the Monitor, Ernst & Young), contains a complete description of the nature of the products, the various market participants, the problem giving rise to the liquidity crisis and the proposed Plan that, if approved, will allow for recovery by most Noteholders of at least their capital over time in return for releases of other market participant parties.

6 An equally informative but less detailed description of the market for ABCP and its problems can be found in the affidavit of Mr. Crawford in the sites referred to above.

7 The Applicants include Crown corporations, business corporations, pension funds and financial institutions. Together, they hold more than $21 billion of the approximately $32 billion of ABCP at issue in this proceeding. Each Applicant holds ABCP for which at least one of the Respondents is the debtor. Each Applicant has a significant ABCP claim.

8 Each series of ABCP was issued pursuant to a trust indenture or supplemental trust indenture. Each trust indenture appointed an "Indenture Trustee" to serve as trustee for the investors, and gave that trustee certain rights, on behalf of

investors, to enforce obligations under ABCP. However, the Indenture Trustee has no economic interest in the underlying debt and, under the circumstances, it is neither practical nor realistic to expect the Indenture Trustees to put forward a restructuring plan.

9 In this proceeding, the Applicants seek to put forward and obtain approval of the restructuring plan they have developed in their own right as holders of ABCP and as the real creditors of the Respondents.

10 Each Respondent is a corporation which is the trustee of one or more Conduits. Each Respondent is the legal owner of the assets held for each series in the Conduit of which it is the trustee, and is the debtor with respect to the ABCP issued by the trustee of that Conduit. The ABCP debt for which each Respondent is liable exceeds $5 million.

11 Each ABCP note provides that recourse under it is limited to the assets of the trust. The trust indentures pursuant to which each series of notes were issued provide that each note is to be repaid from the assets held for that series.

12 Since mid-August, 2007, the trustees of each of the Conduits have, in respect of each series of ABCP, had insufficient liquidity to make payments that were due and payable on their maturing ABCP. Each remains unable to meet its liabilities to the Applicants and to the other holders of each series of ABCP as those obligations become due, from assets held for that series. Accordingly, each of the Respondents is insolvent.

13 Most of the Conduits originally had trustees that were trust companies. The original trustees that were trust companies were replaced by certain of the Respondents, in accordance with applicable law and the terms of the applicable declarations of trust, in order to facilitate the making of this Application. The Respondents that replaced the trust companies assumed legal ownership of the assets of each Conduit for which they serve as trustees and assumed all of the obligations of the original trustees whom they replaced.

14 The Applicants chose court proceedings under the CCAA because the issuer trustees of the Conduits, as currently structured, are insolvent because they cannot satisfy their liabilities as they become due. The CCAA process allows meaningful efficiencies by restructuring all of the affected ABCP simultaneously while also providing stakeholders, including Noteholders, with more certainty that the Plan will be implemented. In addition, the CCAA provides a process to obtain comprehensive releases, which releases bind Noteholders and other parties who are not directly affected by the Plan. The granting of these comprehensive releases is a condition of participation by certain key parties.

15 The CCAA expresses a public policy favouring compromise and consensual restructuring over piecemeal liquidation and the attendant loss of value. It is designed to encourage and facilitate consensual compromises and arrangements among businesspeople; indeed the essence of a CCAA proceeding is the determination of whether a sufficient consensus exists among them to justify the imposition of a statutory compromise. It is only after this determination is made that the Court will examine whether a plan is otherwise fair and reasonable.

16 On the first day of a CCAA proceeding, the Court should strive to maintain the *status quo* while the plan is developed. The Court will exercise its power under the statute and at common law in order to maintain a level playing field while allowing the debtor the breathing space it needs to develop the required consensus. At this stage, the goal is to seek consensus — to allow the business people and individual investors to make their judgments and to express those judgments by voting. The Court's primary concern on a first day application is to ensure that the business people have a chance to exercise their judgment and vote on the Plan.

17 The Applicants submitted that the Initial Order sought should be granted and the creditors given an opportunity to vote on the Plan, because (a) this application complies with all requirements of the CCAA and is properly brought as a single proceeding; (b) the relief sought is available under the CCAA. It is also consistent with the purpose and policy of the CCAA and essential to the resolution of the ABCP crisis; and (c) the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

18 ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling." Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption," ABCP would readily be saleable without the need for extraordinary funding measures.

19 There are three questions that need to be answered before the Court makes an Order accepting an Initial Plan under the CCAA.

20 The first question is, does the Application comply with the requirements of the CCAA? The second question involves determining that the relief sought in the circumstances is available under the CCAA and is consistent with the purpose and policy of the statute. The third question asks whether the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

21 I am satisfied that all three questions can be answered in the affirmative.

22 The CCAA, despite its relative brevity and lack of specifics, has been accepted by the Courts across Canada as a vehicle to encourage and facilitate consensual compromise and arrangements among various creditor interests in circumstances of insolvent corporations.

23 At the stage of accepting a Plan for filing, the Court seeks to maintain a status quo and provide a "structured environment for the negotiation of compromises between a company and its creditors." The ultimate decision on the acceptance of a Plan will be made by those directly affected and vote in favour of it. [1]

24 Section 3(1) of the CCAA applies in respect of a "debtor company" or "affiliate debtor companies" with claims against them of $5 million.

25 The problem faced by the applicants in this proceeding is that the terms "company" and "debtor company" as defined in s. 2 of the CCAA do not include trust entities.

26 For the purpose of this Application and proposed Plan, those entities that did not qualify as "companies" for the purposes of the CCAA were replaced by Companies (the Respondents) that do meet the definition.

27 I am satisfied in the circumstances that these steps are an appropriate exercise of legally available rights to satisfy the threshold requirements of the CCAA. I am satisfied that the change in trustees was undertaken in good faith to facilitate the making of this application.

28 The use of what have been called "instant" trust deeds has been judicially accepted as legitimate devices that can satisfy the requirement of s. 3 of the CCAA as long as they reflect legitimate transactions that actually occurred and are not shams. [2]

29 I am satisfied that the Respondents are "debtor companies" within the meaning of the CCAA because they are companies that meet the s. 2 definition and they are insolvent. The Conduits (referred to above) are trusts and the Respondents are trustees of those trusts. The trustee is the obligor under the trusts covenant to pay. I am satisfied that the trustee corporations are "insolvent" within the judicially accepted meaning under the CCAA.

30 The decision in *Stelco Inc., Re* [3] sets out three disjunctive tests. A company will be an insolvent "debtor company" under the CCAA if: (a) it is for any reason unable to meet its obligations as they generally become due; or (b) it has ceased paying its current obligations in the ordinary course of business as they generally become due; or (c) the aggregate

of its property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

31 I am satisfied that on the material filed as of August 13, 2007 and the stoppage of payment by trustees of the Conduits (which continues), the Conduits and now the Respondents remain unable to meet their liabilities at the present time.

32 The Conduits and now trustees in my view meet the test accepted by the Court in *Stelco Inc., Re* of being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring." [4] Indeed, it was that very circumstance that brought about the standstill agreement and the ensuing discussions and negotiations to formulate a Plan.

33 Finally on this point I am satisfied that the insolvency of the Respondents is not affected or negated by contractual provisions in the applicable notes and trust indentures that limit Noteholders' recourse to the trust assets held in the Conduits. This statement should not be taken as a determination of the rights or remedies of any creditor.

34 It was urged and I accept that the applicants are creditors under ss. 4 and 5 of the CCAA and as such are entitled to standing to propose a Plan for restructuring the ABCP.

35 On the return of the motion for the Initial Order, while the proceeding was technically "ex parte," a significant number of interested parties were represented. None of those parties opposed the making of the Initial Order and since then no one has come forward to challenge the entitlement of the Applicants to the Initial Order.

36 S. 8 of the CCAA renders ineffective any provisions in the trust indentures that otherwise purport to restrict, directly or indirectly, the rights of the Applicants to bring this application:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

37 See also the following for the proposition that a trust indenture cannot by its terms restrict recourse to the CCAA. [5]

38 Another feature of this Application is the joining within a single proceeding of claims by many parties against each of the Respondents. Rules 5.01 and 5.02 of the *Rules of Civil Procedure* allow for the joinder of claims by multiple applicants against multiple respondents. It is not necessary that all relief claimed by each applicant be claimed against each respondent. Here the Applicants assert claims for relief against the Respondents involving common questions of law and fact. Joining of the claims in one proceeding promotes the convenient administration of justice.

39 I am satisfied that in the unique circumstances that prevail here, the practical restructuring of the ABCP claims can only be implemented on a global basis; accordingly, if there were separate proceedings, each individual plan would of necessity have been conditional upon approval of all the other plans.

40 One further somewhat unusual aspect of this Application has been the filing of the proposed Plan along with the request for the Initial Order. This is not unusual in what have come to be known as "liquidating" CCAA applications where the creditors are in agreement when the matter first comes to Court. It is more unusual where there are a large number of creditors who are agreed but a significant number of investors who have yet to be consulted.

41 In general terms, besides complying with the technical requirements of the CCAA, this Application is consistent with the purpose and policy underlying the Act. It is well established that the CCAA is remedial legislation, intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

42 The CCAA is to be broadly interpreted as giving the Court a good deal of power and flexibility. The very brevity of the CCAA and the fact that it is silent on details permits a wide and liberal construction to enable it to serve its remedial purpose.

43 A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met.

> [45] The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. ... It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has been made! *Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.* [Emphasis added.] [6]

44 Similarly, the courts have acknowledged the need to maintain flexibility in CCAA matters, discouraging importation of any statutory provisions, restrictions or requirements that might impede creative use of the CCAA without a demonstrated need or statutory direction.

45 I am satisfied that a failure of the Plan would cause far-reaching negative consequences to investors, including pension funds, governments, business corporations and individuals.

46 All those involved, particularly the individuals, may not yet appreciate the consequences involved with a Plan failure.

47 In order that those who are affected have an opportunity to consider all the consequences and decide whether or not they are prepared to vote in favour of the proposed or any other Plan, the stay of proceedings sought in favour of those parties integrally involved in the financial management of the Conduits or whose support is essential to the Plan is appropriate.

48 S. 11 of the CCAA provides for stays of proceedings against the debtor companies. It is silent as to the availability of stays in favour of non-parties. The granting of stays in favour of non-parties has been held to be an appropriate exercise of the Court's jurisdiction. A number of authorities have supported the concept of a stay to enable a "global resolution." [7]

49 More recently in *Calpine Canada Energy Ltd., Re* [8], Romaine J. of the Alberta Court of Queens Bench permitted not only an initial order, but also one that extended after exit from CCAA without a plan so that the process of the CCAA would not be undermined against orders made during an unsuccessful plan.

50 Finally, I am satisfied at this stage of the approval of filing of the Initial Plan that all creditors be placed in a single class. The CCAA provides no statutory guidance to assist the Court in determining the proper classification of creditors. The tests for proper classification of creditors for the purpose of voting on a CCAA plan of arrangement have been developed in the case law. [9]

51 The Plan is, in essence, an offer to all investors that must be accepted by or made binding on all investors. In light of this reality, the Applicants propose that there be a single class of creditors consisting of all ABCP holders. It is urged that all holders of ABCP invested in the Canadian marketplace with its lack of transparency and other common problems. The Plan treats all ABCP holders equitably. While the risks differ as among traditional assets, ineligible assets and synthetic assets, I am advised that the calculation of the differing risks and corresponding interests has been taken into account consistently across all of the ABCP in the Plan.

52 I am satisfied that, at least at this stage, fragmentation of classes would render it excessively difficult to obtain approval of a CCAA plan and is therefore contrary to the purpose of the CCAA.

> Not every difference in the nature of a debt due to a creditor or a group of creditors warrants the creation of a separate class. What is required is some community of interest and rights which are not so dissimilar as to make it impossible for the creditors in the class to consult with a view toward a common interest. [10]

53 The Court of Appeal for Ontario in *Stelco, Re* noted that a "commonality of interest" applied. Likely fact-driven circumstances were at the heart of classification.

> It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases. [11]

54 For the above reasons the Initial Order and Meeting Ordered will issue in the form filed and signed.

55 I note that the process includes sending to each investor a detailed and comprehensive description of the problems that developed in the ABCP market as well as its proposed solution. In a recognition that the understanding of the problem and its proposed solution might be difficult to understand, the Investor Committee is to be commended for arranging to hold information meetings across Canada.

56 I am of the view that resolution of this difficult and complex problem will be best achieved by those directly affected reaching agreement in a timely fashion for a lasting resolution.

Schedule A

Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B

Applicants

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Application granted.

Footnotes

1 See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 31 contrasted with *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at 316.

2 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) per Doherty J.A. (in dissent on result but not on this point); also cases referred to in *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List])

3 *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) at paras 21-22; leave to appeal to C.A. refused, (Ont. C.A.); leave to appeal to S.C.C. refused (S.C.C.)

4 *Supra* at (2004) paragraphs 26 and 28.

5 Instruments such as trust deeds may give specified rights to creditors or any class of them in certain circumstances. Some instruments may purport to provide that a creditor may not circumvent any limitation in the rights contained in the instrument by proposing an arrangement under the CCAA and thereby obtaining wider or extended rights. ... Relief under the CCAA is available notwithstanding the terms of any instrument. [Footnote omitted.] (John D. Honsberger, *Debt Restructuring: Principles and Practice*, vol. 1 (Aurora: Canada Law Book, 1997+) at 9-18). See also *Citibank Canada v. Chase Manhattan Bank of Canada* [1991 CarswellOnt 182 (Ont. Gen. Div.)], *supra*, at paras. 25-26; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 11

6 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 45

7 *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paras. 23-25; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para. 3

8 *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) at paras. 33-34; *Calpine Canada Energy Ltd., Re* [2007 CarswellAlta 156 (Alta. Q.B.)] (8 February 2007), Calgary 0501-17864 at 5

9 *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 18

10 *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at paras. 13-14

11 *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), at para. 22

TAB 5

1992 CarswellOnt 185
Ontario Court of Justice (General Division)

Campeau v. Olympia & York Developments Ltd.

1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303,
14 C.P.C. (3d) 339, 35 A.C.W.S. (3d) 679, 3 W.D.C.P. (2d) 575

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle*, for the plaintiffs.
Peter F. C. Howard, for National Bank of Canada.
Yoine Goldstein, for Olympia & York Development Limited and 857408 Ontario Inc.

Headnote

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General

Stay of proceedings — Companies' Creditors Arrangement Act — Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

> a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,
>
> b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York

breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

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

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be,*

seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.

(emphasis added)

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

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth

proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

TAB 6

2000 CarswellAlta 622
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 622, [2000] A.W.L.D. 666, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.
S. Dunphy, for Air Canada and 853350 Alberta Ltd.
R. Anderson, Q.C., for Loyalty Group.
H. Gorman, for ABN AMRO Bank N.V.
P. McCarthy, for Monitor - Price Waterhouse Cooper.
D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.
C.J. Shaw, for Airline Pilots Association International.
G. Wells, for NavCanada.
D. Hardy, for Royal Bank of Canada.

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral — Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

***Paperny J.* (orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

> 1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
>
> 2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of th particular case.

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

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

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

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold

required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

TAB 7

2010 CarswellOnt 18852
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc., Re

2010 CarswellOnt 18852

IN THE MATTER OF THE COMPANIES' CREDITORS

ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Decision of the Board

Judgment: January 8, 2010
Docket: CV-10-8533-00CL

Counsel: Counsel — not provided

Headnote
Bankruptcy and insolvency

Decision of the Board:

INITIAL ORDER

THIS APPLICATION, made by Canwest Publishing Inc./Publications Canwest Inc. ("*CPI*"), Canwest Books Inc. ("*CBI*") and Canwest (Canada) Inc. ("*CCI*"), (together, the "*Applicants*"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Thomas C. Strike sworn January, 2009 and the Exhibits thereto (the "*Strike Affidavit*") and the Report of the Proposed Monitor, FTI Consulting Canada Inc. ("*FTI Consulting*" or the "*Monitor*") (the "*Monitor's Pre-Filing Report*"), and on being advised that CIBC Mellon Trust Company and other secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants and Canwest Limited Partnership/Canwest Societe en Commandite (the "*Limited Partnership*"), the Special Committee, being an existing committee comprised only of independent directors of the Board of Directors of Canwest Global Communications Corp. (the "*Special Committee*"), FTI Consulting, The Bank of Nova Scotia in its capacity as Administrative Agent (the "Agent") for the senior lenders to the Limited Partnership (collectively, the "*Senior Lenders*"), and the ad hoc committee of holders of 9.25% senior subordinated notes issued by the Limited Partnership (the "*Ad Hoc Committee*") and the directors and officers of the Applicants and on reading the consent of FTI Consulting to act as the Monitor,

PART I - CCAA RELIEF

SERVICE

1 THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2 THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not an Applicant, the Limited Partnership (together with the Applicants, the "*LP Entities*") shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

3 THIS COURT ORDERS that the Applicants have the authority to file the Senior Lenders CCAA Plan (as defined below) with this Court and that, subject to further Order of this Court, one or more of the Applicants, individually or collectively, with the consent of the Monitor and the LP CRA (as defined below), shall have the authority to file and may file with this Court other plans of compromise or arrangement (hereinafter referred to as an "*LP Plan*") between, *inter alia*, one or more of the LP Entities and one or more classes of their applicable secured and/or unsecured creditors.

POSSESSION OF PROPERTY AND OPERATIONS OF THE LP ENTITIES

4 THIS COURT ORDERS that the LP Entities shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively the "*LP Property*"). Subject to this and further Order of this Court, the LP Entities shall each continue to carry on business in the ordinary course in a manner consistent with the preservation of their respective businesses (collectively the "*LP Business*") and LP Property. The LP Entities shall each be authorized and empowered to continue to retain and employ the consultants, agents, experts, accountants, counsel and such other persons (collectively "*Assistants*") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order, with the prior approval of the Monitor in consultation with the LP CRA and subject to the provisions on the payment of the Assistants set forth in paragraph 9 hereof. The LP Entities shall each be further authorized and empowered to continue to retain and employ the employees currently employed by them, with liberty to employ such further employees as they deem reasonably necessary or desirable in the ordinary course of business.

5 Mr. Dennis Skulsky, the President of CPI (the "*President of CPI*") shall

(a) report directly and solely to the Special Committee;

(b) shall keep the Monitor and the LP CRA advised on a timely basis of developments in the operations and financial performance of the LP Entities and shall meet with the Monitor, the LP CRA and the financial advisor to counsel for the Agent (the "*McMillan Financial Advisor*" and collectively with counsel to the Agent and the other advisors to the Agent, the "*Agent's Advisors*") at least once per week, unless otherwise agreed by the McMillan Financial Advisor, to provide an update on operations and financial performance of the LP Entities; and

(c) advise the Monitor, the LP CRA and the McMillan Financial Advisor forthwith if the Special Committee disagrees with and precludes the President of CPI from proceeding with any recommended financial or operational initiative which the President of CPI believes is in the best interests of the LP Entities, in which case the Monitor will apply to the court for advice and direction, if the Monitor and the LP CRA are unable to assist the parties in coming to agreement.

6 The LP Entities shall provide the Agent's Advisors with any non-privileged information reasonably requested.

7 THIS COURT ORDERS that the LP Entities shall be entitled to continue to utilize the centralized cash management system currently in place as described in the Strike Affidavit or replace it with another substantially similar centralized cash management system satisfactory to the LP DIP Lenders (as defined below) and the Agent (the "*LP Cash Management System*"). Any present or future bank providing the LP Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action

taken thereunder, or as to the use or application by the LP Entities of funds transferred, paid, collected or otherwise dealt with in the LP Cash Management System, shall be entitled to provide the LP Cash Management System without any liability in respect thereof to any individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "*Persons*" and each being a "*Person*") other than the LP Entities, pursuant to the terms of the documentation applicable to the LP Cash Management System, and shall be, in its capacity as provider of the LP Cash Management System, an unaffected creditor in any plan of compromise or arrangement filed by the LP Entities under the CCAA, any proposal filed by the LP Entities under the *Bankruptcy and Insolvency Act of Canada* (the "*BIA*") or any other restructuring with regard to any claims or expenses it may suffer or incur in connection with the provision of the LP Cash Management System. All security interests over the LP Property granted by the LP Entities to The Bank of Nova Scotia to secure obligations under the LP Cash Management System (the "*Cash Management Existing Security*") up to $7.5 million shall rank *pari passu* with the LP DIP Lenders' Charge (as defined below), in accordance with the terms of the Commitment Letter and the LP DIP Definitive Documents (as each term is hereinafter defined) and pursuant to paragraphs 54 and 56 hereof.

8 THIS COURT ORDERS that the LP Entities and the CMI Entities (as defined in the Strike Affidavit) shall continue to provide and pay for the shared services, as described in the Agreement on Shared Services and Employees (the "*New Shared Services Agreement*") dated as of October 26, 2009 attached as Exhibit "S" to the Strike Affidavit (collectively, the "*Shared Services*"), to each other and their other affiliated and related entities, in accordance with the New Shared Services Agreement. Notwithstanding any other provision in this Order, neither the LP Entities nor the CMI Entities shall modify, cease providing or terminate the provision of or payment for the Shared Services or any other provision of the New Shared Services Agreement except with the consent of the parties thereto, the Agent, acting in consultation with the Steering Committee, the LP CRA and the Monitor or further Order of this Court.

9 THIS COURT ORDERS that, subject to availability under the LP DIP Facility (as defined below), subject to the LP DIP Definitive Documents and the LP Support Agreement (all as hereinafter defined), and subject to the cash flow forecasts delivered in accordance with the LP DIP Definitive Documents and the LP Support Agreement (the "*Approved Cash Flow*"), the LP Entities shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order, to the extent that such expenses are incurred or payable by the LP Entities:

(a) all outstanding and future wages, salaries, employee and pension benefits (other than in respect of the Southam Executive Retirement Agreements or the CanWest MediaWorks Limited Partnership (now the Limited Partnership) Retirement Compensation Arrangement Plan), vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) without limiting the generality of paragraph 9(a), all current service, special and similar pension and/or retirement benefit payments (other than in respect of the Southam Executive Retirement Agreements or the CanWest MediaWorks Limited Partnership (now the Limited Partnership) Retirement Compensation Arrangement Plan), commissions and other incentive payments, payments to employees under collective bargaining agreements not otherwise covered by paragraph 9(a) and employee and director expenses and reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, but in the case of director legal expenses, only in accordance with paragraph 37 hereof;

(c) compensation to employees in respect of any payments made to employees prior to the date of this Order by way of the issuance of cheques or electronic transfers that are subsequently dishonoured due to the commencement of these proceedings, unless such payments are not permitted by this Order;

(d) with the prior consent of the Monitor, all outstanding and future amounts owing to or in respect of individuals working as independent contractors or freelancers in connection with the LP Business;

(e) with the prior consent of the Monitor in consultation with the LP CRA, the reasonable fees and disbursements of any Assistants retained or employed by the LP Entities in respect of these proceedings, at their standard rates and charges, including any payments made to Assistants prior to the date of this Order by way of the issuance of cheques or electronic transfers that are subsequently dishonoured due to the commencement of these proceedings;

(f) any and all sums due and owing to Amex Bank of Canada ("*American Express*"), including, without limitation, amounts due and owing by the LP Entities to American Express in respect of the Corporate Card Program and Central Billed Accounts Program as described in the Strike Affidavit;

(g) amounts collected in respect of various sales representation agreements under which the LP Entities sell as commissioned agent printed and/or online advertising on behalf of third-party clients; and

(h) amounts owing for goods and services actually supplied to the LP Entities, or to obtain the release of goods contracted for prior to the date of this Order with the prior consent of the Monitor if, in the opinion of the LP CRA, in consultation with the LP Entities, the supplier is critical to the LP Business and ongoing operations of any of the LP Entities.

For greater certainty, unless otherwise ordered, the LP Entities shall not make (a) any payments to, or in satisfaction of any liabilities or obligations of the CMI Entities, save and except for payments in respect of the New Shared Services Agreement; or (b) any payments on account of change of control or other golden parachute arrangements, severance or termination pay, payment in lieu of notice of termination, claims for wrongful dismissal or other similar obligations.

10 THIS COURT ORDERS that, subject to availability under the LP DIP Facility, and subject to the LP DIP Definitive Documents and the LP Support Agreement, and subject to the Approved Cash Flow, the LP Entities shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the LP Business in the ordinary course from and after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the LP Property or the LP Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services; and

(b) payment, including the posting of letters of credit, for goods or services actually supplied or to be supplied to the LP Entities following the date of this Order.

For greater certainty, the LP Entities shall not make any payments to, or in satisfaction of any liabilities or obligations of the CMI Entities, save and except for payments in respect of the New Shared Services Agreement.

11 THIS COURT ORDERS that the LP Entities shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from the LP Entities' employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "*Sales Taxes*") required to be remitted by the LP Entities in connection with the sale of goods and services by the LP Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business, workers' compensation,

employer's health tax or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the LP Business by the LP Entities.

12 THIS COURT ORDERS that, subject to availability under the LP DIP Facility, subject to the LP DIP Definitive Documents and the LP Support Agreement, and subject to the Approved Cash Flow, the LP Entities shall be entitled but not required to make available to National Post Inc. (formerly known as 4513401 Canada Inc.) secured revolving loans pursuant to the terms of the NP Intercompany Loan Agreement as defined and described in greater detail in the Strike Affidavit.

13 THIS COURT ORDERS that until a real property lease is disclaimed or resiliated in accordance with paragraph 18(c) of this Order, the LP Entities shall pay all amounts constituting rent or payable as rent under their respective real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable LP Entity and the relevant landlord from time to time ("*Rent*"), for the period commencing from and including the date of this Order, monthly on the first day of each month, in advance (but not in arrears). On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid. Upon delivery of a notice of disclaimer or resiliation under section 32 of the CCAA, the relevant LP Entity shall pay all Rent owing by the applicable LP Entity to the applicable landlord in respect of such lease due for the notice period stipulated in section 32 of the CCAA, to the extent that Rent for such period has not already been paid.

14 THIS COURT ORDERS that, except as otherwise specifically permitted herein, the LP Entities are 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 any one of the LP Entities to any of their creditors as of this date, including interest payable in respect of indebtedness owing by CPI to the Limited Partnership, which interest otherwise payable to the Limited Partnership shall cease to accrue as of the date hereof; (b) to grant no security interests, trusts, liens, charges or encumbrances upon or in respect of any of the LP Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the LP Business.

LP SUPPORT AGREEMENT

15 THIS COURT ORDERS that the LP Support Agreement made as of January 8, 2010 between the LP Entities and the Agent (the "*LP Support Agreement*") is hereby approved and the LP Entities are hereby authorized and directed to pay and perform all of their indebtedness, liabilities and obligations under and pursuant to the LP Support Agreement. Without limiting the generality of the foregoing, as set forth in the LP Support Agreement, the LP Entities are authorized and directed to (i) make payments of interest on principal outstanding from time to time under the Senior Credit Agreement and the Hedging Agreements (as those terms are defined in the Senior Lenders CCAA Plan) (ii) pay all Recoverable Expenses (as defined in the LP Support Agreement); and (iii) make payments to the Agent of certain fees as contemplated in section 5.1 (i) of the LP Support Agreement.

RESTRUCTURING

16 THIS COURT ORDERS that the Sale and Investor Solicitation Process, on the terms set out in Schedule "A" hereto (the "*SISP*"), is hereby authorized and approved and the LP Entities are hereby directed and authorized to proceed with the SISP.

17 THIS COURT ORDERS that in connection with the SISP and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, the LP Entities shall disclose personal information of identifiable individuals to prospective bidders under the SISP and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete a sale of the LP Property, or investment in the LP Business (each, a "*Transaction*"). Each prospective bidder to whom such personal information is disclosed shall sign an agreement to maintain and protect the privacy of

such information and limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall return all such information to the LP Entities, or in the alternative destroy all such information. The Successful Bidder (as defined in the SISP) shall be entitled to continue to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the LP Entities, and shall return all other personal information to the LP Entities, or ensure that all other personal information is destroyed.

18 THIS COURT ORDERS that the LP Entities shall, subject to such requirements as are imposed by the CCAA, subject to the LP DIP Facility, the LP DIP Definitive Documents and the LP Support Agreement and subject to the consent of the Monitor, acting with the assistance of and in consultation with the LP CRA or further Order of this Court, have the right to:

(a) to the extent not inconsistent with the SISP, to dispose of redundant or non-material assets, and to sell assets or operations not exceeding $1 million in any one transaction or $5 million in the aggregate, so long as the proceeds of all such sales are applied to reduce the principal amount owed to the Senior Lenders under the Senior Credit Agreement (as defined below);

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as the relevant LP Entity deems appropriate in the ordinary course of business;

(c) in accordance with paragraphs 19 and 20, vacate, abandon or quit the whole but not part of any leased premises and/or disclaim or resiliate any real property lease and any ancillary agreements relating to any leased premises, in accordance with section 32 of the CCAA; and

(d) disclaim or resiliate, in whole or in part, such of their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the LP Entities deem appropriate, except the New Shared Services Agreement, the LP Support Agreement, the NP Intercompany Loan Agreement or any other agreements or documents entered into in connection with this Order, in accordance with section 32 of the CCAA and to deal with any claims arising from such disclaimer or resiliation in an LP Plan, if any,

all of the foregoing to permit the LP Entities to proceed with an orderly restructuring of the LP Business. For greater certainty, the LP Entities shall not shut down any of their daily newspapers without further prior Order of the Court.

19 THIS COURT ORDERS that LP Entities shall provide each of the relevant landlords with notice of the relevant LP Entity's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the LP Entity's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant LP Entity, or by further Order of this Court upon application by the relevant LP Entity on at least two (2) days notice to such landlord and any such secured creditors. If an LP Entity disclaims or resiliates the lease governing such leased premises in accordance with paragraph 18(c) of this Order, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the LP Entity's claim to the fixtures in dispute.

20 THIS COURT ORDERS that if a notice of disclaimer or resiliation is delivered by an LP Entity in respect of a leased premises, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the relevant landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant LP Entity and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the LP Entity in respect of such lease or leased premises and such landlord shall be entitled to notify the LP Entity of the basis on which it is taking possession and to gain possession of and re-

lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE LP ENTITIES OR THE LP PROPERTY

21 THIS COURT ORDERS that until and including February 5, 2010, or such later date as this Court may order (the "*Stay Period*"), no proceeding or enforcement process in any court or tribunal (each, a "*Proceeding*") shall be commenced or continued against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property, except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of proceedings affecting the LP Entities, the LP Property or the LP Business), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property are hereby stayed and suspended pending further Order of this Court. In the case of the LP CRA, no Proceeding shall be commenced against the LP CRA or its directors and officers without prior leave of this Court on seven (7) days notice to CRS Inc.

NO EXERCISE OF RIGHTS OR REMEDIES

22 THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person against or in respect of the LP Entities, the Monitor and/or the LP CRA, or affecting the LP Business or the LP Property, are hereby stayed and suspended except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of the rights and remedies affecting the LP Entities, the LP Property or the LP Business), the LP CRA (in respect of the rights and remedies affecting the LP CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the LP Entities to carry on any business which the LP Entities are not lawfully entitled to carry on, (ii) exempt the LP Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

23 THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the LP Entities, except with the written consent of the relevant LP Entity, the LP CRA and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

24 THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with an LP Entity or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, computer software, communication and other data services, banking and cash management services, payroll services, insurance, transportation services, utility or other services to the LP Business or an LP Entity, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the LP Entities, and that the LP Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the LP Entities in accordance with normal payment practices of the LP Entities or such other practices as may be agreed upon by the supplier or service provider and the applicable LP Entity, with the consent of the LP CRA and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

25 THIS COURT ORDERS that, notwithstanding anything else contained herein, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this

Order to advance or re-advance any monies or otherwise extend any credit to the LP Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26 THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers (or their respective estates) of the LP Entities with respect to any claim against such directors or officers that arose prior to, on or after the date hereof and that relates to any obligations of the LP Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the LP Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the LP Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27 THIS COURT ORDERS that the Applicants shall indemnify their directors and officers from all claims, costs, charges and expenses relating to the failure of any of the LP Entities, after the date hereof, to make payments in respect of the LP Entities of the nature referred to in paragraphs 9(a), 11(a), 11(b) and 11(c) of this Order, which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct. For greater certainty, the indemnity provided by this paragraph 27 shall not indemnify such directors or officers of the Applicants from any costs, claims, charges, expenses or liabilities reasonably attributable to the CMI Entities.

28 THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "*LP Directors' Charge*") on the LP Property, which charge shall not exceed an aggregate amount of $35 million, as security for the indemnity provided in paragraph 27 of this Order. The LP Directors' Charge shall have the priority set out in paragraphs 54 and 56 herein.

29 THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the LP Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the LP Directors' Charge to the extent they do not have or are unable to obtain coverage under a directors' and officers' insurance policy or to the extent that such coverage is insufficient to pay amounts indemnified pursuant to paragraph 27 of this Order.

APPOINTMENT OF MONITOR

30 THIS COURT ORDERS that FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor of the LP Entities, an officer of this Court, to monitor the LP Property and the LP Entities' conduct of the LP Business with the powers and obligations set out in the CCAA and as set forth herein and that the LP Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the LP Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

31 THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the LP Entities' receipts and disbursements;

(b) report to this Court and consult with the Agent's Advisors at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the LP Entities, the LP Property, the LP Business, and such other

matters as may be relevant to the proceedings herein and with respect to any payments made pursuant to paragraph 9(h) herein;

(c) assist the LP Entities, in their dissemination, to the McMillan Financial Advisor, the Agent and the LP DIP Agent (as defined below) and its counsel of financial and other information as agreed to between the LP Entities and the Agent or the LP Entities and the LP DIP Lenders (as defined below) which may be used in these proceedings;

(d) advise the LP Entities in their preparation of the LP Entities' cash flow statements and reporting required by the LP DIP Lenders or the Agent, which information shall be reviewed with the Monitor and delivered to the McMillan Financial Advisor, the LP DIP Agent and the Agent in compliance with the LP DIP Definitive Documents and the LP Support Agreement, or as otherwise agreed to by the LP DIP Agent or the Agent;

(e) assist the LP CRA in the performance of its duties set out in the LP CRA Agreement (as defined below);

(f) advise the LP Entities in their development and implementation of the LP Plan, if any, and any amendments to any such LP Plan;

(g) assist the LP Entities with the holding and administering of creditors' or shareholders' meetings for voting on any LP Plan, as applicable;

(h) have full and complete access to the LP Property, including the premises, books, records, data (including data in electronic form), other financial documents of the LP Entities, and management, employees and advisors of the LP Entities, to the extent that is necessary to adequately assess the LP Entities' business and financial affairs or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(j) monitor and, if necessary, report to the Court on any matters pertaining to the New Shared Services Agreement; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

32 THIS COURT ORDERS that in addition to its prescribed rights and obligations under the CCAA and the powers granted hereunder, the Monitor shall supervise the SISP and supervise the Financial Advisor (as hereinafter defined) in connection therewith and that the Monitor is hereby empowered, authorized and directed to take such actions and fulfill such roles as are contemplated in the SISP, including:

(a) working with the Financial Advisor and the LP CRA to develop a list of potential bidders to be contacted;

(b) working with the Financial Advisor, the LP CRA and counsel for the LP Entities, who at all times are to be instructed by the LP CRA, (together the "*SISP Advisors*") on the negotiation of confidentiality agreements;

(c) working with the SISP Advisors in the preparation and distribution of a confidential information memorandum;

(d) working with the SISP Advisors in the establishment of and supervision of access to an electronic data room;

(e) providing the Agent and the Agent's Advisors with timely and regular updates and information as to the progress of the SISP, subject only to the Monitor reserving its right not to provide information concerning the particulars of any of the Qualified Non-Binding Indications of Interest (as defined in the SISP) or Qualifying Bids (as defined in the SISP) until after the conduct of the vote on the Senior Lenders CCAA Plan;

(f) in accordance with the terms of the SISP, supervising the conduct of Phase 1, and to the extent applicable Phase 2, of the SISP and exercising the duties, powers and authorities to be exercised by the Monitor under the terms of the SISP;

(g) presenting such further and other recommendations to the Special Committee as contemplated in the SISP or as may be considered advisable by the Monitor or the LP CRA, it being understood that subject to further Order of this Court, the authorities and obligations of the Special Committee in the SISP and in the operations of the LP Entities to the extent there are any such obligations, and in the restructuring of the LP Entities generally, shall only be to deal with matters brought to it either by the President of CPI as contemplated by paragraph 5 of this Order or by the Monitor as contemplated by this paragraph in the Order; and

(h) otherwise working with the SISP Advisors on any steps and actions considered necessary or desirable in carrying out the SISP.

33 THIS COURT ORDERS that the Monitor shall not take possession of the LP Property and shall take no part whatsoever in the management or supervision of the management of the LP Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the LP Business or LP Property, or any part thereof.

34 THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "*Possession*") of any of the LP Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "*Environmental Legislation*"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the LP Property within the meaning of any Environmental Legislation, unless it is actually in Possession.

35 THIS COURT ORDERS that that the Monitor shall provide any creditor of the Applicant and the LP DIP Lenders with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor provided that with respect to any Person acting, directly or indirectly, as or on behalf of a bidder or potential bidder involved in the SISP, the Monitor is not required to provide any such information unless the Monitor is satisfied that appropriate internal confidentiality screens are in place. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the LP Entities may agree.

36 THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

37 THIS COURT ORDERS that, subject to the provisions of this paragraph, the Monitor, counsel to the Monitor, counsel to the LP Entities, counsel and financial advisor to the Special Committee, counsel to the directors and officers of the Applicants, the LP CRA, counsel to the LP CRA and the Financial Advisor, shall be paid their reasonable fees and

disbursements, in each case at their standard rates and charges, or as agreed under contracts, as long as such contracts, which shall include any contracts to obtain fairness opinions, are approved by this Court, whether incurred prior to or subsequent to the date of this Order, by the LP Entities, to the extent that such fees and disbursements relate to services provided to the LP Entities. From the date of this Order, the fees and disbursements paid by the LP Entities to:

(a) counsel to the Special Committee shall be limited to those incurred in respect of advice given in connection with the authorities and obligations of the Special Committee as set forth in paragraph 32(g) herein; and

(b) counsel to the directors and officers of the Applicants shall not exceed $75,000 in total.

The Monitor, counsel to the Monitor, counsel to the LP Entities, counsel and financial advisor to the Special Committee, the LP CRA, counsel to the LP CRA, counsel to the Applicants' directors and officers and the Financial Advisor shall keep separate accounts for services provided in respect of the LP Entities and services provided in respect of the CMI Entities. The LP Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, counsel to the LP Entities, counsel and financial advisor to the Special Committee on a weekly basis, and the accounts of the LP CRA, counsel to the LP CRA, and counsel to the Applicants' directors and officers and the Financial Advisor on a monthly basis, to the extent that such accounts relate to services provided to the LP Entities. The LP Entities shall not be liable for and shall not pay any expenses, fees, disbursements or retainers of the Monitor, counsel to the Monitor, counsel to the CMI Entities, counsel and financial advisor to the Special Committee, counsel to the Applicants' directors and officers or the Financial Advisor, to the extent that such expenses, fees, disbursements or retainers are not attributable to the LP Entities.

38 THIS COURT ORDERS that the Monitor, counsel to the Monitor, and if so ordered by the Court on motion brought by the Monitor, after consultation with the LP CRA, other counsel whose fees and disbursements are secured by the LP Administration Charge (as defined below), shall pass their accounts from time to time, and for this purpose the accounts of such parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

39 THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the LP Entities, counsel and the financial advisor to the Special Committee, the LP CRA, and counsel to the LP CRA shall be entitled to the benefit of and are hereby granted a charge on the LP Property (the "*LP Administration Charge*"), which charge shall not exceed an aggregate amount of $3 million, as security for their reasonable professional fees and disbursements incurred at their respective standard rates and charges in respect of such services, both before and after the making of this Order in respect of these proceedings. The LP Administration Charge shall have the priority set out in paragraphs 54 and 56 hereof.

40 THIS COURT ORDERS that the RBC Dominion Securities Inc., a member company of RBC Capital Markets (the "*Financial Advisor*") shall be entitled to the benefit of and is hereby granted a charge on the LP Property (the "*FA Charge*"), which charge shall not exceed an aggregate amount of $10 million, as security for the fees and disbursements, including a success fee (if any) payable to the Financial Advisor pursuant to the engagement letter dated October 1, 2009 between CPI, the Limited Partnership and Financial Advisor (the "*Financial Advisor Agreement*"). The FA Charge shall have the priority set out in paragraphs 54 and 56 hereof.

CHIEF RESTRUCTURING ADVISOR

41 THIS COURT ORDERS that CRS Inc. ("*CRS*") be and is hereby appointed as Chief Restructuring Advisor of the LP Entities in accordance with the terms and conditions of the agreement entered into between Canwest Global Communications Corp. ("*Canwest Global*"), the LP Entities and CRS (CRS and its President, Gary F. Colter, are collectively referred to herein as the "*LP CRA*") dated November 1, 2009 (the "*LP CRA Agreement*"), effective as of the date of this Order.

42 THIS COURT ORDERS that the LP CRA Agreement is hereby approved and given full force and effect and that the LP CRA is hereby authorized to retain counsel as set out in the LP CRA Agreement. The LP CRA Agreement shall not be amended without prior Court approval.

43 THIS COURT ORDERS that the LP Entities are authorized and directed to continue the engagement of the LP CRA on the terms and conditions set out in the LP CRA Agreement.

44 THIS COURT ORDERS that the LP CRA shall not be or be deemed to be a director, officer or employee of any of the LP Entities.

45 THIS COURT ORDERS that the LP CRA and its directors and officers shall incur no liability or obligation as a result of the LP CRA's appointment or the carrying out of the provisions of this Order, or the provision of services pursuant to the LP CRA Agreement, save and except as may result from gross negligence or wilful misconduct on the part of the LP CRA. In particular, the LP CRA and its directors and officers shall incur no liability, whether statutory or otherwise, as a director or officer of the LP Entities.

46 THIS COURT ORDERS that (i) the indemnification obligations of Canwest Global in favour of the LP CRA and its officers and directors set out in the LP CRA Agreement; and (ii) the payment obligations set out in the LP CRA Agreement shall be entitled to the benefit of and form part of the LP Administration Charge set out herein.

47 THIS COURT ORDERS that any claims of the LP CRA under the LP CRA Agreement shall be treated as unaffected in any plan of compromise or arrangement filed by the LP Entities under the CCAA, any proposal filed by the LP Entities under the BIA or any other restructuring.

DIP FINANCING

48 THIS COURT ORDERS that LP Entities are hereby authorized and empowered to obtain and borrow under a credit facility from The Bank of Nova Scotia as Administrative Agent (the "*LP DIP Agent*") and certain other lenders from time to time party to the LP DIP Definitive Documents (as defined below)(collectively, the "*LP DIP Lenders*") in order to finance the LP Entities' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $25 million unless permitted by further Order of this Court.

49 THIS COURT ORDERS THAT such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the LP Entities, the LP DIP Lenders and LP DIP Agent dated as of January 8, 2010 (the "*Commitment Letter*"), filed.

50 THIS COURT ORDERS that the LP Entities are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "*LP DIP Definitive Documents*"), as are contemplated by the Commitment Letter or as may be reasonably required by the LP DIP Lenders pursuant to the terms thereof, and the LP Entities are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the LP DIP Lenders under and pursuant to the Commitment Letter and the LP DIP Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

51 THIS COURT ORDERS that the LP DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "*LP DIP Lenders' Charge*") on the LP Property as security for any and all obligations of the LP Entities under the LP DIP Definitive Documents, which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the LP DIP Definitive Documents. The LP DIP Lenders' Charge shall have the priority set out in paragraphs 54 and 56 hereof.

52 THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the LP DIP Lenders or the LP DIP Agent may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the LP DIP Lenders' Charge or any of the LP DIP Definitive Documents;

(b) upon the occurrence of an event of default under the LP DIP Definitive Documents or the LP DIP Lenders' Charge, the LP DIP Lenders, upon 2 days notice to the LP Entities and the Monitor, may exercise any and all of their rights and remedies against the LP Entities or the LP Property under or pursuant to the Commitment Letter, LP DIP Definitive Documents and the LP DIP Lenders' Charge (except that the right to cease making advances or credit available under the LP DIP Definitive Documents, to set off and/or consolidate any amounts owing by the LP DIP Lenders to the LP Entities against the obligations of the LP Entities to the LP DIP Lenders under the Commitment Letter, the LP DIP Definitive Documents or the LP DIP Lenders' Charge and make demand or accelerate payment thereunder shall be without notice or demand), including, without limitation, to give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the LP Entities and for the appointment of a trustee in bankruptcy of the LP Entities, and upon the occurrence of an event of default under the terms of the LP DIP Definitive Documents, the LP DIP Lenders shall be entitled to seize and retain proceeds from the sale of the LP Property and the cash flow of the LP Entities to repay amounts owing to the LP DIP Lenders in accordance with the LP DIP Definitive Documents and the LP DIP Lenders' Charge, but subject to the priorities as set out in paragraphs 54 and 56 of this Order; and

(c) the foregoing rights and remedies of the LP DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the LP Entities or the LP Property.

53 THIS COURT ORDERS AND DECLARES that the LP DIP Lenders shall be treated as unaffected in any plan of compromise or arrangement filed by the LP Entities under the CCAA, any proposal filed by the LP Entities under the BIA or any restructuring with respect to any advances made under the LP DIP Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

54 THIS COURT ORDERS that the priorities of the LP Directors' Charge, the LP DIP Lenders' Charge, the LP Administration Charge, the FA Charge and the LP MIP Charge (as defined below), shall be as follows:

First — LP Administration Charge

Second — LP DIP Lenders' Charge and the Cash Management Existing Security up to $7.5 million on a *pari passu* basis;

Third — The FA Charge; and

Fourth — the LP Directors' Charge and the LP MIP Charge on a *pari passu* basis.

55 THIS COURT ORDERS that the filing, registration or perfection of the LP Directors' Charge, LP DIP Lenders' Charge, the LP Administration Charge, the FA Charge or the LP MIP Charge (collectively, the "*Charges*") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

56 THIS COURT ORDERS that the LP Directors' Charge, the LP DIP Lenders' Charge, the LP Administration Charge, the FA Charge and the LP MIP Charge shall constitute a charge on the LP Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "*Encumbrances*") in favour of any Person, notwithstanding the order of perfection or attachment, except for any validly perfected purchase money security interest in favour of any secured creditor or for any statutory Encumbrance existing on the date of this order in favour of any Person that is a "secured creditor" as defined in the CCAA in respect of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA.

57 THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the LP Entities shall not grant any Encumbrances over any LP Property that rank in priority to, or *pari passu* with, any of the LP Directors' Charge, the LP DIP Lenders' Charge, the LP Administration Charge, the FA Charge or the LP MIP Charge, unless the LP Entities also obtain the prior written consent of the Monitor, the beneficiaries of the LP Directors' Charge, the LP DIP Lenders' Charge, the LP Administration Charge, the LP MIP Charge or the FA Charge and the Agent, or upon further Order of this Court.

58 THIS COURT ORDERS that the LP Directors' Charge, the LP DIP Lenders' Charge, the LP Administration Charge, the FA Charge, the LP MIP Charge and the LP Support Agreement shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "*Chargees*") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "*Agreement*") which binds the LP Entities, or any of them, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery or performance of the Commitment Letter, the LP DIP Definitive Documents or the LP Support Agreement shall create or be deemed to constitute a breach by any of the LP Entities of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges or the execution, delivery or performance of the Commitment Letter or any LP DIP Definitive Documents; and

(c) the LP Support Agreement, the Commitment Letter, the LP DIP Definitive Documents, payments made by the LP Entities pursuant to this Order, and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

59 THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the relevant LP Entity's interest in such real property leases.

60 THIS COURT ORDERS that, notwithstanding any other provision of this Order, the terms and conditions with respect to any release and discharge of the Charges (as defined herein) shall be subject to the consent of the applicable Chargee and the Monitor or further Order of the Court.

APPROVAL OF FINANCIAL ADVISOR AGREEMENT

61 THIS COURT ORDERS that the Financial Advisor Agreement in the form attached to the Confidential Supplement to the Monitor's Pre-Filing Report (the "*Confidential Supplement*") is hereby approved and the LP Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

MANAGEMENT INCENTIVE PLAN

62 THIS COURT ORDERS that the LP Entities' management incentive plan (the "*LP MIP*"), the National Post Inc. management incentive plan (the "*NP MIP*") and employee special arrangements (the "*Special Arrangements*") in the forms attached to the Confidential Supplement are hereby approved and the LP Entities are authorized and directed to make payments contemplated thereunder in accordance with the terms and conditions of the LP MIP, the NP MIP and

the Special Arrangements which shall not be amended without the consent of the Agent, acting in consultation with the Steering Committee and further Order of the Court.

63 THIS COURT ORDERS that the key employees referred to in the LP MIP and the beneficiaries of the Special Arrangements shall be entitled to the benefit of and are hereby granted a charge (the "*LP MIP Charge*") on the LP Property, which charge shall not exceed an aggregate amount of $3 million, to secure amounts owing to such key employees under the LP MIP and amounts owing to the beneficiaries of the Special Arrangements.

SEALING OF CONFIDENTIAL SUPPLEMENT

64 THIS COURT ORDERS that the Confidential Supplement be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

PART II - SENIOR LENDERS CCAA PLAN OF ARRANGEMENT

SENIOR LENDERS CCAA PLAN OF ARRANGEMENT

65 THIS COURT ORDERS that capitalized terms used in Parts II, III, and IV of this Order not otherwise defined herein shall have the meanings given to them in the Senior Lenders CCAA Plan.

66 THIS COURT ORDERS that the plan of compromise or arrangement (hereinafter referred to as the "*Senior Lenders CCAA Plan*") between the LP Entities and the Senior Secured Creditors, substantially in the form attached as Schedule "B" hereto, be and is hereby accepted for filing, and that the LP Entities are authorized to seek approval of the Senior Lenders CCAA Plan in the manner set forth herein.

67 THIS COURT ORDERS that the Agent is hereby authorized to amend, modify and/or supplement the Senior Lenders CCAA Plan at any time and from time to time prior to the Senior Lenders Meeting (as defined below). The Monitor shall disclose and make available all amendments, modifications and supplements to the Senior Lenders CCAA Plan at the Senior Lenders Meeting.

PART III - SENIOR LENDERS CLAIMS PROCESS

68 THIS COURT ORDERS that for the purposes of voting and distribution under the Senior Lenders CCAA Plan, the Principal amount of the Senior Secured Claims shall be determined in the following manner (the "*Senior Lenders Claims Process*"):

(a) Within two (2) Business Days of the date hereof (the "*Filing Date*"), the Agent, on behalf of the Senior Lenders, shall send to the LP Entities (with a copy to the Monitor):

(i) a notice substantially in the form attached as Schedule "C" hereto, setting out based upon its records: (x) the aggregate Principal amount of the Senior Secured Claims owing directly by each of the LP Entities under the Senior Credit Agreement as at the Filing Date (the "*Syndicate Claims*") and (y) each Senior Lender's pro rata share of the Syndicate Claims as at the Filing Date (all of which shall constitute, the "*Notice of Claim - Syndicate Claims and Pro Rata Notice*").

(ii) concurrently with the delivery of the Notice of Claim - Syndicate Claims and Pro Rata Notice to the LP Entities, the Agent shall post a copy of the Notice of Claim - Syndicate Claims and Pro Rata Notice to one of the IntraLinks websites (the "*Senior Lenders Website*") maintained by the Agent for the benefit of the Senior Lenders.

(b) The LP Entities shall within five (5) Business Days of receipt of the Notice of Claim -Syndicate Claims and Pro Rata Notice advise the Monitor (with a copy to the Agent) whether the amounts set out therein are consistent with their books and records. If the LP Entities fail to file a notice of dispute substantially in the form attached as Schedule "D" hereto (a "*Notice of Dispute - Syndicate Claims and Pro Rata Notice*"), within the five (5) day period noted above, then the LP Entities shall be deemed to have confirmed the amounts set out in the Notice of Claim - Syndicate Claims and Pro Rata Notice.

(c) Each of the Senior Lenders holding Syndicate Claims shall within five (5) Business Days of the posting of the Notice of Claim - Syndicate Claims and Pro Rata Notice to the Senior Lenders Website advise the Monitor (with a copy to the Agent) whether such Senior Lender's pro rata share of the Syndicate Claims set out in the Notice of Claim - Syndicate Claims and Pro Rata Notice is accurate. If a Senior Lender fails to file a Notice of Dispute - Syndicate Claims and Pro Rata Notice within the five (5) day period noted above then such Senior Lender shall be deemed to have confirmed its pro rata share of the Syndicate Claims as set out in the Notice of Claim - Syndicate Claims and Pro Rata Notice is accurate.

(d) If the amount of a Senior Lender's Syndicate Claim is: (i) confirmed by the LP Entities pursuant to paragraph 68(b); and (ii) confirmed by such Senior Lender pursuant to paragraph 68(c), then the amount designated in the Notice of Claim -Syndicate Claims and Pro Rata Notice to be such Senior Lender's pro rata share of the Syndicate Claims shall be deemed to be finally determined ("*Finally Determined*") and accepted as the Proven Principal Claim of such Senior Lender for the purposes of voting and for calculating the entitlement to distribution under the Senior Lenders CCAA Plan in respect of the Syndicate Claims.

(e) Within two (2) Business Days of the Filing Date, the LP Entities shall send to each holder of a Senior Secured Claim under or pursuant to one or more Hedging Agreements (each, a "*Hedging Creditor*") (with a copy to the Monitor and the Agent) a notice, substantially in the form attached as Schedule "E" hereto, setting out the Principal amount of such Hedging Creditor's Senior Secured Claim owing directly by each of the LP Entities and the rate of interest payable on such Principal amount (each, a "*Notice of Claim - Hedging Agreements*").

(f) Each Hedging Creditor shall within five (5) Business Days of receipt of their respective notices confirm to the Monitor whether the amounts and interest rate set out therein are accurate.

(g) If the Principal amount and interest rate set out in a Notice of Claim - Hedging Agreements is confirmed by the specified Hedging Creditor or if such Hedging Creditor does not deliver a notice of dispute substantially in the form attached as Schedule "F" hereto (a "*Notice of Dispute - Hedging Agreements*") within five (5) Business Days of receipt of such Notice of Claim - Hedging Agreements, then the Principal amount set out in such Notice of Claim - Hedging Agreements shall be deemed to be Finally Determined and accepted as the Proven Principal Claim of such Hedging Creditor for the purposes of voting and for calculating the entitlement to distributions under the Senior Lenders CCAA Plan and the interest rate set out in the Notice of Claim - Hedging Agreements shall be deemed to be the proper interest rate for the purposes of calculating the entitlement to distributions under the Senior Lenders CCAA Plan.

(h) Within five (5) Business Days of receipt (or posting on the Senior Lenders Website) of either the Notice of Claim - Syndicate Claims and Pro Rata Notice or a Notice of Claim - Hedging Agreements, as the case may be, a Senior Lender holding a Syndicate Claim, the LP Entities or a Hedging Creditor (in such circumstances a "*Disputing Claimant*") may deliver a Notice of Dispute - Syndicate Claims and Pro Rata Notice or a Notice of Dispute - Hedging Agreements to the Monitor (with a copy to the Agent in respect of a Notice of Dispute - Syndicate Claims and Pro Rata Notice) as follows:

(i) the LP Entities or a Senior Lender holding a Syndicate Claim may deliver a Notice of Dispute - Syndicate Claims and Pro Rata Notice indicating that they dispute the amount set out in the Notice of Claim - Syndicate

Claims and Pro Rata Notice. If a Notice of Dispute - Syndicate Claims and Pro Rata Notice is delivered pursuant to the preceding sentence, then the applicable Senior Lender, the Monitor, the LP Entities and the Agent shall have three (3) Business Days to reach an agreement in writing as to the Principal amount of the Senior Secured Claim that is subject to the Notice of Dispute - Syndicate Claims and Pro Rata Notice, in which case such agreement shall govern and the Principal amount of such Senior Secured Claim as agreed shall be deemed to be Finally Determined and accepted as the Senior Lender's Proven Principal Claim for the purposes of voting and for calculating the entitlement to distributions under the Senior Lenders CCAA Plan in respect of the Syndicate Claims.

(ii) a Hedging Creditor may deliver a Notice of Dispute - Hedging Agreements indicating that it disputes the amount or interest rate set out in its Notice of Claim - Hedging Agreements. If a Notice of Dispute -Hedging Agreements is delivered pursuant to the preceding sentence, then the Monitor, the LP Entities and the Agent and the particular Hedging Creditor shall have three (3) Business Days to reach an agreement in writing as to the Principal amount of, and/or interest rate applicable to the Senior Secured Claim that is subject to the Notice of Dispute - Hedging Agreements, in which case such agreement shall govern and the Principal amount as agreed shall be deemed to be Finally Determined and accepted as the Proven Principal Claim of such Hedging Creditor for the purposes of voting and for calculating the entitlement to distributions under the Senior Lenders CCAA Plan and the interest rate, as agreed, shall be deemed to be the proper interest rate for the purposes of calculating the entitlement to distributions under the Senior Lenders CCAA Plan.

(i) If a Notice of Dispute - Syndicate Claims and Pro Rata Notice or a Notice of Dispute - Hedging Agreements is unable to be resolved in the manner and within the time period set out in paragraph 68(h) above, then the Claim of such Disputing Claimant shall be determined by the Court on a motion for advice and directions brought by the Monitor (the "*Dispute Motion*") on notice to all interested parties. The Monitor and the Disputing Claimant shall each use reasonable efforts to have the Dispute Motion, and any appeals therefrom, disposed of on an expedited basis with a view to having the Claim of the Disputing Claimant Finally Determined on a timely basis.

(j) If the Principal amount of a Senior Secured Claim held by a Senior Lender is the subject of a Notice of Dispute - Syndicate Claims and Pro Rata Notice and is not Finally Determined on or before the second Business Day immediately prior to the day of the Senior Lenders Meeting, then for the purposes of voting, such a Senior Lender shall be deemed to have an accepted Senior Secured Claim for voting purposes (an "*Accepted Voting Claim*") equal to the amount of its pro rata share of the Syndicate Claims set out in the Notice of Claim - Syndicate Claims and Pro Rata Notice.

(k) If the Principal amount of a Senior Secured Claim held by a Hedging Creditor is the subject of a Notice of Dispute - Hedging Agreements and is not Finally Determined on or before the second Business Day immediately prior to the day of the Senior Lenders Meeting, then for the purposes of voting, such a Hedging Creditor shall be deemed to have an Accepted Voting Claim equal to the amount set out in its Notice of Claim - Hedging Agreements.

69 *THIS COURT ORDERS* that any Senior Lender, who asserts that its Senior Secured Claim as at the Filing Date includes a claim or claims for amounts in addition to a claim for Principal (an "*Additional Claim*"), shall notify the Monitor (with a copy to the Agent and the LP Entities), of such Additional Claim and the amount of such Additional Claim within ten (10) Business Days of the Filing Date. If no such notice is received by the Monitor within ten (10) Business Days of the Filing Date, such Senior Lender's Additional Claim shall be and is hereby forever extinguished and barred.

70 *THIS COURT ORDERS* that, for the purposes of calculating Senior Secured Claims for voting and distribution purposes, Senior Secured Claims denominated in US dollars shall be converted into Canadian dollars at the Bank of Canada United States/Canadian Dollar noon exchange rate in effect on the date of the Initial Order.

71 *THIS COURT ORDERS* that the Agent shall post a copy of this Order on the Senior Lenders Website within two (2) Business Days of the making of the Order.

PART IV - SENIOR LENDERS MEETING

THE SENIOR LENDERS MEETING

72 THIS COURT ORDERS that the holding and conduct of a meeting of the Senior Lenders on January 27, 2010 for the purpose of voting on, with or without variation, a resolution to approve the Senior Lenders CCAA Plan (the "*Senior Lenders Meeting*") is hereby authorized.

73 THIS COURT ORDERS that an officer of the Monitor shall preside as the chair of the Senior Lenders Meeting (the "*Chair*") and, subject to this Order and any further order of this Court, shall decide all matters relating to the conduct of the Senior Lenders Meeting.

74 THIS COURT ORDERS that the Chair is authorized to adjourn the Senior Lenders Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair deems necessary or desirable (without the need to first convene the Senior Lenders Meeting for the purpose of adjournment). Notice of such adjourned date shall be posted on the Monitor's website and there shall be no requirement to provide any other notice.

75 THIS COURT ORDERS that the only persons entitled to attend the Senior Lenders Meeting shall be the LP Entities, the Monitor, the LP CRA, the Agent and the Senior Lenders entitled to vote at the Senior Lenders Meeting (including, for the purposes of attendance, speaking and voting, their respective proxy holders) and their respective legal counsel. Any other person may be admitted to the Senior Lenders Meeting by the Chair or the LP Entities.

76 THIS COURT ORDERS that the only Persons entitled to vote at the Senior Lenders Meeting are Senior Lenders holding Proven Principal Claims or Accepted Voting Claims (collectively "*Accepted Senior Voting Claims*") on the second Business Day immediately prior to the day of the Senior Lenders Meeting.

77 THIS COURT ORDERS that record date (the "*Record Date*") for the purposes of voting on the Senior Lenders CCAA Plan shall be the date hereof.

78 THIS COURT ORDERS that if, after the Record Date, the holder of a Senior Secured Claim on the Record Date, or any subsequent holder of the whole of a Senior Secured Claim who has been acknowledged by the Monitor as the Senior Lender (as disclosed in either the Notice of Claim - Syndicate Claims and Pro Rata Notice or an applicable Notice of Claim - Hedging Agreements) in respect of such Senior Secured Claim, transfers or assigns the whole of such Senior Secured Claim to another Person, the Agent, the LP Entities and the Monitor shall not be obligated to give notice to or to otherwise deal with a transferee or assignee of a Senior Secured Claim as the Senior Lender for the purposes of such Person's entitlement to vote at the Senior Lenders Meeting.

CLASSIFICATION OF CREDITORS AND VOTING

79 THIS COURT ORDERS that for the purpose of voting on the Senior Lenders CCAA Plan there shall be one class of creditors constituted by the Senior Lenders holding Accepted Senior Voting Claims.

80 THIS COURT ORDERS that the quorum required at the Senior Lenders Meeting shall be one Senior Secured Creditor holding an Accepted Senior Voting Claim present at the Senior Lenders Meeting in person or by proxy. If the requisite quorum is not present at the Senior Lenders Meeting, then the Senior Lenders Meeting shall be adjourned by the Chair to such time, date and place as the Chair deems necessary or desirable.

81 THIS COURT ORDERS that the Chair shall direct a vote with respect to a resolution to approve the Senior Lenders CCAA Plan and containing such other related provisions as the Agent, in consultation with the Monitor, may consider appropriate.

82 THIS COURT ORDERS that if any matter other than those referred to in paragraph 81 arises at the Senior Lenders Meeting and requires a vote, such vote shall be conducted in the manner decided by the Chair, and (i) if the Chair decides to conduct such vote by way of show of hands, the vote shall be decided by a majority of the votes given on a show of hands, and (ii) if the Chair decides to conduct such vote by written ballot, the vote shall be decided by a majority in number of Senior Lenders holding Accepted Senior Voting Claims and representing a two-thirds majority in value of the Accepted Senior Voting Claims present and voting at the Senior Lenders Meeting (the "*Required Majority*").

83 THIS COURT ORDERS that the Monitor is authorized to accept and rely upon a proxy submitted in the form attached hereto as Schedule "G", or such other form of proxy as is acceptable to the Monitor, and received by the Monitor by 5:00 p.m. (Toronto time) on January 25, 2010 or 2 days prior to any adjournment of the Senior Lenders Meeting.

84 THIS COURT ORDERS that following the vote at the Senior Lenders Meeting, the Monitor shall tally the votes and determine whether the Senior Lenders CCAA Plan has been accepted by the Required Majority and how the result of the votes, for and against the Senior Lenders CCAA Plan, would have been affected if Senior Lenders had been allowed to vote in respect of the portion of any Senior Secured Claim, including, for greater certainty, any Additional Claim, that had not been Finally Determined at the time of the Senior Lenders Meeting (the "*Unresolved Senior Claims*").

85 THIS COURT ORDERS that the result of any vote at the Senior Lenders Meeting shall be binding on all Persons affected by the Senior Lenders CCAA Plan, whether or not any such Person is present at the Senior Lenders Meeting.

NOTICE OF SENIOR LENDERS MEETING

86 THIS COURT ORDERS that on or before January 12, 2010, the Monitor shall deliver the following documents (collectively, the "*Meeting Materials*") to the Agent and the Agent shall forthwith post such documents on the Senior Lenders Website:

(a) A Notice of Senior Lenders Meeting, substantially in the form attached hereto as Schedule "H";

(b) A copy of this Order;

(c) A copy of the Senior Lenders CCAA Plan, as amended; and

(d) A form of proxy for use at the Senior Lenders Meeting, substantially in the form attached hereto as Schedule "G";

87 THIS COURT ORDERS that on or before January 12, 2010, the Monitor shall post the Meeting Materials on the Monitor's website at: [*http://cfcanada.fticonsulting.com/clp*].

88 THIS COURT ORDERS that service of a copy of the Meeting Materials upon the Senior Lenders in the manner set out in paragraph 86 shall constitute good and sufficient service of the Senior Lenders CCAA Plan and this Order and good and sufficient notice of the Senior Lenders Meeting on all the Senior Lenders who may be entitled to receive notice thereof, or of these proceedings, and no other document or material need be served on any Persons in respect of these proceedings.

SANCTION HEARING AND ORDER

89 THIS COURT ORDERS that the Monitor shall file a report to this Court by no later than February 5, 2010, with respect to the results of the vote, including whether:

(a) the Senior Lenders CCAA Plan was approved by the Required Majority; and

(b) the votes, for and against the Senior Lenders CCAA Plan, that were cast by Senior Lenders holding Unresolved Senior Claims would affect the result of the vote on the Senior Lenders CCAA Plan.

90 THIS COURT ORDERS that if the approval or non-approval of the Senior Lenders CCAA Plan would be altered by the votes in respect of Unresolved Senior Claims, the Monitor shall, in consultation with the LP Entities and the Agent, request the direction of the Court.

91 THIS COURT ORDERS that if the Senior Lenders CCAA Plan has been accepted by the Required Majority, the LP Entities shall bring a motion seeking the Sanction Order (the "*Sanction Hearing*") on a date to be determined by the Monitor in accordance with the SISP and in consultation with the LP CRA and the Agent, or such other date as the Court may set.

92 THIS COURT ORDERS that service of the Meeting Materials and this Order pursuant to paragraphs 86 and 96 hereof shall constitute good and sufficient service of notice of the Sanction Hearing upon all Persons who are entitled to receive such service and no other form of service need be made and no other materials need be served on any Person in respect of the Sanction Hearing.

93 THIS COURT ORDERS that any Person intending to object to the motion seeking the Sanction Order shall serve on counsel to the Monitor, the Agent and the LP Entities and those persons listed on the LP Entities' service list and file with the Court no later than three days before the Sanction Hearing a written notice containing a description of its proposed grounds of contestation.

94 THIS COURT ORDERS that in the event that the Sanction Hearing is adjourned, only those Persons who have filed and served a Notice of Appearance herein are required to be served with notice of the adjourned date.

SERVICE AND NOTICE

95 THIS COURT ORDERS that the LP Entities and the Monitor shall (i) without delay, publish, in each of the National Post, the Globe and Mail and La Presse newspapers, one notice containing the information prescribed under the CCAA, (ii) within five (5) days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the LP Entities of more than $5,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims (other than in respect of Senior Lenders holding Senior Secured Claims, as contemplated by the LP Support Agreement), and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the names and addresses of individual creditors publicly available.

96 THIS COURT ORDERS that the LP Entities and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the LP Entities' creditors or other interested parties at their respective addresses as last shown on the records of the LP Entities and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

97 THIS COURT ORDERS that the LP Entities, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website at *http://cfcanada.fticonsulting.com/clp*.

GENERAL

98 THIS COURT ORDERS that the LP Entities, the Monitor or the Agent may from time to time apply to this Court for advice and directions in connection with, *inter alia*, the discharge of powers and duties hereunder.

99 THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the LP Entities, the LP Business or the LP Property.

100 THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the LP Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the LP Entities 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 LP Entities and the Monitor and their respective agents in carrying out the terms of this Order.

101 THIS COURT ORDERS that each of the LP Entities 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 that 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.

102 THIS COURT ORDERS that any interested party (including the LP Entities, the Monitor and the Agent) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order, provided however that the LP DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the Commitment Letter and the LP DIP Definitive Documents up to and including the date this Order may be varied or amended.

103 THIS COURT ORDERS that, notwithstanding the immediately preceding paragraph, no order shall be made varying, rescinding or otherwise affecting the provisions of this Order with respect to the Commitment Letter or the LP DIP Definitive Documents, unless notice of a motion for such order is served on the Monitor and the LP Entities, the Agent and the LP DIP Lenders returnable no later than February 11, 2010.

104 THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/ Daylight Time on the date of this Order.

Schedule "A"

Procedures for the Sale and Investor Solicitation Process

On January 8, 2010, Canwest Publishing Inc. / Publications Canwest Inc. ("*CPI*"), Canwest (Canada) Inc. and Canwest Books Inc. (the "*Applicants*") obtained an initial order (the "*Initial Order*") under the *Companies' Creditors Arrangement Act* ("*CCAA*") from the Ontario Superior Court of Justice (the "*Court*"). The Initial Order also applies to Canwest Limited Partnership/Canwest Societe en Commandite (the. "*Limited Partnership*", which together with the Applicants make up the "*LP Entities*"). As part of the Initial Order, the Court: (i) approved the Sale and Investor Solicitation Process (the "*SISP*") set forth herein to determine whether a Successful Bid (as defined below) can be obtained; and (ii) authorized CPI and the Limited Partnership to file the Senior Lenders CCAA Plan, pursuant to which, if there is no Successful Bid, 7272049 Canada Inc. ("*AcquireCo*") will acquire certain assets and assume certain liabilities of CPI (the "*Credit Acquisition*").

Set forth below are the procedures (the "*SISP Procedures*") to be followed with respect to a sale and investor solicitation process to be undertaken to seek a Successful Bid, and if there is a Successful Bid, to complete the transactions contemplated by the Successful Bid.

Defined Terms

All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Initial Order or in the Senior Lenders CCAA Plan, attached to the Initial Order. In addition, in these SISP Procedures:

"**CCAA Senior Lender Approval**" means a formal vote of the Senior Lenders under the CCAA, pursuant to which super majority approval of the Senior Lenders as required by the CCAA, being 66.7% by Cdn$ and an absolute majority in number of the Senior Lenders that vote, is obtained;

"**Senior Secured Claims Amount**" means the aggregate amount owing (whether for principal, interest, fees, recoverable costs or otherwise) to the Senior Lenders and the Agent, as at the date upon which the transactions contemplated by the Successful Bid, if any, are completed, under:

(i) the Senior Credit Agreement;

(ii) all Hedging Agreements; and

(iii) the LP Support Agreement,

in each case calculated based on the deemed conversion of claims denominated in US Dollars to Canadian Dollars on the Filing Date;

"**Superior Cash Offer**" means a credible, reasonably certain and financially viable offer that would result in a cash distribution to the Senior Lenders on closing of the transaction contemplated by the offer of the Senior Secured Claims Amount less a discount of Cdn $25 million calculated as of the date of such closing (the "**Reference Amount**");

"**Superior Alternative Offer**" means a credible, reasonably certain and financially viable offer for the purchase of all or substantially all of the LP Property (for greater certainty, including any such offer where the cash component available for distribution to the Senior Lenders upon closing, if any, is less than the Reference Amount) or a reorganization of the LP Plan Entities, in each case approved by a CCAA Senior Lender Approval; and

"**Superior Offer**" means either a Superior Cash Offer or a Superior Alternative Offer.

Solicitation Process

The SISP Procedures set forth herein describe, among other things, the LP Property available for sale and the opportunity for an investment in the LP Business, the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the LP Property and the LP Business, the manner in which bidders and bids become Qualified Bidders (as defined below) and Qualified Bids (as defined below), respectively, the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder (as defined below) and the Court's approval thereof (collectively, the "Solicitation Process"). The Monitor shall supervise the SISP Procedures and in particular shall supervise the Financial Advisor in connection therewith. The LP Entities are required to assist and support the efforts of the Monitor, the Financial Advisor, and the LP CRA as provided for herein. In the event that there is disagreement as to the interpretation or application of these SISP Procedures, the Court will have jurisdiction to hear and resolve such dispute.

Sale and Investment Opportunity

A Confidential Information Memorandum describing the opportunity to acquire all or substantially all of the LP Property or invest in the LP Entities will be made available by the Financial Advisor to prospective purchasers or prospective strategic or financial investors that have executed a confidentiality agreement with the LP Entities. One or more Qualified Non-Binding Indications of Interest (as defined below) for less than substantially all of the LP Property

will not be precluded from consideration as a Superior Cash Offer or Potential Superior Alternative Offer (as defined below).

"As Is, Where Is"

The sale of the LP Property or investment in the LP Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the LP Entities or any of their agents or estates, except to the extent set forth in the relevant sale or investment agreement with a Successful Bidder.

Free Of Any And All Claims And Interests

In the event of a sale, all of the rights, title and interests of the LP Entities in and to the LP Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "*Claims and Interests*") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such LP Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant sale agreement with a Successful Bidder.

An investment in the LP Entities may, at the option of the Successful Bidder, include one or more of the following: a restructuring, recapitalization or other form of reorganization of the business and affairs of the LP Entities as a going concern; a sale of LP Property to a newly formed acquisition entity on terms described in the above paragraph; or a plan of compromise or arrangement pursuant to the CCAA or any applicable corporate legislation which compromises the Claims and Interests as set out therein.

Phase 1 - Initial Timing

For a period of approximately seven weeks following the date of the Initial Order, or for such shorter period as the Monitor, in consultation with the Financial Advisor and the LP CRA, may determine appropriate ("*Phase 1*"), the Financial Advisor (with the assistance of the LP CRA and under the supervision of the Monitor and in accordance with the terms of the Initial Order) will solicit non-binding indications of interest from prospective strategic or financial parties to acquire the LP Property or to invest in the LP Entities (the "*Non-Binding Indications of Interest*").

Publication Notice

As soon as reasonably practicable after the granting of the Initial Order approving these SISP Procedures, but in any event no more than three (3) Business Days after the issuance of the Initial Order, the Monitor shall cause a notice of the sale and investor solicitation process contemplated by these SISP Procedures and such other relevant information which the Monitor, in consultation with the Financial Advisor, considers appropriate to be published in the *National Post* (National Edition). At the same time, the LP Entities shall issue a press release setting out the notice and such other relevant information in form and substance satisfactory to the Monitor, following consultation with the Financial Advisor, with Canada Newswire designating dissemination in Canada and major financial centres in the United States, Europe and Asia Pacific.

Participation Requirements

Unless otherwise ordered by the Court or as otherwise determined by the Monitor (in consultation with the Financial Advisor, the LP CRA and the Agent), in order to participate in the Solicitation Process, each person (a "Potential Bidder") must deliver to the Financial Advisor at the address specified in Schedule "1" hereto (including by email or fax transmission):

(a) prior to the distribution of any confidential information by the Financial Advisor to a Potential Bidder (including the Confidential Information Memorandum), an executed confidentiality agreement in form and

substance satisfactory to the Monitor, the. Financial Advisor, the LP CRA and the LP Entities, which shall inure to the benefit of any purchaser of the LP Property or any investor in the LP Business; and

(b) on or prior to the Phase I Bid Deadline, as defined below, specific indication of the anticipated sources of capital for the Potential Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit-quality support or enhancement that will allow the Monitor, the Financial Advisor, the LP CRA and the Agent and each of their respective legal and financial advisors, to make, in their reasonable business or professional judgment, a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the transaction.

A Potential Bidder that has executed a confidentiality agreement, as described above, and delivers the documents described above, whose financial information and credit quality support or enhancement demonstrate to the satisfaction of the Monitor, in its reasonable business judgment, the financial capability of the Potential Bidder to consummate a transaction, and that the Monitor determines, in its reasonable business judgment, after consultation with the Financial Advisor, the LP CRA and the Agent is likely (based on availability of financing, experience and other considerations) to be able to consummate a Sale Proposal (as defined below) or an Investment Proposal (as defined below) will be deemed a "*Qualified Bidder*".

The determination as to whether a Potential Bidder is a Qualified Bidder will be made as promptly as practicable after a Potential Bidder delivers all of the materials required above. If it is determined that a Potential Bidder is a Qualified Bidder, the Financial Advisor will promptly notify the Potential Bidder that it is a Qualified Bidder.

Due Diligence

The Financial Advisor shall provide any person seeking to become a Qualified Bidder that has executed a confidentiality agreement with a copy of the Confidential Information Memorandum. The Monitor, the Financial Advisor, the LP CRA and the LP Entities make no representation or warranty as to the information contained in the Confidential Information Memorandum or the information to be provided through the due diligence process in Phase 2 or otherwise, except, in the case of the LP Entities, to the extent otherwise contemplated under any definitive sale or investment agreement with a Successful Bidder executed and delivered by the LP Entities.

Phase 1 Seeking Non-Binding Indications of Interest by Qualified Bidders

A Qualified Bidder that desires to participate in Phase 1 shall deliver written copies of a non-binding indication of interest to the Financial Advisor, at the address specified in Schedule "1" hereto (including by email or fax transmission), so as to be received by it not later than February 26, 2010 at 5:00 PM (Toronto time), or such other date or time as may be agreed by the Monitor, in consultation with the Financial Advisor and the LP CRA, and the Agent (the "*Phase 1 Bid Deadline*").

Non-Binding Indications of Interest by Qualified Bidders

A non-binding indication of interest submitted will be considered a Qualified Non-Binding Indication of Interest only if the bid is submitted on or before the Phase 1 Bid Deadline by a Qualified Bidder (pursuant to the criteria indicated above) and contains the following information (a "*Qualified Non-Binding Indication of Interest*"):

(a) An indication of whether the Qualified Bidder is offering to (i) acquire all or substantially all of the LP Property (a "*Sale Proposal*") or (ii) make an investment in the LP Entities (an "*Investment Proposal*");

(b) In the case of a Sale Proposal: it shall identify(i) the purchase price range (including liabilities to be assumed by the Qualified Bidder); (ii) any of the LP Property expected to be excluded or any additional assets desired to be included; (iii) the structure and financing of the transaction (including, but not limited to, the sources of financing for the purchase price, preliminary evidence of the availability of such financing and the steps necessary and associated timing to obtain the financing and any related contingencies, as applicable); (iv) any. anticipated

corporate, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals; (v) additional due diligence required or desired to be conducted during Phase 2 (defined below), if any; (vi) any conditions to closing that the Qualified Bidder may wish to impose; (vii) any other terms or conditions of the Sale Proposal which the Qualified Bidder believes are material to the transaction; and (viii) whether, if the proposed transaction is completed, the newspapers operated by the LP Business and the National Post will continue to be "Canadian issues" of "Canadian newspapers" as defined in the *Income Tax Act* (Canada); and

(c) In the case of an Investment Proposal, it shall identify: (i) the direct or indirect investment target, whether the Limited Partnership or CPI or both; (ii) the aggregate amount of the equity and debt investment (including, the sources of such capital, preliminary evidence of the availability of such capital and the steps necessary and associated timing to obtain the capital and any related contingencies, as applicable) to be made in the LP Business; (iii) the underlying assumptions regarding the pro forma capital structure (including, the anticipated debt levels, debt service fees, interest and amortization); (iv) equity, if any, to be allocated to the Senior Secured Claims or to any other secured or unsecured creditors of the LP Entities; (v) the structure and financing of the transaction (including, but not limited to, whether and what portion of the Senior Secured Claims Amount is proposed to be paid on closing and all requisite financial assurance); (vi) any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction, the anticipated time frame and any anticipated impediments for obtaining such approvals; (vii) additional due diligence required or desired to be conducted during Phase 2, if any; (viii) any conditions to closing that the Qualified Bidder may wish to impose; (ix) any other terms or conditions of the Investment Proposal which the Qualified Bidder believes are material to the transaction; and (x) whether, if the proposed transaction is completed, the newspapers operated by the LP Business and the National Post will continue to be "Canadian issues" of "Canadian newspapers" as defined in the *Income Tax Act* (Canada).

(d) In the case of a Sale Proposal or an Investment Proposal, it shall contain such other information reasonably requested by the Financial Advisor, in consultation with the LP CRA and the Agent.

Unless the Qualified Bidder otherwise indicates in its Sale Proposal or Investment Proposal, as the case may be, it shall be assumed for purposes of assessing the proposal that (i) substantially all of the employees of the LP Entities will become employees of the Qualified Bidder or remain employees of the LP Entities, as the case may be, and the proposed terms and conditions of employment to be offered to those employees will be substantially similar to their existing terms and conditions of employment; and (ii) all pension liabilities and assets related to any employees currently covered under any registered pension or retirement income plan or any post-retirement benefit plan will be assumed or purchased, as applicable, by the Qualified Bidder or will remain liabilities and assets of the LP Entities, as the case may be.

The Monitor, in consultation with the Financial Advisor and the LP CRA, may waive compliance with any one or more of the requirements specified herein and deem such non-compliant bids to be Qualified Non-Binding Indication of Interest, but only with the prior consent of the Agent, acting in consultation with the Steering Committee. Copies of all Qualified Non-Binding Indications of Interest shall be provided to the Agent on terms that permit the Agent to consult with respect thereto with the Steering Committee and other Senior Lenders on a confidential basis, subject only to the Monitor reserving its right not to provide information concerning the particulars of any of the Qualified Non-Binding Indications of Interest until after the conduct of the vote on the Senior Lenders CCAA Plan.

Assessment of Qualified Non-Binding Indications of Interest

I - Advance to Phase 2

Within the two week period following the Phase 1 Bid Deadline, or by such other later date as may be agreed by the Monitor, in consultation with the Financial Advisor and the LP CRA, and the Agent, the Monitor will, in consultation with the Financial Advisor, the LP CRA and the Agent, assess the Qualified Non-Binding Indications of Interest received during Phase 1, if any, and will determine whether there is a reasonable prospect of obtaining a Superior Cash Offer. If

the Monitor determines that there is such a reasonable prospect, the Monitor will recommend to the Special Committee that the SISP continue for a further seven weeks in accordance with these SISP Procedures ("*Phase 2*"). If the Special Committee accepts such recommendation, the SISP will immediately thereafter continue to Phase 2. If the Special Committee does not accept such recommendation, the Monitor will report to the Court that the Special Committee does not accept such recommendation, and will seek advice and directions from the Court with respect to the SISP.

If the Monitor, in consultation with the Financial Advisor, the LP CRA and the Agent, determines that there is no reasonable prospect of a Qualified Non-Binding Indication of Interest resulting in a Superior Cash Offer, the Monitor will forthwith advise the Agent of such determination.

The Monitor will also consult with the Agent, the LP CRA and the Financial Advisor to assess whether there is a reasonable prospect of a Qualified Non-Binding Indication of Interest resulting in a Superior Alternative Offer (a "*Potential Superior Alternative Offer*"). If the Monitor determines that there is a Potential Superior Alternative Offer, the Monitor will forthwith so advise the Agent. If CCAA Senior Lender Approval has been obtained for the Senior Lenders CCAA Plan, and if the Agent, acting in consultation with the Steering Committee, considers it highly unlikely that the Potential Superior Alternative Offer would receive CCAA Senior Lender Approval, it may elect, by notice to the Monitor, for a delay of two weeks to consult with relevant Senior Lenders. If within those two weeks, the Agent provides satisfactory written confirmation to the Monitor that Senior Lenders holding more than 33.3% of the Senior Secured Claims do not support pursuing the Potential Superior Alternative Offer, it shall be deemed that there is no reasonable prospect of the Potential Superior Alternative Offer resulting in a Superior Alternative Offer. If the Agent does not so notify the Monitor within such period, the SISP will proceed to Phase 2.

II. Terminate SISP

The Monitor shall recommend to the Special Committee that the SISP be terminated at the end of Phase 1 if:

1. no Qualified Non-Binding Indication of Interest is received by the Financial Advisor; or

2. the Monitor determines that there is no reasonable prospect that any Qualified Non-Binding Indication of Interest received will result in a Superior Cash Offer or in a Superior Alternative Offer.

If the Special Committee does not accept the Monitor's recommendation to terminate the SISP at the end of Phase 1, the Monitor shall advise the Court and seek advice and directions of the Court with respect to the SISP. If the SISP is terminated pursuant to the Monitor's recommendation or pursuant to Court Order, the LP Entities shall promptly, and if they do not, the Agent may: (i) apply for Court sanction of the Senior Lenders CCAA Plan in accordance with the Initial Order and (ii) take steps to complete the Credit Acquisition, subject to satisfaction of the conditions precedent under and compliance with the terms and conditions of (a) the Senior Lenders CCAA Plan, (b) the Acquisition and Assumption Agreement between Acquireco and the LP Entities (the "*Credit Acquisition Agreement*"), and (c) the LP Support Agreement made among the LP Entities and the Agent dated January 8, 2010 (the "*LP Support Agreement*"). The Financial Advisor shall also notify each Qualified Bidder that submitted a Qualified Non-Binding Indication of Interest that the SISP has been terminated.

Phase 2 Seeking Qualified Bids by Qualified Bidders

At the outset of Phase 2, the Monitor shall, in its reasonable business judgment, in consultation with the Financial Advisor, the LP CRA and the Agent, recommend to the Special Committee whether any Qualified Bidders should be eliminated from the SISP (the "*Elimination Recommendation*"). If the Special Committee disagrees with the Elimination Recommendation, the Monitor shall advise the Court and seek advice and directions of the Court with respect "to the SISP.

During Phase 2, each Qualified Bidder that is not eliminated from the SISP in accordance with these SISP Procedures shall have such due diligence access to materials and information relating to the LP Property and the LP Business as the

Financial Advisor, in its reasonable business judgment, in consultation with Monitor, deems appropriate, having regard to the advance to Phase 2 and the requirements of a Qualified Purchase Bid (defined below) and a Qualified Investment Bid (defined below), including, as appropriate, meetings with senior management of the LP Entities and facility tours.

A Qualified Bidder that is not eliminated from the SISP in accordance with these SISP Procedures and which desires to participate in Phase 2 will deliver written copies of a Qualified Purchase Bid or a Qualified Investment Bid to the Financial Advisor at the address specified in Schedule "1" hereto (including by email or fax transmission) so as to be received by it not later than 5:00 pm (Toronto time) on the date which is seven (7) weeks following the commencement of Phase 2, or such other date or time as may be agreed by the Financial Advisor, in consultation with the Monitor and the LP CRA, and the Agent (the "*Phase 2 Bid Deadline*").

Qualified Purchase Bids

A bid submitted to acquire all or substantially all of the LP Property will be considered a Qualified Purchase Bid only if (i) the bid is submitted by a Qualified Bidder who submitted a Qualified Non-Binding Indication of Interest on or before the Phase 1 Bid Deadline, (ii) the Qualified Bidder was not eliminated from the SISP in accordance with these SISP Procedures and (iii) and the bid complies with all of the following (a "*Qualified Purchase Bid*"):

(a) it includes a letter stating that the bidder's offer is irrevocable until the earlier of (x) the selection of the Successful Bidder and (y) thirty (30) days following the Phase 2 Bid Deadline, *provided* that if such bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the sale to the Successful Bidder;

(b) it includes a duly authorized and executed purchase agreement, including the purchase price for assets proposed to be acquired expressed in Canadian dollars (the "*Purchase Price*"), together with all exhibits and schedules thereto, and such ancillary agreements as may be required by the bidder with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements);

(c) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Monitor, in consultation with the Financial Advisor, the LP CRA and the Agent, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the bid;

(d) it is not conditioned on (i) the outcome of unperformed due diligence by the bidder and/or (ii) obtaining financing;

(e) it fully discloses the identity of each entity that will be sponsoring or participating in the bid, and the complete terms of any such participation;

(f) it includes an acknowledgement and representation that the bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its bid; and (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly stated in the purchase agreement;

(g) it includes evidence, in form and substance reasonably satisfactory to the Monitor: (i) of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid and (ii) that, if the proposed transaction is completed, the newspapers operated by the LP Business and the National Post will continue to be "Canadian issues" of "Canadian newspapers" as defined in the *Income Tax Act* (Canada);

(h) it is accompanied by a refundable deposit (the "*Deposit*") in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Monitor, payable to the order of the Monitor, in trust, in an amount equal to Cdn$10 million to be held and dealt with in accordance with these SISP Procedures;

(i) it (i) contains full details of the proposed number of employees of the LP Entities who will become employees of the bidder and the proposed terms and conditions of employment to be offered to those employees and (ii) identifies any pension liabilities and assets related to any employees currently covered under any registered pension or retirement income plan who will become employees of the bidder that the bidder intends to assume or purchase;

(j) it contains other information reasonably requested by the Financial Advisor, in consultation with the Monitor, the LP CRA and the Agent; and

(k) it is received by the Phase 2 Bid Deadline.

Qualified Investment Bids

A bid submitted to make an investment in the LP Entities will be considered a Qualified Investment Bid only if (i) the bid is submitted by a Qualified Bidder who submitted a Qualified Non-Binding Indication of Interest on or before the Phase 1 Bid Deadline, (ii) the Qualified Bidder was not eliminated from the SISP in accordance with these SISP Procedures and (iii) the bid complies with all of the following (a "*Qualified Investment Bid*"):

(a) it includes a duly authorized and executed term sheet describing the terms and conditions of the proposed transaction, including details regarding the proposed equity and debt structure of the LP Entities following completion of the proposed transaction (the "*Term Sheet*");

(b) it includes a letter stating that the bidder's offer is irrevocable until the earlier of (x) the selection of the Successful Bidder and (y) thirty (30) days following the Phase 2 Bid Deadline, *provided* that if such bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the investment by the Successful Bidder;

(c) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Monitor, in consultation with the Financial Advisor, the LP CRA and the Agent, to make a reasonable determination as to the bidder's financial and other capabilities to consummate the transaction contemplated by the bid;

(d) it is not conditioned on (i) the outcome of unperformed due diligence by the bidder and/or (ii) obtaining financing;

(e) it fully discloses the identity of each entity that will be sponsoring or participating in the bid, and the complete terms of any such participation;

(f) it includes an acknowledgement and representation that the bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents in making its bid; and (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the business of the LP Entities or the completeness of any information provided in connection therewith except as expressly stated in the Term Sheet;

(g) it includes evidence, in form and substance reasonably satisfactory to the Monitor, (i) of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid; and (ii) that, if the proposed transaction is completed, the newspapers operated by the LP Business and the National Post will continue to be "Canadian issues" of "Canadian newspapers" as defined in the *Income Tax Act* (Canada);

(h) it is accompanied by a refundable deposit (the "*Good Faith Deposit*") in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Monitor, payable to the order of the Monitor, in trust, in an amount equal to Cdn$10 million to be held and dealt with in accordance with these SISP Procedures,;

(i) it contains other information reasonably requested by the Monitor, the Financial Advisor, the LP CRA or the Agent; and

(j) it is received by the Phase 2 Bid Deadline.

Qualified Investment Bids and Qualified Purchase Bids shall hereinafter be referred to as "*Qualified Bids*" and each a "*Qualified Bid*".

The Monitor, in consultation with the Financial Advisor and the LP CRA, may waive compliance with any one or more of the requirements specified herein and deem such non-compliant bids to be Qualified Investment Bids or Qualified Purchase Bids, as the case may be, but only with the prior consent of the Agent, acting in consultation with the Steering Committee. Copies of all Qualified Bids shall be provided to the Agent on terms that permit the Agent to consult with respect thereto with the Steering Committee and other Senior Lenders on a confidential basis, subject only to the Monitor reserving its right not to provide information concerning the particulars of any of the Qualified Bid until after the conduct of the vote on the Senior Lenders CCAA Plan.

If at any point during Phase 2, the Monitor determines, in consultation with the Financial Advisor, the LP CRA, and the Agent, that a Successful Bid will not be obtained by the Phase 2 Bid Deadline, (i) it will advise the Special Committee, the Financial Advisor, the LP CRA and the Agent of that fact; and (ii) following that advice, the Monitor and the LP Entities shall promptly, and if they do not, the Agent may, apply for Court sanction of the Senior Lenders CCAA Plan in accordance with the Initial Order, including completion of the Credit Acquisition, subject to satisfaction of the conditions precedent under and compliance with the terms and conditions of (a) the Senior Lenders CCAA Plan, (b) the Credit Acquisition Agreement and (c) the LP Support Agreement.

No Qualified Bids

If none of the Qualified Bids received by the Financial Advisor constitute Superior Offers, the LP Entities shall promptly, and if they do not, the Agent may, apply for Court sanction of the Senior Lenders CCAA Plan in accordance with the Initial Order, including completion of the Credit Acquisition, subject to satisfaction of the conditions precedent under and compliance with the terms and conditions of (a) the Senior Lenders CCAA Plan, (b) the Credit Acquisition Agreement and (c) the LP Support Agreement.

Superior Cash Offer is Received

If the Monitor determines in its reasonable business judgment following consultation with the Financial Advisor and the LP CRA, that one or more of the Qualified Bids is a Superior Cash Offer, the Monitor, in consultation with the Financial Advisor and the LP CRA, shall recommend (the "*Superior Cash Offer Recommendation*") to the Special Committee that the most favourable Superior Cash Offer be selected and that a definitive agreement be negotiated and settled in respect of that Superior Cash Offer, conditional upon Court approval and conditional on the Superior Cash Offer closing within 60 days after the Phase 2 Bid Deadline, or such longer period as shall be agreed to by the Monitor, in consultation with the Financial Advisor and the LP CRA, and consented to by the Agent, acting in consultation with the Steering Committee.

If the Special Committee accepts the Superior Cash Offer Recommendation, the Monitor, in consultation with the Financial Advisor and the LP CRA, shall negotiate and settle a definitive agreement in accordance with the recommendation but subject to the terms and conditions of the Senior Lenders CCAA Plan.

If the Special Committee does not wish to proceed with the Superior Cash Offer recommended by the Monitor, the Monitor shall advise the Court and seek advice and directions from the Court with respect to the SISP.

Superior Alternative Offer is Received

If the Monitor does not receive a Superior Cash Offer but receives a Qualified Bid which the Monitor determines, in consultation with the Financial Advisor, the LP CRA and the Agent, is a Potential Superior Alternative Offer, the Monitor shall so advise the Agent. If CCAA Senior Lender Approval has been obtained for the Senior Lenders CCAA Plan, and if the Agent, acting in consultation with the Steering Committee, considers it highly unlikely that the Potential Superior Alternative Offer would receive CCAA Senior Lender Approval, it may elect, by notice to the Monitor, for a delay of two weeks to consult with relevant Senior Lenders. If within those two weeks, the Agent provides satisfactory written confirmation to the Monitor that Senior Lenders holding more than 33.3% of the Senior Secured Claims do not support pursuing the Potential Superior Alternative Offer, it shall be deemed that there is no reasonable prospect of the Potential Superior Alternative Offer resulting in a Superior Alternative Offer. If the Agent does not so notify the Monitor within such period, the Monitor, in consultation with the Financial Advisor and the LP CRA, shall recommend (the "*Superior Alternative Offer Recommendation*") to the Special Committee that the Monitor, in consultation with the Financial Advisor and the LP CRA, and the Agent negotiate a definitive agreement in respect of the Potential Superior Alternative Offer, conditional upon Court approval and CCAA Senior Lender Approval and on the Superior Alternative Offer closing within 60 days after the Phase 2 Bid Deadline, or such longer period as shall be agreed to by the Monitor and the Agent acting in consultation with the Steering Committee.

In the event that the Special Committee does not accept the Superior Alternative Offer Recommendation, the Monitor shall so advise the Court and seek its advice and directions with respect to the SISP.

In the event that the Special Committee does accept the Superior Alternative Offer Recommendation, the Monitor, in consultation with the Financial Advisor and the LP CRA, and the Agent shall negotiate a definitive agreement in accordance with such recommendation and thereafter the Monitor, in consultation with the Financial Advisor and the LP CRA, or the Agent shall have the right to seek CCAA Senior Lender Approval of the Potential Superior Alternative Offer.

If within the two week delay referred to above, the Agent provides satisfactory written confirmation to the Monitor that Senior Lenders holding more than 33.3% of the Senior Secured Claims do not support pursuing the Potential Superior Alternative Offer or if CCAA Senior Lender Approval is sought but not obtained, then the LP Entities shall promptly, and if they do not, the Agent may, apply for Court sanction of the Senior Lenders CCAA Plan in accordance with the Initial Order, including completion of the Credit Acquisition, subject to satisfaction of the conditions precedent under and compliance with the terms and conditions of (a) the Senior Lenders CCAA Plan, (b) the Credit Acquisition Agreement and (c) the LP Support Agreement.

Once a definitive agreement has been negotiated and settled in respect of the Superior Offer which has been selected by the Monitor or by Court Order (the "*Selected Superior Offer*") in accordance with the provisions hereof, the Selected Superior Offer shall be the "*Successful Bid*" hereunder and the person(s) who made the Selected Superior Offer shall be the "*Successful Bidder*" hereunder.

Approval Motion

The hearing to authorize some or all of the Applicants to enter into agreements with respect to the Successful Bid (the "*Approval Motion*") will be held on a date to be scheduled by the Court upon application by the Applicants. The Approval Motion may be adjourned or rescheduled by the Monitor with the consent of the Agent, acting in consultation with the Steering Committee, without further notice by an announcement of the adjourned date at the Approval Motion. All Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of approval of the Successful Bid by the Court.

Deposits

All Deposits shall be retained by the Monitor and invested in an interest bearing trust account If there is a Successful Bid, the Deposit (plus accrued interest) paid by the Successful Bidder whose bid is approved at the Approval Motion shall be applied to the purchase price to be paid or investment amount to be made by the Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits (plus applicable interest) of Qualified Bidders not selected as the Successful Bidder shall be returned to such bidders within five Business Days of the date upon which the Successful Bid is approved by the Court. If there is no Successful Bid, all Deposits shall be returned to the bidders within five Business Days of the date upon which the SISP is terminated in accordance with these procedures.

Approvals

For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA or any other statute or are otherwise required at law in order to implement a Successful Bid or the Senior Lenders CCAA Plan.

No Amendment

There shall be no amendments to this SISP, including, for greater certainty the process and procedures set out herein, without the consent of the Agent, acting in consultation with the Steering Committee.

Further Orders

At any time during the Solicitation Process, the Monitor may, following consultation with the Financial Advisor, the LP CRA and the Agent, apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder.

Schedule "1" Address for Notices and Deliveries

To the Financial Advisor:

RBC Capital Markets

Mergers & Acquisitions

P.O. Box 50, 5th Floor

South Tower, Royal Bank Plaza

Toronto, Ontario

M5J 2W7

Attention: Peter Buzzi, Managing Director, Co-Head M&A

Email: peter.buzzi@rbccm.com

Facsimile: (416) 842-5360

Schedule "B"

SCHEDULE 1.1(2) TO LP SUPPORT AGREEMENT

Court File No. 10-CL-.....

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 OR PLANS OF COMPROMISE OR ARRANGEMENT OF CANWEST (CANADA) INC., CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC. AND CANWEST BOOKS INC.

PLAN OF COMPROMISE AND ARRANGEMENT

AFFECTING SENIOR SECURED CLAIMS AGAINST CANWEST (CANADA) INC., CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST LIMITED PARTNERSHIP / CANWEST SOCIÉTÉ EN COMMANDITE

January 8, 2010

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PLAN OF COMPROMISE AND ARRANGEMENT

AFFECTING SENIOR SECURED CLAIMS AGAINST CANWEST (CANADA) INC., CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST LIMITED PARTNERSHIP / CANWEST SOCIÉTÉ EN COMMANDITE

ARTICLE 1 - INTERPRETATION

Section 1.1 Definitions

In this Plan (including the Schedules hereto), unless otherwise stated or the context otherwise requires:

(1) *Acceleration Notice and Direction* has the meaning given to such term in the Collateral Agency Agreement;

(2) *Accepted Senior Voting Claims* has the meaning given to such term in the Initial Order;

(3) *Acquireco* means 7272049 Canada Inc., a corporation incorporated pursuant to the CBCA for the purpose of acquiring the Acquired Assets pursuant to the Acquisition and Assumption Agreement and this Plan;

(4) *Acquireco Capitalization Term Sheet* means the confidential Summary of Terms and Conditions for the Initial Capitalization of Acquireco that is posted as of the Filing Date on the IntraLinks site established by the Administrative Agent solely for that purpose for the Senior Lenders or otherwise made available to certain of the Senior Lenders, as it may be amended from time to time in accordance with the provisions hereof;

(5) *Acquireco Debt* means debt to be issued by Acquireco in partial consideration for the exchange of the Senior Secured Claims in accordance with the terms of the Plan and the Acquireco Capitalization Term Sheet;

(6) *Acquireco Equity* means, collectively, the Class C Common Shares, the Class NC Common Shares and the Class Z Common Shares to be issued by Acquireco in partial consideration for the exchange of the Senior Secured Claims in accordance with the terms of the Plan and the Acquireco Capitalization Term Sheet;

(7) *Acquired Assets* means the assets or property of or used by or in the possession or control of the LP Entities to be acquired by Acquireco pursuant to the Acquisition and Assumption Agreement and this Plan;

(8) *Acquisition and Assumption Agreement* means the Acquisition and Assumption Agreement between Acquireco and the LP Entities in the form attached as Schedule "1.1(8)", as it may be amended from time to time in accordance with the provisions hereof;

(9) *Administrative Agent* means The Bank of Nova Scotia or any successor in its capacity as Administrative Agent for the Senior Lenders under the Senior Credit Agreement;

(10) *Administrative Agent Claims* means Claims of the Administrative Agent arising under the Senior Credit Agreement in such capacity rather than in its capacity as a Senior Lender, including Recoverable Expenses and other Claims;

(11) *Applicants* means Canwest GP, CPI and Canwest Books;

(12) *BIA* means the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended from time to time;

(13) *Business Day* means a day on which banks are open for business in Toronto and Winnipeg, but does not include a Saturday, Sunday or a holiday in either the Province of Ontario or the Province of Manitoba;

(14) *Canadian Dollars* means lawful currency of Canada;

(15) *Canadian Person* means (i) a Canadian citizen, (ii) a corporation incorporated under the laws of Canada or a province a class of shares of which is listed on a Canadian stock exchange, (iii) any other corporation incorporated under the laws of Canada or a province that certifies to Acquireco it is at least 75% owned and controlled by one or more Persons listed in (i), (ii), and (iv) to (x) of this Section 1.1(15) (either directly or indirectly through one or more partnerships or corporations incorporated under the laws of Canada or a province), (iv) a RRSP; (v) a RRIF, (vi) a Canadian registered pension plan, (vii) a mutual fond trust, (viii) any other trust that certifies to Acquireco each of its beneficiaries is (a) a Person listed in (i) to (vii), (ix) or (x) of this Section 1.1(15) or (b) a trust each of the beneficiaries of which is a Person listed in (i) to (vii), (ix) or (x) of this Section 1.1(15), (ix) Her Majesty in right of Canada or a province, or a municipality in Canada, and (x) a Person that falls within such other categories of Persons, if any, as may be designated from time to time by the Board of Acquireco, in each case as will be more specifically set out in the share attributes of the Class C Common Shares and the Class NC Common Shares, but shall not include a Person whose ownership of voting shares of Acquireco the Board of Acquireco reasonably determines could contribute to adverse consequences to customers (including advertisers in newspapers) of Acquireco under section 19 of the ITA (or legislation enacted in lieu of section 19, if applicable);

(16) *Canwest Books* means Canwest Books Inc., a corporation existing pursuant to the CBCA;

(17) *Canwest Books Assets* means all assets or property of or used by or in the possession or control of Canwest Books immediately before the closing of the Intercompany Transfers;

(18) *Canwest GP* means Canwest (Canada) Inc., a corporation existing pursuant to the CBCA;

(19) *Canwest GP Assets* means all assets or property of or used by or in the possession or control of Canwest GP immediately before the closing of the Intercompany Transfers, other than the partnership interest of Canwest GP in CLP and the special voting shares of CPI;

(20) *Cash Management Claims* means Claims of The Bank of Nova Scotia arising under or pursuant to any agreement or other arrangements relating to the provision of cash management services to any of the LP Entities (including ordinary course spot foreign exchange transactions);

(21) *Cash Reserve* means a cash reserve in a maximum amount to be agreed by the Monitor, the LP Entities and Acquireco or determined pursuant to an Order, which reserve shall be established by the Monitor as a segregated account held in trust by the Monitor for the benefit of Persons entitled to be paid the Cash Reserve Costs and Acquireco out of the LP Plan Entity Cash and Cash Equivalents in accordance with the Plan for the purpose of paying the Cash Reserve Costs in accordance with the Plan and the Cash Reserve Order;

(22) *Cash Reserve Account* means an account established by the Monitor in trust pursuant to the Cash Reserve Order;

(23) *Cash Reserve Costs* means specified administrative claims and costs outstanding on the Credit Acquisition Plan Implementation Date (or to the extent expressly provided below arising thereafter) falling within one or more of the following categories (i) amounts secured by the administration charge or the directors' and officers' charge (including for greater certainty claims for wages indirectly secured by the directors' and officers' charge that accrue during the period between the date of the Credit Acquisition Sanction Order and the Credit Acquisition Plan Implementation Date) or financial advisor charge granted by the Court including, in the case of the Monitor, the reasonable fees and costs of the Monitor with respect to the performance of its duties and obligations required under the Plan and any Order issued before the Credit Acquisition Plan Implementation Date to be performed by the Monitor after the Credit Acquisition Plan Implementation Date, (ii) Government Priority Claims, (iii) any portion of prefiling vacation pay that is not part of Employee Priority Claims, (iv) Pension Priority Claims, (v) Trustee Fees and Costs, and (vi) Post-Filing Trade Payables, in each case to the extent not paid by the LP Entities on or before the implementation of the Plan or to the extent Acquireco so elects as permitted by the Plan (including pursuant to the Acquisition and Assumption Agreement), assumed by Acquireco on the Credit Acquisition Plan Implementation Date;

(24) *Cash Reserve Order* means an Order of the Court to be made in these proceedings that will set out the amount of the Cash Reserve and the process for the administration of the Cash Reserve by the Monitor;

(25) *CBCA* means the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, as amended from time to time;

(26) *CCAA* means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended from time to time;

(27) *Claims* means any right of any Person against any of the LP Entities in connection with any indebtedness, liability or obligation of any kind of such LP Plan Entity owed to such Person and any interest accrued thereon or costs or other amounts payable in respect thereof whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any grievance, matter, action, cause or chose in action, whether existing at present or commenced in the future, and

for greater certainty, includes any claim that would have been provable if the LP Entities had become bankrupt on the Filing Date;

(28) *Class* means the Senior Secured Claims designated as a Class in Article 4 of this Plan;

(29) *Class C Common Shares* means voting common shares in the capital of Acquireco, which shares shall have the identical share attributes as the Class NC Common Shares and Class Z Common Shares except that the Class C Common Shares (i) shall have no restraints on the maximum aggregate voting rights for the election of directors of Acquireco or otherwise, (ii) shall be permitted to be convertible at the election of the Holder of such shares into Class Z Common Shares, and (iii) to the extent acquired or held by a Person that is not a Canadian Person, shall automatically convert to Class NC Common Shares on a one-for-one basis without any action by such Person;

(30) *Class NC Common Shares* means voting common shares in the capital of Acquireco, which shares shall have the identical share attributes as the Class C Common Shares and Class Z Common Shares except that the Class NC Common Shares shall (i) have at all times in the aggregate not more than 49.9% of the aggregate voting rights for the election of directors of Acquireco or otherwise, (ii) be permitted to be convertible at the election of the Holder of such shares into Class Z Common Shares, and (iii) to the extent acquired or held by a Person that is a Canadian Person, shall automatically convert to Class C Common Shares on a one-for-one basis without any action by such Person;

(31) *Class Z Common Shares* means non-voting common shares in the capital of Acquireco, which shares shall have the identical share attributes as the Class C Common Shares and Class NC Common Shares except that the Class Z Common Shares shall (i) not have at any time any voting rights except as otherwise provided under applicable law, and (ii) be convertible at the election of the Holder of a Class Z Common Share on a one-for-one basis into Class C Common Shares or Class NC Common Shares, as applicable;

(32) *CLP* means Canwest Limited Partnership / Canwest Societe en Commandite, a limited partnership pursuant to the Limited Partnerships Act (Ontario);

(33) *CLP Assets* means all assets or property of or used by or in the possession or control of CLP immediately before the closing of the Intercompany Transfers, other than the common shares of CPI and the CPI Debt;

(34) *CLP Subrogated Debt* means indebtedness owing by CLP to CPI as a result of the closing of the Credit Acquisition in a principal amount equal to the aggregate of the Unpaid Interest and Recoverable Expenses paid by CPI on the Plan Implementation Date plus the Reference Amount;

(35) *Collateral Agency Agreement* means the Amended and Restated Intercreditor and Collateral Agency Agreement dated as of July 10, 2007 between CanWest MediaWorks Limited Partnership (now CLP), the persons from time to time parties thereto as guarantors, the Collateral Agent, and the persons from time to time party thereto as secured creditors, as amended from time to time;

(36) *Collateral Agent* means the CIBC Mellon Trust Company or any successor agent for the creditors under the Collateral Agency Agreement;

(37) *Court* means the Ontario Superior Court of Justice (Commercial List);

(38) *CPI* means Canwest Publishing Inc. / Publications Canwest Inc., a corporation existing pursuant to the CBCA;

(39) *CPI Debt* means the 11% notes owing by CPI to CLP with an aggregate principal amount of $2,250,000,000;

(40) *CPI Guarantee* means the Omnibus Guarantee executed on July 10, 2007 by CPI and all of the Guarantors (as that term is defined in the Omnibus Guarantee), in favour of the Administrative Agent on behalf of itself and the other Senior Lenders;

(41) *Credit Acquisition* has the meaning given to such term in Section 8.4;

(42) *Credit Acquisition Plan Implementation Date* means the date on which all of the conditions precedent to the implementation of the Credit Acquisition set out in Section 8.2 have been fulfilled or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by a certificate to that effect filed with the Court by the Monitor;

(43) *Credit Acquisition Sanction Order* means an Order substantially in the form attached as Schedule 1.1(43)(i) approving the transactions contemplated in the Acquisition and Assumption Agreement, (ii) sanctioning this Plan pursuant to the provisions of the CCAA, (iii) vesting in CPI all of the right, title and interest in and to the Canwest Books Assets, Canwest GP Assets and CLP Assets, (iv) vesting in Acquireco all right, title and interest in and to the Senior Secured Claims and the Senior Security, (v) vesting in Acquireco all right, title and interest in and to the Acquired Assets, and (vi) vesting in Acquireco any amounts in the Cash Reserve Account that are not used by the Monitor to pay Cash Reserve Costs in accordance with the Cash Reserve Order, as such Order may be amended or modified by the Court from time to time on notice to the Senior Lenders;

(44) *Credit Acquisition Sanction Order Date* means the date on which the Credit Acquisition Sanction Order is made by the Court;

(45) *Credit Acquisition Sanction Order Trigger Date* means the earliest to occur of the following events: (i) the determination that the SISP will not proceed to Phase 2, (ii) the determination by the Monitor in accordance with the SISP that it will be unable to obtain a Successful Bid by the Phase 2 Bid Deadline, (iii) no Qualified Bid is received by the Phase 2 Bid Deadline that constitutes a Superior Offer, and (iv) no Superior Offer results in the completion of a transaction on or before the date that is sixty days following the Phase 2 Bid Deadline (or such longer period as is permitted pursuant to the SISP);

(46) *Creditor* means any Person having a Claim and where the context requires, includes the assignee of a Claim or a trustee in bankruptcy, interim receiver, receiver, receiver and manager, liquidator or other Person acting on behalf of or through such Person;

(47) *Demand* has the meaning given to it in Section 8.4(k);

(48) *DIP Claims* means all Claims of the DIP Lenders arising under or in connection with the DIP Loan;

(49) *DIP Loan* means a $25,000,000 senior secured super-priority debtor-in-possession credit financing approved by the Court pursuant to the Initial Order;

(50) *DIP Lenders* means the lenders party to the DIP Loan from time to time;

(51) *Discount Amount* means $25,000,000;

(52) *Employee Priority Claims* has the meaning given to it in Section 3.1(e);

(53) *Encumbrance* means security interests, hypothecs, mortgages, trusts or deemed trusts, liens, executions, levies, charges, or other financial or monetary claims, in each case whether or not they have attached or been perfected, registered or filed, whether secured, unsecured or otherwise and whether contractual, statutory, or otherwise;

(54) *Filing Date* means the date on which the Initial Order is made;

(55) *Final Determination Date* means the date upon which with respect to all Unresolved Senior Claims it has been determined in accordance with the procedures set forth in the Initial Order and the Credit Acquisition Sanction Order whether or not such Unresolved Senior Claims are Proven Senior Secured Claims;

(56) *Final Order* means in respect of any Order, such Order after (i) the expiry of applicable appeal periods; or (ii) in the event of an appeal or application for leave to appeal or to stay, vary, supersede, set aside or vacate such Order, final determination of such appeal or application by the applicable court or appellate tribunal;

(57) *Government Priority Claims* has the meaning given to it in Section 3.1(d);

(58) *Hedging Agreements* means the interest rate, currency and commodity hedging agreements entered into between a LP Plan Entity and one or more Senior Lenders, in respect of which such LP Plan Entity's obligations are secured *pari passu* with the obligations under the Senior Credit Agreement;

(59) *Holder* means, in respect of a share of Acquireco Equity, the Person that beneficially owns such share;

(60) *Implementation Senior Secured Claim Amount* means a Proven Senior Secured Claim of a Senior Lender plus any Unpaid Interest that is not paid on the Plan Implementation Date pursuant to Section 8.4(c) less any repayments of Principal and Other Amounts received by such Senior Lender on such Proven Senior Secured Claim after the Filing Date as determined in accordance with Section 7.4;

(61) *Indemnitees* means each of the Senior Lenders, each individual, corporation or other entity that was at any time a Senior Lender, each member and former member of the Steering Committee or any other committee of holders of Senior Secured Claims, the Administrative Agent, the DIP Lenders, Acquireco and the Collateral Agent, and their respective agents, affiliates, directors, officers, employees, and representatives, including counsel and its financial advisor;

(62) *Initial Order* means the initial Order in these proceedings;

(63) *Intercompany Transfers* has the meaning given to it in Section 8.3;

(64) *ITA* means the *Income Tax Act* (Canada), R.S.C. 1985, c. 1 (5th Supp.);

(65) *LP Entities* means the Applicants and CLP;

(66) *LP Plan Entity Cash and Cash Equivalents* means all cash, certificates of deposits, bank deposits, commercial paper, treasury bills and other cash equivalents of the LP Entities on the Credit Acquisition Plan Implementation Date;

(67) *Monitor* means PTI Consulting Canada Inc., in its capacity as CCAA court-appointed Monitor of the LP Entities pursuant to the Initial Order;

(68) *Order* means any order of the Court;

(69) *Other Amounts* means any amounts owing as of the Sanction Order Date to the Senior Lenders under the Senior Credit Agreement or Hedging Agreements other than on account of Principal, Unpaid Interest or Administrative Agent Claims;

(70) *Pension Priority Claims* has the meaning given to it in Section 3.1(f);

(71) *Permitted Encumbrances* means the permitted encumbrances set out in the Acquisition and Assumption Agreement;

(72) *Person* means any natural person, sole proprietorship, partnership, limited partnership, corporation, trust, joint venture, governmental authority, incorporated or unincorporated entity, or incorporated or unincorporated association of any nature;

(73) *Phase 1* means the first phase of the SISP;

(74) *Phase 2* means the second phase, if any, of the SISP;

(75) *Phase 2 Bid Deadline* has the meaning given to it in the SISP;

(76) *PID Cash Deficiency* has the meaning given to it in Section 8.4(d);

(77) *Plan* means this Plan of Compromise and Arrangement, as varied, amended, modified or supplemented in accordance with the provisions hereof;

(78) *Plan Implementation Date* means the Credit Acquisition Plan Implementation Date or the Superior Cash Offer Plan Implementation Date, whichever occurs;

(79) *Post-Filing Trade Payables* means trade payables which the Monitor determines, and either the Administrative Agent acting in consultation with the Steering Committee agrees or the Court by Order confirms, were incurred by the LP Entities entirely (i) after the Filing Date and before the Plan Implementation Date, (ii) in the ordinary course of business, and (iii) in compliance with the Initial Order and other Orders in these proceedings;

(80) *Principal* means, in the case of the Senior Credit Agreement any principal amounts owing to the Senior Lenders pursuant to the terms thereof, and, in the case of any Hedging Agreement, the net amount that became payable by an LP Plan Entity to the applicable Senior Lender on the date of termination of such Hedging Agreement by reason of the termination of such Hedging Agreement on or about June 1, 2009, and does not include Other Amounts;

(81) *Prior Ranking Secured Claim* means a Secured Claim that exists on both the Filing Date and the Plan Implementation Date and that would have ranked senior in priority to the Senior Secured Claims if the LP Entities had become bankrupt on the Filing Date excluding for greater certainty Claims secured by Court-ordered charges;

(82) *Pro Rata Share* means, in respect of any Senior Lender, the ratio determined on the Credit Acquisition Plan Implementation Date by the following formula:

Pro Rata Share =	*Implementation Senior Secured Claim Amount of such Senior Lender* aggregate amount of all Implementation Senior Secured Claim Amounts of all Senior Lenders plus the Unresolved Amount;

(83) *Proven Other Amounts Claim* means Other Amounts or the portion thereof, with respect to which all issues concerning the validity, amount and status have been determined in favour of the applicable Senior Lender in accordance with the Sanction Order with any dispute or appeal rights either having been exhausted or the applicable time period for the exercise thereof having expired;

(84) *Proven Principal Claim* means the Principal amount as of the Filing Date of *a* Senior Secured Claim or the portion thereof, with respect to which all issues concerning the validity, amount and status have been determined in favour of the applicable Senior Lender in accordance with the Initial Order with any dispute or appeal rights either having been exhausted or the applicable time period for the exercise thereof having expired;

(85) *Proven Senior Secured Claim* means collectively, a Senior Lender's Proven Principal Claim and its Proven Other Amounts Claim;

(86) *Qualified Bid* has the meaning given to such term in the SISP;

(87) *Recoverable Expenses* means all recoverable fees, expenses and costs incurred by the Administrative Agent, both prior to and after the date of the Initial Order, which CLP has agreed to reimburse under the terms of the

Senior Credit Agreement (including for greater certainty recoverable fees, expenses and costs provided for in the Support Agreement), including the reasonable fees, expenses and costs of the legal, financial and other advisors to the Administrative Agent, reasonable costs of conducting the search for directors of Acquireco, and, following the approval of this Plan by the Senior Lenders, investment banking advice relating to the equity of Acquireco;

(88) *Reference Amount* means the aggregate amount of the Senior Secured Claims calculated as of the Plan Implementation Date minus the Discount Amount; for greater certainty, in the case of the Credit Acquisition, such calculation shall be made after crediting any payments of Unpaid Interest and Administrative Agent Claims paid by CPI on the Credit Acquisition Plan Implementation Date pursuant to the Plan and the Acquisition and Assumption Agreement;

(89) *Sanction Order* means the Credit Acquisition Sanction Order or the Superior Cash Offer Sanction Order, whichever is made;

(90) *Sanction Order Date* means the date on which the Sanction Order is made;

(91) *Secured Claims* means Claims that have the benefit of a valid and enforceable security interest in, mortgage or charge over (including the charges granted by the Court pursuant to the Initial Order), lien against or other similar interest in, any of the assets that the LP Entities own or to which the LP Entities are entitled, to the extent of the realizable value of the property subject to such security, but for greater certainty does not include Government Priority Claims, Employee Priority Claims or Pension Priority Claims;

(92) *Senior Credit Agreement* means the Credit Agreement dated as of 10 July 2007 between CanWest Media Works Limited Partnership (now CLP), as Borrower, the Guarantors party thereto from time to time, as Guarantors, the Lenders party thereto from time to time as Lenders and the Administrative Agent on behalf of the Lenders, as amended from time to time;

(93) *Senior Lender* means any Creditor having a Senior Secured Claim;

(94) *Senior Lenders Meeting* means a meeting of the Senior Lenders called for the purpose of considering and voting in respect of this Plan;

(95) *Senior Lenders Meeting Date* means the date on which the Senior Lenders Meeting is held or to which the same may be adjourned in accordance with the Initial Order;

(96) *Senior Secured Claims* means Claims of the Senior Lenders arising under the Senior Credit Agreement or a Hedging Agreement, in each case calculated based on the deemed conversion of claims denominated in US Dollars to Canadian Dollars on the Filing Date, including for Principal, Unpaid Interest, Other Amounts and Administrative Agent Claims but, for greater certainty, does not include any Cash Management Claims;

(97) *Senior Security* means the security granted by the LP Entities in favour of the Collateral Agent to secure the payment and performance of, among other things, the LP Entities' liabilities, indebtedness and obligations to the Senior Lenders under the Senior Credit Agreement and the Hedging Agreements;

(98) *SISP* means the "SISP" as such term is defined in the Initial Order;

(99) *Steering Committee* means the steering committee of Senior Lenders formed by the Administrative Agent, as composed from time to time;

(100) *Successful Bid* has the meaning given to such term in the SISP;

(101) *Superior Alternative Offer* has the meaning given to such term in the SISP;

(102) *Superior Cash Offer* has the meaning given to such term in the Initial SISP;

(103) *Superior Cash Offer Plan Implementation Date* means the date on which all conditions precedent to the implementation of a Superior Cash Offer Transaction set out in Section 9.2 have been fulfilled or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by a certificate to that effect filed with the Court by the Monitor;

(104) *Superior Cash Offer Sanction Order* means an Order in form and substance satisfactory to the Administrative Agent, acting in consultation with the Steering Committee, *inter alia*, (i) approving the Superior Cash Offer Transaction, (ii) sanctioning this Plan pursuant to the provisions of the CCAA and (iii) approving the distribution to and acceptance by the Senior Lenders of the Reference Amount calculated as of the Plan Implementation Date in full and final satisfaction of the Senior Secured Claims;

(105) *Superior Cash Offer Sanction Order Date* means the date on which the Superior Cash Offer Sanction Order is made by the Court;

(106) *Superior Cash Offer Transaction* means a transaction or series of transactions contemplated by a Superior Cash Offer;

(107) *Superior Offer* has the meaning given to such term in the SISP;

(108) *Superior Offer Transaction* means a transaction or series of transactions contemplated by a Superior Offer;

(109) *Support Agreement* means the LP support agreement among the LP Entities and the Administrative Agent with respect to the principal terms and conditions of this Plan and the Credit Acquisition;

(110) *Tag Along Notice* has the meaning given to such term in the Collateral Agency Agreement;

(111) *Trustee Fees and Costs* means the fees and costs of any Trustee in Bankruptcy that may be appointed in respect of any of the LP Entities upon or following the implementation of the Plan up to a maximum amount of $150,000 incurred on or before the first meeting of creditors and/or in connection with the final completion of the estate and, for greater certainty, do not include any fees and costs incurred by any Trustee in Bankruptcy in relation to the investigation or pursuit of claims or remedies pursuant to sections 95 to 101 of the BIA or any similar claims under any applicable law;

(112) *Unaffected Claims* has the meaning given to such term in Section 3.1;

(113) *Unpaid Interest* means unpaid interest on the Principal amount and Other Amounts of a Proven Senior Secured Claim from time to time;

(114) *Unresolved Amount* means the aggregate amount as of the Credit Acquisition Plan Implementation Date of the Principal amounts and Other Amounts of the Unresolved Senior Claims;

(115) *Unresolved Senior Claim* has the meaning given to such term in the Initial Order;

(116) *Unresolved Senior Claims Reserve* means a reserve of (i) in the case of the Credit Acquisition, Acquireco Debt, Acquireco Equity and cash, and (ii) in the case of a Superior Cash Offer Transaction, cash proceeds of such Superior Cash Offer Transaction, in either case to be established by the Monitor pursuant to the Plan for the purpose of making distributions on account of Senior Secured Claims that are Unresolved Senior Claims on the Plan Implementation Date and that subsequently become Proven Senior Secured Claims;

(117) *Unsecured Claims* means all Claims other than Secured Claims and includes the Claims of holders of Secured Claims (other than Senior Secured Claims) to the extent such Claims exceed the realizable value of the property subject to such security; and

(118) *US Dollars* means lawful currency of the United States of America.

Section 1.2 Articles and Sections

The terms "this Plan", "hereof", "hereunder", "herein" and similar expressions refer to this Plan and not to any particular article, section, subsection, clause or paragraph or schedule of this Plan and include any variations, amendments, modifications or supplements hereto. In this Plan, a reference to an article, section, subsection, clause or paragraph or schedule shall, unless otherwise stated, refer to an article, section, subsection, clause or paragraph or schedule of this Plan.

Section 1.3 Extended Meanings

In this Plan, where the context requires, a word importing the singular number shall include the plural and vice versa; and a word or words importing gender shall include all genders. The terms "including", "includes" and other similar terms mean "including without limitation".

Section 1.4 Interpretation Not Affected by Headings

The division of this Plan into articles, sections, subsections, clauses and paragraphs and the insertion of a table of contents and headings are for convenience of reference only and shall not affect the construction or interpretation of this Plan.

Section 1.5 Date for any Action

In the event that any date on which any action is required to be taken hereunder by any of the parties is not a Business Day, such action shall be required to be taken on the next succeeding day which is a Business Day.

Section 1.6 Calculation of Time

Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day.

Section 1.7 Time

All times expressed herein are local time in Toronto, Ontario unless otherwise stipulated herein.

Section 1.8 Currency

Unless otherwise stated herein, all references to currency in this Plan are to lawful money of Canada.

Section 1.9 Successors and Assigns

This Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person bound by this Plan.

Section 1.10 Governing Law

This Plan and each of the documents contemplated by or delivered under or in connection with this Plan are governed by, and are to be construed and interpreted in accordance with, the laws of the Province of Ontario and the laws of Canada applicable in the Province of Ontario.

Section 1.11 Severability

If any provision of this Plan is or becomes illegal, invalid or unenforceable on or following the Plan Implementation Date in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect:

(a) the legality, validity or enforceability of the remaining provisions of this Plan; or

(b) the legality, validity or enforceability of that provision in any other jurisdiction.

Section 1.12 Schedules

The following are the Schedules to this Plan which are incorporated by reference and deemed to be a part of this Plan:

Schedule "1.1(8)" — Form of Acquisition and Assumption Agreement

Schedule "1.1(43)" — Form of Credit Acquisition Sanction Order

ARTICLE 2 — BACKGROUND AND PURPOSE OF PLAN

Section 2.1 Purpose and Effect of Plan

The purpose of this Plan is to effect a compromise and arrangement of the Senior Secured Claims against the LP Entities and implement the Credit Acquisition or a Superior Cash Offer Transaction, as applicable.

Section 2.2 Persons Affected

On the Plan Implementation Date, this Plan will become effective and be binding on the LP Entities and the Senior Lenders, and for greater certainty shall not affect Unaffected Claims.

ARTICLE 3 — TREATMENT OF UNAFFECTED CLAIMS

Section 3.1 Claims Unaffected by the Plan

Notwithstanding any other provision hereof this Plan does not compromise or affect any Claims other than the Senior Secured Claims, which other Claims are referred to herein collectively as "*Unaffected Claims*" and, for greater certainty, include:

(a) Secured Claims (other than the Senior Secured Claims), including DIP Claims;

(b) Unsecured Claims;

(c) Cash Management Claims;

(d) claims of government entities as follows (collectively, "*Government Priority Claims*"):

(i) claims by Her Majesty in Right of Canada pursuant to subsections 224(1.2) and 224(1.3) of the ITA;

(ii) claims pursuant to any provision of the *Canada Pension Plan* or the *Employment Insurance Act* that refers to subsection 224(1.2) of the ITA and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or employee's premium or employer's premium as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts;

(iii) claims pursuant to any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the ITA, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the ITA or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection;

(e) claims of employees as follows (collectively, "*Employee Priority Claims*"):

(i) amounts equal to the amounts that employees and former employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the LP Entities had become bankrupt on the Filing Date; and

(ii) claims for wages, salaries, commissions or compensation for services rendered after the Filing Date and before the Credit Acquisition Sanction Order Date or the Superior Cash Offer Sanction Order Date, whichever occurs, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period;

(f) claims for the payment of any of the following amounts that, in respect of the period up to the Plan Implementation Date are due and remain unpaid to the funds established in respect of CCAA prescribed pension plans of the LP Entities (collectively, the "*Pension Priority Claims*"):

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to such funds;

(ii) if any of the CCAA prescribed pension plans is regulated by an Act of Parliament:

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund; and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other CCAA prescribed pension plan:

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament; and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(g) claims for any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence and any interest owed in relation thereto.

Section 3.2 No Vote or Distribution in Respect of Unaffected Claims

Under this Plan, no holder of an Unaffected Claim shall be entitled to vote on or receive any distribution in respect of such Unaffected Claim.

ARTICLE 4 — CLASSIFICATION OF CLAIMS

Section 4.1 Classification of Claims

For the purpose of considering and voting upon this Plan and any entitlement to receive distributions hereunder, there shall be one Class of Senior Lenders consisting of all of the Senior Lenders and each Senior Lender shall, to the extent herein provided and subject to Section 6.1, be entitled to vote upon the Plan as part of that Class in respect of its Senior Secured Claim in accordance with the Initial Order.

ARTICLE 5 — TREATMENT OF UNAFFECTED CREDITORS

Section 5.1 Payment of DIP Lenders

The DIP Claims shall be repaid in full by the LP Entities to the DIP Lenders on the Plan Implementation Date, or subject to obtaining the prior written consent of the DIP Lenders (i) in the case of the Credit Acquisition, assumed by Acquireco in accordance with the Acquisition and Assumption Agreement, or (ii) in the case of a Superior Cash Offer Transaction, otherwise dealt with in accordance with that consent.

Section 5.2 Government Priority Claims

(1) In the case of a Credit Acquisition, the Government Priority Claims shall at the election of Acquireco either be (i) paid by the LP Entities on or before the Credit Acquisition Plan Implementation Date, (ii) assumed by Acquireco on behalf of the applicable LP Entities on the Credit Acquisition Plan Implementation Date, or (iii) paid in full by the Monitor from the Cash Reserve to Her Majesty in right of Canada or the applicable province when due and, in any event, within six months after the Credit Acquisition Sanction Order Date.

(2) In the case of a Superior Cash Offer Transaction, the Government Priority Claims shall either be (i) paid by the LP Entities on or before the Plan Implementation Date, or (ii) other arrangements satisfactory to the Court shall be made for the payment in full of the Government Priority Claims to Her Majesty in right of Canada or the applicable province when due and, in any event, within six months after the Superior Cash Offer Sanction Order Date.

Section 5.3 Employee Priority Claims

(1) In the case of a Credit Acquisition, at the election of Acquireco Employee Priority Claims shall either be (i) paid by the LP Entities on or before the Credit Acquisition Sanction Order Date, or (ii) paid immediately after the Credit Acquisition Sanction Order Date from funds set aside for that purpose on terms satisfactory to the Court on or before such date.

(2) In the case of a Superior Cash Offer Transaction, the Employee Priority Claims shall either be (i) paid by the LP Entities on or before the Superior Cash Offer Sanction Order Date, or (ii) paid immediately after the Superior Cash Offer Sanction Order Date from funds set aside for that purpose on terms satisfactory to the Court on or before such date.

Section 5.4 Pension Priority Claims

(1) In the case of a Credit Acquisition, at the election of Acquireco either (i) Pension Priority Claims shall be paid by the LP Entities on or before the Credit Acquisition Plan Implementation Date, (ii) assumed by Acquireco on behalf of the applicable LP Entities on the Credit Acquisition Plan Implementation Date, (iii) paid in full by the Monitor from the Cash Reserve on or following the Credit Acquisition Plan Implementation Date, or (iv) other arrangements satisfactory to the Court shall be made for payment in full of the Pension Priority Claims on or following the Credit Acquisition Plan Implementation Date.

(2) In the case of a Superior Cash Offer Transaction, either Pension Priority Claims shall either be paid (i) by the LP Entities on or before the Superior Cash Offer Plan Implementation Date, or (ii) immediately after the Superior Cash Offer Plan Implementation Date from funds set aside for that purpose on terms satisfactory to the Court on or before such date.

Section 5.5 Prior Ranking Secured Claims

(1) In the case of a Credit Acquisition, at the election of Acquireco either (i) Prior Ranking Secured Claims shall be paid by the LP Entities on or before the Credit Acquisition Plan Implementation Date, (ii) Prior Ranking Secured Claims shall be assumed by Acquireco on behalf of the applicable LP Entities on the Credit Acquisition Plan Implementation Date, or (iii) arrangements satisfactory to the Court shall be made for the property subject to security in respect of such Prior Ranking Secured Claim to be released to the holder of such Prior Ranking Secured Claim on or after the Plan Implementation Date.

(2) In the case of a Superior Cash Offer Transaction, either (i) Prior Ranking Secured Claims shall be paid by the LP Entities on or before the Superior Cash Offer Plan Implementation Date, (ii) the property subject to security in respect of such Prior Ranking Secured Claim shall be released to the holder of such Prior Ranking Secured Claim on or after the Plan Implementation Date, or (iii) other arrangements satisfactory to the Court shall be made for the payment of the Prior Ranking Secured Claims.

Section 5.6 Cash Management Claims

(1) In the case of a Credit Acquisition, at the election of Acquireco either (i) Cash Management Claims shall be assumed by Acquireco on behalf of the applicable LP Entities, or (ii) other arrangements satisfactory to the Administrative Agent shall be made for the payment in full of the Cash Management Claims.

(2) In the case of a Superior Cash Offer Transaction arrangements satisfactory to the Administrative Agent shall be made for the payment in full of the Cash Management Claims on the Superior Cash Offer Plan Implementation Date.

ARTICLE 6 — TREATMENT OF SENIOR LENDERS

Section 6.1 Voting

Each Senior Lender shall be entitled to vote to the extent that its Senior Secured Claim is an Accepted Senior Voting Claim on the second Business Day immediately prior to the date of the Senior Lenders Meeting. Voting in respect of Unresolved Senior Claims shall be dealt with in accordance with the Initial Order. Notwithstanding any other provision of this Plan, none of the LP Entities shall be entitled to vote on this Plan.

Section 6.2 Additional Matters

In conjunction with the holding of the Senior Lenders Meeting, the Senior Lenders will also vote on an amendment to the Senior Credit Agreement whereby any transferee in respect of any transfer of a Senior Secured Claim recorded in the Administrative Agent's records after a favourable vote under Section 6.1 shall be bound by such favourable vote and in particular, shall not be entitled to oppose an application for the Sanction Order made in accordance with the terms hereof. On the Credit Acquisition Plan Implementation Date, the Senior Credit Agreement shall be deemed to be amended such that no Other Amounts shall accrue thereunder after the Credit Acquisition Sanction Order Date.

Section 6.3 Exchange of Senior Secured Claims

Subject to Section 6.5, on and after the Credit Acquisition Plan Implementation Date, each Senior Lender shall be entitled to receive Acquireco Debt and Acquireco Equity in accordance with the Acquireco Capitalization Term Sheet on account of its Proven Senior Secured Claim in accordance with Section 8.4(g), with Unpaid Interest either paid on the Plan Implementation Date or assumed by Acquireco pursuant to the terms hereof.

Section 6.4 Repayment of Senior Secured Claims

On and after the Superior Cash Offer Plan Implementation Date, each Senior Lender shall be entitled to receive its Pro Rata Share of the Reference Amount in repayment of its Senior Secured Claim in accordance with Section 9.3.

Section 6.5 Unresolved Senior Claims Reserve

(1) The Monitor shall establish the Unresolved Senior Claims Reserve on the Plan Implementation Date.

(2) In the case of a Credit Acquisition:

(a) the Unresolved Senior Claims Reserve shall be comprised of Acquireco Debt, Acquireco Equity and cash reserved out of the LP Entity Cash and Cash Equivalents;

(b) the aggregate value of the Acquireco Debt and Acquireco Equity to be included in the Unresolved Senior Claims Reserve shall be equal to the value of Acquireco Debt and Acquireco Equity that would have been distributed in respect of the Unresolved Senior Claims if the full amounts of such Unresolved Senior Claims were Proven Senior Secured Claims on the Credit Acquisition Plan Implementation Date;

(c) the aggregate amount of the cash to be included in the Unresolved Senior Claims Reserve shall be equal to the amount of all Unpaid Interest on Unresolved Senior Claims as of the Credit Acquisition Plan Implementation Date that would have been paid to the Senior Lenders holding such Unresolved Senior Claims if the full amounts of such Unresolved Senior Claims were Proven Senior Secured Claims on the Credit Acquisition Plan Implementation Date;

(d) not later than fifteen days (or such later date as may be specified by Order of the Court) following the Final Determination Date, the Monitor shall distribute from the Unresolved Senior Claims Reserve (i) to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet Acquireco Debt and Acquireco Equity in respect of any Senior Secured Claims that were Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date and that subsequently became Proven Senior Secured Claims together with any interest, dividends, distributions or other payments actually received by the Monitor on account or in respect thereof, (ii) following the distribution referred to in (i) of this Section 6.5(2)(d), any balance of Acquireco Debt and Acquireco Equity that forms part of the Unresolved Senior Claims Reserve shall be distributed to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet such that all Acquireco Debt and Acquireco Equity shall have been distributed in accordance with the Plan and the Acquireco Capitalization Term Sheet, (iii) any interest, distributions or other payments actually received by the Monitor on account or in respect of the Acquireco Debt and Acquireco Equity referred to in (ii) shall be distributed to the Persons receiving the applicable Acquireco Debt or Acquireco Equity pursuant to (ii), (iv) to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet cash in an amount equal to the aggregate amount of all Unpaid Interest on Senior Secured Claims that were Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date that subsequently became Proven Senior Secured Claims, together with any interest actually received by the Monitor on account or in respect thereof, and (v) following the distribution referred to in (iv) of this Section 6.5(2)(d), any balance of cash that forms part of the Unresolved Senior Claims Reserve together with any interest actually received by the Monitor on account or in respect thereof shall be paid to Acquireco; and

(e) For the purposes of calculating the various distributions to made pursuant to Section 6.5(2)(d), each Senior Lender's Pro Rata Share shall be calculated as if (i) the Senior Secured Claims that became Proven Senior Secured Claims after the Credit Acquisition Plan Implementation Date were Proven Senior Secured Claims and not Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date, (ii) the Unresolved Amount was zero on the Credit Acquisition Plan Implementation Date, and (iii) Unpaid Interest on Senior Secured Claims that became Proven Senior Secured Claims after the Credit Acquisition Plan Implementation Date was paid on the Credit Acquisition Plan Implementation Date.

(3) In the case of a Superior Cash Offer Transaction:

(a) the Unresolved Senior Claims Reserve shall be comprised of cash in the amount that would have been paid to the Senior Lenders holding Unresolved Senior Claims if the full amount of all Unresolved Senior Claims were Proven Senior Secured Claims on the Plan Implementation Date; and,

(b) not later than fifteen days (or such later date as may be specified by Order of the Court) following the Final Determination Date, the Monitor shall distribute from the Unresolved Senior Claims Reserve cash plus any interest actually received by the Monitor on account or in respect thereof, to those Senior Lenders whose Unresolved Senior Claims are determined to be Proven Senior Secured Claims after the Plan Implementation Date, following which distribution, any balance of the cash, together with any interest actually received by the Monitor on account or in respect thereof shall be paid to the LP Entities or as otherwise directed in the Superior Cash Offer Sanction Order.

Section 6.6 Interests in and Encumbrances on Senior Secured Claims

(1) Not later than fifteen days prior to the Credit Acquisition Plan Implementation Date, each Senior Lender shall deliver to the Monitor with a copy to the Administrative Agent reasonable evidence satisfactory to the Monitor that:

(a) such Senior Lender is the sole legal and beneficial owner of (i) any Proven Senior Secured Claim of, and any Unresolved Senior Claim asserted by, such Senior Lender, and (ii) accrued and unpaid interest relating to such Claims that such Senior Lender is entitled to claim pursuant to the Senior Credit Agreement or the applicable Hedging Agreements; and

(b) such Senior Lender's Senior Secured Claim is not subject to any Encumbrance.

(2) In the event that any Senior Lender fails to deliver the evidence referred to in Section 6.6(1) on or before the date specified therein, the Acquireco Debt and the Acquireco Equity that would otherwise be distributed to such Senior Lender in accordance with the Acquireco Capitalization Term Sheet upon implementation of the Plan shall be held by the Monitor pending further Order.

ARTICLE 7 — QUANTIFYING CLAIMS AND PROCEDURAL MATTERS

Section 7.1 Senior Lenders Meeting

The Initial Order authorizes the holding of the Senior Lenders Meeting to be held pursuant to section 5 of the CCAA to consider and vote upon the Plan, appoints the Monitor as chair of the Senior Lenders Meeting and fixes the Senior Lenders Meeting Date. The Senior Lenders Meeting shall be held in accordance with this Plan, the Initial Order and any further Order made in these proceedings.

Section 7.2 Approval by Senior Lenders

In order that the Plan be binding on the Senior Lenders in accordance with the CCAA, it must first be accepted by vote passed by the Class as prescribed by this Plan by a majority in number of the Senior Lenders in the Class who actually vote on the Plan (whether in person or by proxy) at the Senior Lenders Meeting, representing two-thirds in amount of the Accepted Senior Voting Claims of the Senior Lenders in the Class who actually vote on the Plan (whether in person or by proxy) at the Senior Lenders Meeting.

Section 7.3 Procedure for Quantifying Senior Secured Claims

The procedure for quantifying Senior Secured Claims and resolving disputes for the purposes of this Plan shall be as set forth in the Initial Order, as modified or supplemented by this Plan and any further Order in these proceedings.

Section 7.4 Determination of Amounts

The Implementation Senior Secured Claim Amounts (including the determination of Other Amounts and the amount of any Principal and Other Amounts repayments received after the Filing Date) and the amount of the Unpaid Interest shall be determined on or before the Plan Implementation Date either by the Administrative Agent with the approval of the Monitor or by Order.

Section 7.5 Transfer of Senior Secured Claims

(1) If, after the Filing Date, the holder of a Senior Secured Claim on the Filing Date, or any subsequent holder of the whole of a Senior Secured Claim who has been acknowledged by the Monitor as the Senior Lender in respect of such Senior Secured Claim, transfers or assigns the whole of such Senior Secured Claim to another Person, neither the Administrative Agent, the LP Entities nor the Monitor shall be obligated to give notice to or to otherwise deal with a transferee or assignee of a Senior Secured Claim as the Senior Lender in respect thereof unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the Administrative Agent on written notice to the Monitor and thereafter such transferee or assignee shall for the purpose hereof constitute the Senior Lender in respect of such Senior Secured Claim. Any such transferee or assignee of a Senior Secured Claim shall be bound by any notices given or steps taken in respect of such Senior Secured Claim in accordance with this Plan and the Initial Order prior to receipt and acknowledgement by the Administrative Agent of satisfactory evidence of such transfer or assignment.

(2) If, after the Filing Date, the holder of a Senior Secured Claim on the Filing Date, or any subsequent holder of the whole of a Senior Secured Claim who has been acknowledged by the Monitor as the Senior Lender in respect of such Senior Secured Claim, transfers or assigns the whole of such Senior Secured Claim to more than one Person or part of such Senior Secured Claim to another Person or Persons, such transfer or assignment shall not create a separate Senior Secured Claim or Senior Secured Claims and such Senior Secured Claim shall continue to constitute and be dealt with as a single Senior Secured Claim notwithstanding such transfer or assignment, and until the Plan is sanctioned or terminated in accordance with its terms the LP Entities, the Administrative Agent and the Monitor shall in each such case not be bound to recognize or acknowledge any such transfer or assignment and shall be entitled to give notices to and to otherwise deal with such Senior Secured Claim only as a whole and then only to and with the Person last holding such Senior Secured Claim in whole as the Senior Lender in respect of such Senior Secured Claim, provided such Senior Lender may by notice in writing to the Monitor direct that subsequent dealings in respect of such Senior Secured Claim, but only as a whole, shall be with a specified Person and in such event, such Senior Lender and such transferee or assignee of the Senior Secured Claim shall be bound by any notices given or steps taken in respect of such Senior Secured Claim with such Person in accordance with this Plan and the Initial Order.

ARTICLE 8 — CREDIT ACQUISITION

Section 8.1 Application for Credit Acquisition Sanction Order

In the event that this Plan is accepted by the Class in accordance with Section 7.2, on the Credit Acquisition Sanction Order Trigger Date the Applicants shall, and the Administrative Agent acting in consultation with the Steering Committee may, apply for the Credit Acquisition Sanction Order. If the Class does not approve this Plan at the Senior Lenders Meeting or any adjourned meeting, the Monitor shall report to the Court as soon as reasonably possible.

Section 8.2 Conditions Precedent to Credit Acquisition

(1) The implementation of the Credit Acquisition is conditional upon the fulfilment or satisfaction of the following conditions, on or before June 30, 2010 as such date may be extended from time to time by the Administrative Agent acting in consultation with the Steering Committee:

(a) the Credit Acquisition Sanction Order shall have been made and be in form and substance satisfactory to the Administrative Agent, acting in consultation with the Steering Committee and shall have become a Final Order;

(b) the Cash Reserve Order shall have been made;

(c) there shall be outstanding no order or decree restraining or enjoining the consummation of the transactions contemplated by this Plan;

(d) all amounts secured by charges created by the Initial Order shall have been paid by the LP Entities or assumed by Acquireco or provision acceptable to the Court therefor shall have been made by way of the Cash Reserve;

(e) payment of the Government Priority Claims, the Pension Priority Claims and the Employee Priority Claims shall have been provided for in accordance with Section 5.2(1), Section 5.3(1) and Section 5.4(1), respectively;

(f) the Prior Ranking Secured Claims shall have been paid, assumed or provided for in accordance with Section 5.5(1);

(g) each condition in favour of the LP Entities pursuant to the Acquisition and Assumption Agreement shall have been fulfilled or performed or have been waived by the LP Entities;

(h) the LP Entities shall have complied with all of their respective obligations under the Initial Order and the Support Agreement or the requirement to comply with such obligations shall have been waived by the Administrative Agent acting in consultation with the Steering Committee;

(i) each condition in favour of Acquireco pursuant to the Acquisition and Assumption Agreement shall have been fulfilled or performed or have been waived by Acquireco in its discretion; and

(j) the execution and delivery by all relevant Persons of all other documentation and the taking of all other actions necessary to give effect to all material terms and provisions of this Plan.

(2) The conditions precedent set out in Section 8.2(1)(a), Section 8.2(1)(b), Section 8.2(1)(c), Section 8.2(1)(d) and Section 8.2(1)(f) are for the mutual benefit of the Senior Lenders and the LP Entities and may be waived in whole or in part only in writing by joint action of the Administrative Agent acting in consultation with the Steering Committee and the LP Parties.

(3) The condition precedent set out in Section 8.2(1)(e) may not be waived.

(4) The condition precedent set out in Section 8.2(1)(g) is for the exclusive benefit of the LP Entities and may be waived in whole or in part only in writing by the LP Entities or by Order; and

(5) The conditions precedent set out in Section 8.2(1)(h), Section 8.2(1)(i) and Section 8.2(1)(j) are for the exclusive benefit of the Senior Lenders and may be waived in whole or in part only in writing by the Administrative Agent acting in consultation with the Steering Committee.

Section 8.3 Intercompany Transfers

Upon the satisfaction or waiver in accordance with the provisions of this Plan of all conditions precedent to the implementation of the Credit Acquisition set out in Section 8.2, the LP Entities shall enter into the transactions described below on the Credit Acquisition Plan Implementation Date (collectively, the "*Intercompany Transfers*"), prior to the implementation of the transactions described in Section 8.4:

(a) all right, title and interest in and to the Canwest Books Assets shall vest absolutely in CPI free and clear of and from any and all Encumbrances in consideration for the issuance by CPI to Canwest Books of a non-interest bearing demand promissory note with a principal amount equal to the aggregate fair market value of the Canwest Books Assets immediately prior to the Credit Acquisition Implementation Date;

(b) all right, title and interest in and to the Canwest GP Assets shall vest absolutely in CPI free and clear of and from any and all Encumbrances in consideration for the issuance by CPI to Canwest GP of a non-interest bearing demand promissory note with a principal amount equal to the aggregate fair market value of the Canwest GP Assets immediately prior to the Credit Acquisition Implementation Date; and

(c) all right, title and interest in and to the CLP Assets shall vest absolutely in CPI free and clear of and from any and all Encumbrances (other than Prior Ranking Secured Claims expressly assumed by Acquireco) and all employees of CLP will be transferred to CPI by way of notification in consideration for (i) the assumption by CPI of all Liabilities (as defined in the Acquisition and Assumption Agreement) of CLP, Canwest Books or Canwest GP immediately prior to the Credit Acquisition Implementation Date that constitute Assumed Liabilities under the Acquisition and Assumption Agreement, and (ii) the issuance of 100 common shares of CPI. CLP and CPI will file a joint election under section 85 of the ITA, and any corresponding provision of an applicable provincial taxing statute, in respect of this transfer.

Section 8.4 Credit Acquisition

Upon the satisfaction or waiver in accordance with the provisions of this Plan of all conditions precedent to the implementation of the Credit Acquisition set out in Section 8.2, Acquireco, the Senior Lenders and the LP Entities shall enter into the transactions described below (collectively, the "*Credit Acquisition*") on the Credit Acquisition Plan Implementation Date in the same sequence that such steps appear below:

Transfer of Amounts to Monitor

(a) CPI shall pay to the Monitor in trust in immediately available funds the amount of the Cash Reserve for deposit in the Cash Reserve Account in accordance with the Cash Reserve Order;

(b) CPI shall pay to the Monitor in trust in immediately available funds the amount of the cash to be included in the Unresolved Senior Claims Reserve in accordance with Section 6.5(2)(c);

Payment of Unpaid Interest and Administrative Agent Claims

(c) to the extent that there exists on the Plan Implementation Date sufficient LP Plan Entity Cash and Cash Equivalents to do so, CPI shall pay to the Administrative Agent pursuant to the CPI Guarantee, firstly, all Administrative Agent Claims and, secondly, Unpaid Interest outstanding or accrued as of the Plan Implementation Date;

(d) in the event that there does not exist on the Plan Implementation Date sufficient LP Plan Entity Cash and Cash Equivalents to enable CPI to pay the outstanding and accrued Administrative Agent Claims and Unpaid Interest pursuant to Section 8.4(c) (such deficiency being referred to herein as the "**PID Cash Deficiency**"), the obligation to pay, firstly, to the extent necessary because of the PID Cash Deficiency Unpaid Interest and, secondly, to the extent necessary because of the PID Cash Deficiency the Administrative Agent Claims in the amount of such PID Cash Deficiency shall be assumed by Acquireco to be paid when due;

Acquisition of Senior Secured Claims by Acquireco

(e) each Senior Lender shall be deemed to have transferred its outstanding Senior Secured Claim net of amounts, if any, paid to such Senior Lender under the terms of the Plan on the Plan Implementation Date (for greater certainty, including Unresolved Senior Claims and excluding the Administrative Agent Claims) and Senior Security pertaining thereto to Acquireco in exchange for such Senior Lender's Pro Rata Share of the (i) Acquireco Debt, and (ii) Acquireco Equity (based on the number of shares of all three classes of shares and not of each class), each in accordance with the Acquireco Capitalization Term Sheet, whereupon Acquireco shall become the only lender

under the Senior Credit Agreement and shall be the only holder of Senior Secured Claims other than Administrative Agent Claims arising after the Plan Implementation Date;

(f) each Senior Lender shall be deemed to have transferred to Acquireco pursuant to Section 8.4(e) and Acquireco shall be deemed to have acquired from such Senior Lender such Senior Lender's outstanding Senior Secured Claim net of amounts, if any, paid to such Senior Lender under the terms of the Plan on the Plan Implementation Date (for greater certainty, including Unresolved Senior Claims and excluding the Administrative Agent Claims) and Senior Security pertaining thereto at a value equal to the aggregate amount of such outstanding Senior Secured Claim net of amounts, if any, paid to such Senior Lender under the terms of the Plan on the Plan Implementation Date, or in the case of Unresolved Senior Claims set aside in cash in the Unresolved senior Claims Reserve and subsequently paid to such Senior Lender, and Acquireco and such Senior Lender shall not make any Canadian or provincial tax filing on a basis inconsistent with this Section 8.4(f);

(g) subject to Section 6.5 each Senior Lender's Pro Rata Share of (i) the Acquireco Debt shall be distributed on the Credit Acquisition Plan Implementation Date in accordance with the Acquireco Capitalization Term Sheet, and (ii) the Acquireco Equity (based on the number of shares of all three classes of shares and not of each class) shall be distributed on or after the Credit Acquisition Plan Implementation Date in accordance with the Acquireco Capitalization Term Sheet, together in full and final exchange for such Senior Lender's Senior Secured Claim;

(h) all right, title and interest in and to the Senior Secured Claims transferred to Acquireco pursuant to Section 8.4(e) shall vest absolutely in Acquireco free and clear of and from any and all Encumbrances;

(i) for the purposes of any Encumbrances on or against any Senior Lender's Senior Secured Claim that is transferred to Acquireco pursuant to Section 8.4(e), the Acquireco Equity and the Acquireco Debt to be distributed in respect of such Senior Lender's Senior Secured Claim shall stand in the place and stead of such Senior Secured Claim, and all Encumbrances on or against such Senior Secured Claim shall attach to the interest in the Acquireco Equity and the Acquireco Debt to be distributed in respect such Senior Lender's Senior Secured Claim with the same priority as they had immediately prior to the implementation of the Plan, as if such Senior Secured Claim had not been transferred to Acquireco and had remained the property of such Senior Lender immediately prior to the implementation of the Plan;

Transfer of Unresolved Senior Claims Reserve Amounts to Monitor

(j) Acquireco shall distribute to the Monitor Acquireco Debt and Acquireco Equity to be used by the Monitor for the purpose of establishing the Unresolved Senior Claims Reserve in accordance with Section 6.5;

Acquisition of CPI Assets/Assumption of CPI Liabilities by Acquireco

(k) the stay of proceedings provided for in the Initial Order shall be lifted to permit Acquireco to deliver a demand to CPI in respect of CPI's obligations pursuant to the CPI Guarantee (the "**Demand**");

(l) Acquireco shall deliver the Demand;

(m) Acquireco shall deliver an Acceleration Notice and Direction and Tag Along Notice to the Collateral Agent;

(n) CPI shall be deemed to have consented to the immediate enforcement by the Collateral Agent of Acquireco's security in the Acquired Assets;

(o) the transactions contemplated by section 2.1(1) of the Acquisition and Assumption Agreement shall occur and Acquireco shall acquire the remaining Acquired Assets, in each case on the terms and in the manner contemplated by the Acquisition and Assumption Agreement;

(p) all right, title and interest in and to the Acquired Assets acquired by Acquireco pursuant to Section 8.4(o) shall vest absolutely in Acquireco free and clear of and from any and all Encumbrances (other than Prior Ranking Secured Claims expressly assumed by Acquireco), including without limitation any amounts in the Cash Reserve Account that are not used by the Monitor in accordance with the Cash Reserve Order to pay Cash Reserve Costs;

(q) the other steps, actions, transactions and matters contemplated by the Acquisition and Assumption Agreement shall be taken and shall occur and be dealt with on the terms and in the manner contemplated by the Acquisition and Assumption Agreement;

(r) all of the assets of the LP Entities that do not constitute Acquired Assets shall remain the property of the LP Entities;

Compromise of Senior Secured Claims

(s) the Senior Secured Claims shall be deemed to have been satisfied in an amount equal to the Reference Amount;

(t) the Senior Secured Claims in an amount equal to the Discount Amount shall constitute outstanding unsecured claims against the LP Entities and will be owned by Acquireco;

(u) the Collateral Agent and the Administrative Agent shall be deemed to have been authorized and directed pursuant to the provisions of the Plan to irrevocably release and discharge all security interests, hypothecs, mortgages, liens and guarantees granted by the LP Entities in favour of the Collateral Agent pursuant to and in connection with the Senior Security, provided that notwithstanding such release and discharge and notwithstanding any other provision in the Plan, after the Plan Implementation Date the Senior Secured Claims shall continue to have priority over and rank senior to any Claim which by agreement, statute, operation of law or equity, or otherwise is subordinate to the Senior Secured Claims (other than the priority afforded to the Senior Secured Claims over general unsecured claims arising solely by reason of the holding of security) immediately prior to the Plan Implementation Date;

Other Matters

(v) CLP shall be deemed to owe the CLP Subrogated Debt to CPI; and

(w) all actions contemplated by this Plan shall be deemed authorized and approved in all respects.

Section 8.5 Acquireco Capitalization Term Sheet

The Acquireco Capitalization Term Sheet will be kept confidential unless and until any application is made for the Credit Acquisition Sanction Order.

ARTICLE 9 — SUPERIOR CASH OFFER TRANSACTION

Section 9.1 Application for Superior Cash Offer Sanction Order

In the event that this Plan is accepted by the Class in accordance with Section 7.2 and a Superior Cash Offer is received and is to be closed not later than sixty days after the Phase 2 Bid Deadline (or such longer period as is permitted pursuant to the SISP), the Applicants shall apply for the Superior Cash Offer Sanction Order and not the Credit Acquisition Sanction Order.

Section 9.2 Conditions Precedent to Superior Cash Offer Transaction

(1) The implementation of a Superior Cash Offer Transaction is conditional upon the fulfilment or satisfaction of the following conditions within sixty days after the Phase 2 Bid Deadline, or such longer period as permitted pursuant to the SISP:

(a) the Superior Cash Offer Sanction Order shall have been made and shall have become a Final Order;

(b) there shall be outstanding no order or decree restraining or enjoining the confirmation of the transactions contemplated by this Plan;

(c) the Prior Ranking Secured Claims shall have been paid, assumed or provided for in accordance with Section 5.5(2);

(d) payment of the Government Priority Claims, the Pension Priority Claims and the Employee Priority Claims shall have been provided for in accordance with Section 5.2(2), Section 5.3(2) and Section 5.4(2) respectively;

(e) the Administrative Agent shall have received, or escrow arrangements satisfactory to the Administrative Agent shall have been made to ensure that it receives on the Superior Cash Offer Plan Implementation Date, from or on behalf of the LP Entities in immediately available funds an amount equal to the aggregate amount of all Implementation Senior Secured Claim Amounts plus Unpaid Interest plus all Administrative Agent Claims less the Discount Amount for distribution to the Senior Lenders in indefeasible repayment in full of the Senior Secured Claims in accordance with the terms and conditions of the Senior Credit Agreement, the Hedging Agreements and the Collateral Agency Agreement;

(f) the Monitor shall have received, or escrow arrangements satisfactory to the Administrative Agent shall have been made to ensure that the Monitor receives, from or on behalf of the LP Entities in immediately available funds an amount equal to the amount of the Unresolved Senior Claims Reserve established in accordance with Section 6.5; and

(g) the execution and delivery by all relevant Persons of all other documentation and the taking of all other actions necessary to give effect to all material terms and provisions of this Plan.

(2) The conditions precedent set out in Section 9.2(1)(a), Section 9.2(1)(b) and Section 9.2(1)(c) are for the mutual benefit of the Senior Lenders and the LP Entities.

(3) The conditions precedent set out in Section 9.2(1)(d), Section 9.2(1)(e) and Section 9.2(1)(f) may not be waived.

(4) The condition precedent set out in Section 9.2(1)(g) is for the exclusive benefit of the Senior Lenders and may be waived in whole or in part only in writing by the Administrative Agent acting in consultation with the Steering Committee.

Section 9.3 Superior Cash Offer Transaction

In the event that a Superior Cash Offer is received and is to be closed not later than sixty days after the Phase 2 Bid Deadline (or such longer period as is permitted pursuant to the SISP), and all conditions precedent to the implementation of a Superior Cash Offer Transaction set out in Section 9.2 have been satisfied or waived:

(a) each Senior Lender holding a Proven Senior Secured Claim shall receive pursuant to the terms of the Credit Agreement, the Hedging Agreements and the Collateral Agency Agreement as soon as reasonably practicable following the later of (i) the Superior Cash Offer Plan Implementation Date, and (ii) the date upon which such Senior Lender's entire Senior Secured Claim becomes a Proven Senior Secured Claim, such Senior Lender's Pro Rata Share of the Reference Amount in indefeasible repayment in full of its Senior Secured Claim; and

(b) the Collateral Agent and the Administrative Agent shall be deemed to have been authorized and directed pursuant to the provisions of the Plan to irrevocably release and discharge all security interests, hypothecs, mortgages, liens and guarantees granted by the LP Entities in favour of the Collateral Agent pursuant to and in connection with the Senior Security.

ARTICLE 10 — SUPERIOR ALTERNATIVE OFFER

Section 10.1 Superior Alternative Offer

In the event that a Superior Alternative Offer closes not later than sixty days after the Phase 2 Bid Deadline (or such longer period as is permitted pursuant to the SISP), the LP Entities will not proceed under Article 8 or Article 9 and this Plan shall terminate unless otherwise provided pursuant to such Superior Alternative Offer.

ARTICLE 11 — AMENDMENT AND TERMINATION OF PLAN

Section 11.1 Amendment of Plan Prior to Approval

Upon providing notice to the Monitor and the LP Entities, the Administrative Agent in consultation with the Steering Committee shall have the right to file any modification of or amendment to the Plan by way of a supplementary plan or plans of compromise or arrangement, filed with the Court at any time or from time to time prior to the conducting of the vote under the Plan by the Class of Senior Lenders at the Senior Lenders Meeting convened by the Monitor for that purpose, in which case any such supplementary plan or plans of compromise or arrangement shall, for all purposes, be and be deemed to be part of and incorporated into the Plan. The Monitor shall give notice of the details of any modifications or amendments by publication or otherwise to all Senior Lenders at least five Business Days prior to the Senior Lenders Meeting the vote being taken to approve the Plan.

Section 11.2 Amendment of Plan Following Approval

After the Senior Lenders Meeting at which the Plan has been approved (and whether before or after the Sanction Order is made), the Administrative Agent in consultation with the Steering Committee may at any time and from time to time vary, amend, modify, or supplement the Plan or the Acquireco Capitalization Term Sheet in writing if such variation, amendment, modification or supplement either is non-material (for greater certainty any changes to the principal amount of the term indebtedness of Acquireco pursuant to the Acquireco Capitalization Term Sheet being deemed to be material except as expressly permitted under the terms of the Acquireco Capitalization Term Sheet) and approved by an Order or, if material, is approved by the same voting majority of Senior Lenders of the Class as is required hereunder to approve the Plan and approved by an Order.

ARTICLE 12 — PLAN ADMINISTRATION

Section 12.1 Administration

Subject to the provisions of this Plan, the Monitor shall after the Plan Implementation Date continue to exercise the powers and authorities previously granted to the Monitor by the Court or pursuant to the CCAA. Notwithstanding the foregoing, after the Credit Acquisition Plan Implementation Date no material decisions or steps shall be taken by the Monitor in respect of the administration of the Cash Reserve or the Unresolved Senior Claims Reserve without obtaining either the prior written consent of the Administrative Agent in consultation with the Steering Committee or prior approval of the Court on notice to the Administrative Agent.

Section 12.2 Cash Reserve

The Monitor shall establish the Cash Reserve on the Credit Acquisition Plan Implementation Date in accordance with the Cash Reserve Order. From time to time after the Credit Acquisition Plan Implementation Date, the Monitor may (i)

pay from the Cash Reserve the Cash Reserve Costs, and (ii) reduce the amount of the Cash Reserve as and to the extent it is no longer required to satisfy the Cash Reserve Costs by distributing to Acquireco the amount of such reductions, in each case in accordance with the Cash Reserve Order. Any residual balance in the Cash Reserve after the payment of the Cash Reserve Costs shall be an asset of and owned by Acquireco.

Section 12.3 Implementation Authority

(1) In the event that this Plan is approved by the Class in accordance with this Plan, the Administrative Agent, acting in consultation with the Steering Committee:

(a) shall be authorized to take commercially reasonable steps to organize Acquireco, establish Acquireco's initial board of directors with a membership determined through a search process conducted by the Administrative Agent acting in consultation with the Steering Committee, designed to obtain board participation from independent, respected individuals (at least 75% of which will be Canadian citizens) having the experience, reputation, contacts and skills which are relevant to the success of Acquireco's business (and not to be representatives of specific creditor interests), with a view to obtaining a strong board that will be independent of Acquireco management and the individual Secured Lenders; and

(b) shall be authorized to and may issue, execute, deliver, file, make or record such contracts, instruments, releases, elections and other agreements or documents and take such all other steps or actions as may be considered necessary or appropriate by the Administrative Agent, acting in consultation with the Steering Committee, to pursue and effectuate and implement the Credit Acquisition and the other elements of this Plan or the Acquireco Capitalization Term Sheet without the need for any approval, authorization or consent except for those expressly required pursuant to the Plan or the Acquireco Capitalization Term Sheet.

(2) Notwithstanding that the Senior Secured Claims include Claims that arise under the Hedging Agreements as well as Claims that arise under the Senior Credit Agreement, in taking any action or omitting to take any action pursuant to the authority granted to the Administrative Agent pursuant to or in accordance with the provisions of this Plan, the Administrative Agent is and shall be deemed to be acting in its capacity as agent on behalf of the Lenders pursuant to the Senior Credit Agreement and the Administrative Agent and its advisors shall have no additional obligations or liabilities to any Senior Lender by virtue of any acts or omissions under or in relation to this Plan, and the obligations and liabilities, if any, of the Administrative Agent and its advisors shall remain fully subject to and are limited by the terms of the Senior Credit Agreement.

Section 12.4 Effectuating Documents and Further Transactions

On and after the Credit Acquisition Plan Implementation Date, Acquireco and the members of its board of directors shall be authorized to and may issue, execute, deliver, file or record such contracts, securities, instruments, releases and other agreements or documents and take such actions as may be necessary or appropriate to effectuate, implement, and further evidence the terms and conditions of this Plan and the securities issued pursuant to this Plan in the name of and on behalf of Acquireco without the need for any approval, authorization or consent except for those expressly required pursuant to the Plan.

Section 12.5 Advice and Directions

The Monitor, the LP Entities and the Administrative Agent shall be entitled to apply to the Court from time to time for advice and directions concerning the implementation, operation and administration of this Plan.

ARTICLE 13 — MISCELLANEOUS

Section 13.1 Exculpation and Limitation of Liability

(1) None of the LP Entities, the Monitor, the Administrative Agent, the Senior Lenders, Acquireco, any individual, corporation or other entity that was at any time formerly a Senior Lender, the Steering Committee or any other committee of holders of Senior Secured Claims, the DIP Lenders, the Collateral Agent, or any of their respective present or former members, officers, directors, employees, direct or indirect advisors, attorneys, or agents, shall have or incur any liability to any holder of a Senior Secured Claim, or any of their respective agents, employees, representatives, financial advisors, attorneys, or affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of, the LP Entities' CCAA proceedings initiated by the Initial Order, formulating, negotiating or implementing the Plan or the Support Agreement, the solicitation of acceptances of the Plan or the Support Agreement, the pursuit of confirmation of the Plan, the confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for their wilful misconduct, and in all respects shall be entitled to rely reasonably upon the advice of counsel with respect to their duties and responsibilities under the Plan.

(2) The LP Entities hereby jointly and severally fully indemnify each of the Indemnitees against any manner of actions, causes of action, suits, proceedings, liabilities and claims of any nature, costs and expenses (including reasonable legal fees) which may be incurred by such Indemnitee or asserted against such Indemnitee arising out of or during the course of, or otherwise in connection with or in any way related to, the negotiation, preparation, formulation, solicitation, dissemination, implementation, confirmation and consummation of the Plan, other than any liabilities to the extent arising from the gross negligence or willful or intentional misconduct of any Indemnitee or any breach by Acquireco of the terms of the Acquisition and Assumption Agreement as determined by a final judgment of a court of competent jurisdiction. If any claim, action or proceeding is brought or asserted against an Indemnitee in respect of which indemnity may be sought from any of the LP Entities, the Indemnitee shall promptly notify the LP Entities in writing, and the LP Entities may assume the defence thereof, including the employment of counsel reasonably satisfactory to the Indemnitee, and the payment of all costs and expenses. The Indemnitee shall have the right to employ separate counsel in any such claim, action or proceeding and to consult with the LP Entities in the defence thereof and the fees and expenses of such counsel shall be at the expense of the LP Entities unless and until the LP Entities shall have assumed the defence of such claim, action or proceeding. If the named parties to any such claim, action or proceeding (including any impleaded parties) include both the Indemnitee and any of the LP Entities, and the Indemnitee reasonably believes that the joint representation of such entity and the Indemnitee may result in a conflict of interest, the Indemnitee may notify the LP Entities in writing that it elects to employ separate counsel at the expense of the LP Entities, and the LP Entities shall not have the right to assume the defence of such action or proceeding on behalf of the Indemnitee. In addition, the LP Entities shall not affect any settlement or release from liability in connection with any matter for which the Indemnitee would have the right to indemnification from the LP Entities, unless such settlement contains a full and unconditional release of the Indemnitee, or a release of the Indemnitee satisfactory in form and substance to the Indemnitee.

Section 13.2 Releases

(1) On the Plan Implementation Date, the LP Entities shall be deemed to have released the Indemnitees and the Monitor, from any and all claims, obligations, rights, causes of action, and liabilities, of whatever kind or nature, whether based on contract, negligence or other tort, fiduciary duty, common law, equity, statute or otherwise, whether known or unknown, whether foreseen or unforeseen, arising on or before the Plan Implementation Date (other than any claims, obligations, rights, causes of action, and liabilities arising from fraud as determined by a final judgment of a court of competent jurisdiction) which such LP Entities may have for, upon or by reason of any matter, cause or thing whatsoever, which are based upon, arise under or are related to the Senior Credit Agreement, Hedging Agreements, Collateral Agency Agreement or Senior Secured Claims.

(2) On the Plan Implementation Date unless otherwise ordered by the Court, the Senior Lenders shall be deemed to have released the Monitor and the present and former officers and directors of the LP Entities from any and all claims, obligations, rights, causes of action, and liabilities, of whatever kind or nature, whether known or unknown, whether foreseen or unforeseen, arising on or before the Plan Implementation Date, which such Senior Lenders may have for, upon or by reason of any matter, cause or thing whatsoever, which are based upon, arise under or are related to the

Senior Credit Agreement, Hedging Agreements, Collateral Agency Agreement or Senior Secured Claims, provided that (i) nothing herein will release any of the present or former officers or directors of the LP Entities in respect of any claim, obligations right, cause of action, or liability referred to in section 5.1(2) of the CCAA, and (ii) the release set out in this Section 13.2(2) is not a condition of this Plan and, accordingly, in the event that the Court declares pursuant to Section 5.1(3) of the CCAA that any claim against any present or former officer or director of any of the LP Entities (that would otherwise be released under this Section 13.2(2)) shall not be compromised or released, the remaining provisions of this Plan shall continue to remain operative and in full force and effect.

Section 13.3 Effect of Plan Generally

On the Plan Implementation Date the treatment of Senior Secured Claims under this Plan shall be final and binding on the LP Entities and all Senior Lenders.

Section 13.4 Paramountcy

From and after the Plan Implementation Date, any conflict between the Plan and the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any Loan Document or Hedging Agreement and all amendments or supplements thereto existing between one or more of the Senior Lenders and the LP Entities as at the Plan Implementation Date will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction Order, which shall take precedence and priority.

Section 13.5 Compromise Effective for all Purposes

The compromise or other satisfaction of any Senior Secured Claim under this Plan, from and after the Plan Implementation Date shall be binding upon such Senior Lender, its heirs, executors, administrators, successors and assigns for all purposes as against the LP Entities.

Section 13.6 Participation in Different Capacity

Senior Lenders whose Senior Secured Claims are affected by this Plan may be affected in more than one capacity. Each such Senior Lender shall be entitled to participate hereunder separately in each such capacity. Any action taken by a Senior Lender in any one capacity shall not affect the Senior Lender in any other capacity unless the Senior Lender agrees in writing.

Section 13.7 Consent, Waivers and Agreements

As at 12:01 a.m. on the Plan Implementation Date, each Senior Lender shall be deemed to have consented and to have agreed to all of the provisions of this Plan as an entirety. In particular, each Senior Lender shall be deemed to have executed and delivered to the Monitor all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan as an entirety.

Section 13.8 Deeming Provisions

In this Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

Section 13.9 Notices

Unless otherwise specified, each Notice to a party must be given in writing and delivered personally or by courier, or transmitted by fax or email to the party as described below or to any other address, fax number, email address or Person that the party designates. Any Notice, if delivered personally or by courier, will be deemed to have been given when actually received, if transmitted by fax or email before 3:00 p.m. on a Business Day, will be deemed to have been given on that Business Day, and if transmitted by fax or email after 3:00 p.m. on a Business Day, will be deemed to have been given on the Business Day after the date of the transmission.

(1) If to any of the LP Entities:

c/o Canwest Limited Partnership

1450 Don Mills Road

Don Mills, Ontario

M3B 2X7

Attention: Doug Lamb, Executive Vice President and Chief Financial Officer

Fax: 416.442.2135

Email: dlamb@canwest.com

with a copy to:

CRS Inc.

541 Arrowhead Road

Mississauga, Ontario

L5H 1V5

Attention: Gary F. Colter,

Fax: 905-891-7036

email: colter@crsgfc.ca

and with a copy to:

Osler, Hoskin & Harcourt LLP

100 King Street West

1 First Canadian Place

Suite 6100

Toronto, Ontario

M5X 1B8

Attention: Edward Sellers

Fax: 416-862-6666

email: esellers@osler.com

(2) If to the Monitor:

FTI Consulting Canada Inc.

TD Waterhouse Tower

79 Wellington St. West

Suite 2010, P.O. Box 104

Toronto, Ontario

M5K 1G8

Attention: Paul Bishop, Senior Managing Director

Fax: 416.649.8101

Email: paul.bishop@fticonsulting.com

with a copy to:

Stikeman Elliott LLP

5300 Commerce Court West

199 Bay St.

Toronto, Ontario

M5L 1B9

Attention: David Byers

Fax: 416.869.5697

Email: dbyers@stikeman.com

(3) If to the Administrative Agent:

The Bank of Nova Scotia

62nd Floor, 40 King Street West

Scotia Plaza

Toronto, Ontario

M5W 2X6

Attention: Robert King

Fax: 416.866.2010

Email: rob_king@scotiacapital.com

with a copy to:

McMillan LLP

Bay Wellington Tower

Brookfield Place, Suite 4400

181 Bay Street

Toronto, Ontario

M5J 2T3

Attention: Andrew J.F. Kent

Fax: 416.865.7048

Email: andrew.kent@mcmillan.ca

(4) If to a Senior Lender:

To the address for notice specified in the Senior Credit Agreement or the Hedging Agreements, as applicable.

Section 13.10 Further Assurances

Notwithstanding that some of the transactions and events set out in this Plan may be deemed to occur without any additional act or formality other than as set out herein, each of the Persons affected hereby shall from time to time promptly execute and deliver all further documents and take all further action reasonably necessary to better implement this Plan.

Dated at Toronto the 8th day of January, 2010.

Schedule "1.1 (8)" — ACQUISITION AND ASSUMPTION AGREEMENT

See attached.

SCHEDULE "1.1(8)" TO ACQUIRECO PLAN

ACQUISITION AND ASSUMPTION AGREEMENT

Dated as of •, 2010

Between *7272049 CANADA INC.* and *CANWEST BOOKS INC.* and *CANWEST (CANADA) INC.* and *CANWEST LIMITED PARTNERSHIP/CANWEST SOCIÉTÉ EN COMMANDITE* and *CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC.*

Graphic 1

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ACQUISITION AND ASSUMPTION AGREEMENT

This Agreement is dated as of •, 2010 between *7272049 CANADA INC. ("Acquireco")* and *CANWEST BOOKS INC. ("Canwest Books")* and *CANWEST (CANADA) INC. ("Canwest GP")* and *CANWEST LIMITED PARTNERSHIP/CANWEST SOCIÉTÉ EN COMMANDITE ("Canwest LP")* and *CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC.* ("*CPI*")

RECITALS

A. Canwest LP is in default of its obligations under the Senior Credit Agreement.

B. Canwest LP was party to the Hedging Agreements, which were terminated on or about June 1, 2009 and pursuant to which termination payments and interest thereon are outstanding and due by Canwest LP.

C. CPI has guaranteed amounts owing by Canwest LP under the Senior Credit Agreement and Hedging Agreements pursuant to the Omnibus Guarantee executed on July 10, 2007 by CPI and all of the Guarantors (as that term is defined in the Omnibus Guarantee), in favour of the Administrative Agent on behalf of itself and the other Senior Lenders (the "*CPI Guarantee*").

D. On the Acquisition Date, pursuant to the Plan the lenders under the Senior Credit Agreement and Hedging Agreements will have assigned rights to and interests under the Senior Credit Agreement and Hedging Agreements, respectively, to Acquireco.

E. On the Acquisition Date, Acquireco will have enforced its security on and will acquire the Acquired Assets (which include certain assets of Canwest GP and substantially all of the assets of Canwest Books and Canwest LP that CPI will acquire from Canwest Books, Canwest GP and Canwest LP prior to the Acquisition Date) pursuant hereto as a consequence of the LP Entities' failure to pay (the "*Failure to Pay*") (i) amounts owing under the Senior Credit Agreement; (ii) amounts owing pursuant to the Hedging Agreements representing termination payments thereunder; and (iii) the CPI Guarantee, respectively.

F. On the Acquisition Date, Acquireco will assume the Assumed Liabilities (which include certain Liabilities of Canwest LP that CPI will assume from Canwest LP prior to the Acquisition Date) pursuant to and in accordance with the terms of this Agreement.

The Parties agree as follows:

ARTICLE 1 - INTERPRETATION

Section 1.1 Definitions

In this Agreement:

(1) "*Accounts Receivable*" means all accounts receivable, notes receivable, loans receivable and other evidences of Indebtedness and rights of CPI to receive payment and the security arrangements and collateral securing the repayment and satisfaction of the foregoing.

(2) "*Acquireco Assumed Benefit Plans*" has the meaning given to it in Section 5.2(1)(a).

(3) "*Acquireco Benefit Plans*" means the employee benefit plans, agreements, and other similar arrangements existing or established by Acquireco to provide benefits to the Transferred Employees and former employees of the LP Entities as contemplated under Section 5.2 and in respect of which Acquireco sponsors or is obligated to contribute to, or is in any way liable, pursuant to the terms of this Agreement, including bonus, deferred compensation, incentive compensation, share purchase, share appreciation, share option, severance and termination pay, hospitalization, health and other medical benefits, life and other insurance, dental, vision, legal, long-term and short-term disability, salary continuation, vacation, supplemental unemployment benefits, education assistance, profit sharing, mortgage assistance, employee loan, employee assistance, the Acquireco Assumed Pension Plans, the Acquireco Established Pension Plans or Acquireco Elected Pension Plans, as the case may be, and any registered retirement savings arrangements), except that the term "Acquireco Benefit Plans" shall not include any statutory plans which Acquireco is required to provide or participate in, including the Canada/Quebec Pension Plan and plans administered pursuant to applicable provincial health tax, workers' compensation and workers' safety and employment legislation.

(4) "*Acquireco Elected Benefit Plans*" has the meaning given to it in Section 5.5(4)

(5) "*Acquireco Assumed Pension Plans*" has the meaning given to it in Section 5.3(1).

(6) "*Acquireco Elected Pension Plans*" has the meaning given to it in Section 5.5(2).

(7) "*Acquireco Established Pension Plans*" has the meaning given to it in Section 5.3(1)(d).

(8) "*Acquired Assets*" means all right, title and interest in and to all properties, assets, interests and rights which are related to the Business or which CPI otherwise has an interest, or which are used by or which are in the possession or control of CPI, or which immediately before the completion of the Intercompany Transfers any of the other LP Entities otherwise had an interest or which were used by or which were in the possession or control of any of the other LP Entities, including the following:

(a) the Accounts Receivable, including all debts owed by National Post to CPI;

(b) the Actions;

(c) the Books and Records;

(d) the Contracts;

(e) the Goodwill;

(f) the Intellectual Property;

(g) the Inventory;

(h) the Licences;

(i) the Personal Property Leases;

(j) the Prepaid Expenses;

(k) the Real Property; (1) the Real Property Leases;

(m) the shares of National Post, and

(n) the Tangible Personal Property,

provided, for greater certainty, that "Acquired Assets" does not include the Excluded Assets.

(9) "*Acquisition*" means the acquisition by Acquireco of the Acquired Assets and other assets as contemplated by this Agreement.

(10) "*Acquisition Date*" means the Plan Implementation Date or such other date as may be agreed by the Parties.

(11) "*Acquisition Time*" means 12:00 p.m. on the Acquisition Date.

(12) "*Actions*" means all rights of action and claims whatsoever of CPI (including for greater certainty all rights of action and claims that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers) against third parties arising by reason of any facts or circumstances that occurred or existed before the Acquisition Time whether or not an action or other proceeding shall have been commenced before the Acquisition Time.

(13) "*Administrative Agent*" means The Bank of Nova Scotia or any successor in its capacity as Administrative Agent for the Senior Lenders under the Senior Credit Agreement.

(14) "*Affiliate*" of a Person means any Person that directly or indirectly Controls, is Controlled by, or is under common Control with, that Person, and for greater certainty includes a subsidiary.

(15) "*Agreement*" means this agreement and all schedules to this agreement, as may be amended from time to time in accordance with the terms hereof.

(16) "*Applicable Law*" means, in respect of any Person, property, transaction, event or other matter, any present or future law, statute, regulation, code, ordinance, principle of common law or equity, municipal by-law, treaty or Order, domestic or foreign, applicable to that Person, property, transaction, event or other matter and all applicable requirements, requests, official directives, rules, consents, approvals, authorizations, guidelines, and policies, in each case, having the force of law, of any Governmental Authority having or purporting to have authority over that Person, property, transaction, event or other matter and regarded by such Governmental Authority as requiring compliance.

(17) "*Assumed Liabilities*" means the Liabilities identified in Section 2.1(1)(d) and 2.1(1)(e) and the Deferred Revenue Obligations.

(18) "*Benefits Assignment and Assumption Agreement*" has the meaning given to it in Section 5.2(1)(a).

(19) "*Books and Records*" means the Financial Records, the corporate charters, minute and share record books and corporate seals of National Post, and all other books, records, files and papers of CPI (including for greater certainty all Financial Records and all other books, records, files and papers that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers) including drawings,

engineering information, computer programs (including source code), software programs, manuals and data, sales and advertising materials, sales and purchase correspondence, trade association files, research and development records, lists of present and former customers and suppliers, personnel, employment and other records, and all such records, data and information stored electronically, digitally or on computer-related media.

(20) "*Business*" means, collectively, the English language newspaper, digital and online businesses carried on by CPI and the respective business carried on by Canwest Books, Canwest GP and Canwest LP immediately prior to the completion of the Intercompany Transfers, including the businesses described in Schedule 1.1(20).

(21) "*Business Day*" means a day on which banks are open for business in Toronto and Winnipeg, but does not include a Saturday, Sunday or a holiday in either the Province of Ontario or the Province of Manitoba

(22) "*Canadian Dollars*" and the symbol "$" each means the lawful currency of Canada

(23) "*Cash and Equivalents*" means all cash, certificates of deposits, bank deposits, commercial paper, treasury bills and other cash equivalents of, and all of the cheques and cheque books of, CPI (including for greater certainty all cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents of Canwest Books, Canwest GP and Canwest LP, and all of the cheques and cheque books of Canwest Books, Canwest GP and Canwest LP, that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers).

(24) "*Cash Reserve*" has the meaning given to it in the Plan

(25) "*CCAA*" means *Companies' Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36, as amended from time to time.

(26) "*CCAA Case*" means the proceedings commenced by way of an application for an initial order pursuant to the CCAA filed by Canwest Books, Canwest GP and CPI.

(27) "*CCAA Court*" means the Ontario Superior Court of Justice (Commercial List).

(28) "*Claims*" means any right of any Person against any of the LP Entities in connection with any Indebtedness, liability or obligation of any kind of such LP Entity owed to such Person and any interest accrued thereon or costs or other amounts payable in respect thereof, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any grievance, matter, action, cause or chose in action, whether existing at present or commenced in the future, and for greater certainty, includes any claim that would have been provable if the LP Entities had become bankrupt on the date on which the Initial Order is made.

(29) "*Commissioner*" means the Commissioner of Competition under the *Competition Act* (Canada).

(30) "*Competition Act Approval*" means the applicable waiting period under section 123 of the Competition Act (Canada) shall have expired and neither Acquireco nor CPI shall have been advised in writing by the Commissioner that the Commissioner has determined to make an application for an order under section 92 or 100 of the Competition Act (Canada) in respect of the acquisition of the Acquired Assets by Acquireco; and

> (a) the Commissioner shall have issued an advance ruling certificate under section 102(1) of the *Competition Act* (Canada) to the effect that the Commissioner is satisfied that the Commissioner would not have sufficient grounds upon which to apply to the Competition Tribunal for an order under section 92 of the *Competition Act* (Canada) in respect of the acquisition of the Acquired Assets by Acquireco; or

(b) the Commissioner shall have issued a "no-action letter" whether pursuant to section 123(1) of the *Competition Act* (Canada) or otherwise, whereby the Commissioner provides written notice that the Commissioner does not intend, at that time, to make an application under section 92 of the *Competition Act* (Canada) in respect of the acquisition of the Acquired Assets by Acquireco.

(31) "*Computer Systems*" means all computer hardware, peripheral equipment, software and firmware, processed data, technology infrastructure and other computer systems and services that are used by CPI (including for greater certainty all computer hardware, peripheral equipment, software and firmware, processed, data, technology infrastructure and other computer systems and services of Canwest Books, Canwest GP and Canwest LP that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers) to receive, store, process or transmit data, to carry on the Business, to carry on its day to day operations and affairs, or otherwise.

(32) "*Consent*" means any consent, approval, permit, waiver, ruling, exemption or acknowledgement from any Person (other than an LP Entity or National Post) which is provided for or required in respect of or pursuant to the terms of any Contract, Personal Property Lease or Real Property Lease in connection with the acquisition of the Acquired Assets by Acquireco on the terms contemplated in this Agreement, to permit Acquireco to use the Acquired Assets to carry on the Business after the Acquisition Date or which is otherwise necessary to permit the Parties to perform their obligations under this Agreement.

(33) "*Contaminant*" means any substance, product, element, radiation, vibration, sound or matter included in any definition of "hazardous product," "dangerous goods," "waste," "toxic substance," "contaminant," "pollutant," "deleterious substance" or words of similar import defined under any Environmental Law, or the presence of which in the environment is likely to affect adversely the quality of the environment in any way.

(34) "*Contracts*" means all contracts and agreements to which CPI (including all contract and agreements of Canwest Books, Canwest GP and Canwest LP that were or will be assigned to CPI, or in respect of which CPI acquired or will acquire the benefit, in connection with the Intercompany Transfers) is a party as at the Acquisition Time (other than the Personal Property Leases and the Real Property Leases, but including the CPI Leased Property Leases).

(35) "*Control*" of a Person by another Person means that the second Person directly or indirectly possesses the power to direct or cause the direction of the management and policies of the first Person, whether through the ownership of securities, by contract or by any other means and "*controlled by*" and "*under common control with*" have corresponding meanings.

(36) "*CPI Benefit Plans*" means the employee benefit plans, agreements, arrangements (whether oral or written, formal or informal, funded or unfunded) described in Schedule 7.8(1) that are maintained for, available to, or otherwise relating to any Employee or former employee of any LP Entity or in respect of which any LP Entity sponsors or is obligated to contribute to or is in any way liable for, whether or not insured and whether or not subject to any Applicable Law, including bonus, deferred compensation, incentive compensation, share purchase, share appreciation, share option, severance and termination pay, hospitalization, health and other medical benefits, accidental death and dismemberment, life and other insurance, dental, vision, legal, long-term and short-term disability, salary continuation, vacation, supplemental unemployment benefits, education assistance, profit sharing, mortgage assistance, employee loan, employee assistance and pension, retirement and supplemental retirement plans, programs, agreements (including the CPI Pension Plans or registered retirement savings arrangements), except that the term "CPI Benefit Plans" shall not include any Multi-Employer Plans or statutory plans which any LP Entity is required to provide or participate in, including but not limited to the Canada/Quebec Pension Plan and plans required by or administered pursuant to applicable provincial health tax, workers' compensation and workers' safety and employment legislation.

(37) "*CPI Debt*" means the 11% notes owing by CPI to Canwest LP with an aggregate principal amount of $2,250,000,000.

(38) "*CPI Guarantee*" has the meaning given to it in Recital C.

(39) "*CPI Leased Property Leases*" means all executed offers to lease, agreements to lease, leases, subleases, renewals of leases, tenancy agreements, rights of occupation, licences or other occupancy agreements granted by or on behalf of CPI or its predecessors in title as lessor to possess or occupy space within the Real Property or any part thereof now or hereafter, together with all security, guarantees and indemnities of the Tenants' obligations thereunder, all of which CPI Leased Property Leases are listed on Schedule 1.1(39).

(40) "*CPI Pension Plans*" means each of the defined benefit and defined contribution pension plans described in Schedule 7.8(1) that are sponsored and administered by any LP Entity and that are required to be, and are, registered and regulated under the ITA and under applicable provincial minimum standards legislation, but excluding any Multi-Employer Plan.

(41) "*Deferred Revenue Obligations*" means obligations in respect of prepaid circulation and advertising revenues of the Business to be satisfied following the Acquisition Time.

(42) "*Designated Acquireco*" has the meaning given to it in Section 12.3.

(43) "*DIP Claims*" has the meaning given to it in the Plan.

(44) "*Employees*" means:

(a) as of the date hereof, any and all (i) active employees (including full-time, part-time or temporary employees) of Canwest LP or CPI and (ii) employees of Canwest LP or CPI who are on approved leaves of absence, including maternity leave, parental leave, short-term disability leave, long-term disability leave, workers' compensation and other statutory leaves); and

(b) as of the Acquisition Time, any and all (i) active employees (including full-time, part-time or temporary employees) of CPI and (ii) employees of CPI who are on approved leaves of absence, including maternity leave, parental leave, short-term disability leave, long-term disability leave, workers' compensation and other statutory leaves,

in each case who are employed in connection with the Business on the basis of a written, oral or implied contract of employment, whether of indefinite duration or for a fixed term.

(45) "*Employment Laws*" means all Applicable Laws relating to employment and labour, including those relating to wages, hours of work, employment or labour standards, collective bargaining, labour or industrial relations, pension benefits, human rights, pay equity, employment equity, workers' compensation or workplace safety and insurance, employer health tax, employment or unemployment insurance, income tax withholdings, Canada or Quebec Pension Plan, occupational health and safety and hazardous substances.

(46) "Encumbrance" means any charge, mortgage, lien, pledge, claim, restriction, security interest or other encumbrance whether created or arising by agreement, statute or otherwise at law, attaching to property, interests or rights and shall be construed in the widest possible terms and principles known under the law applicable to such property, interests or rights and whether or not they constitute specific or floating charges as those terms are understood under the laws of the Province of Ontario.

(47) "*Environmental Claim*" includes a claim, notice, administrative order, citation, complaint, summons, writ, proceeding or demand relating to remediation, investigation, monitoring, emergency response, decontamination,

restoration or other action under any Environmental Law or any notice, claim, demand or other communication alleging or asserting liability, either direct or indirect, and either in whole or by way of contribution or indemnity, for investigatory, monitoring or cleanup costs, Governmental Authority response costs, damages, personal injuries, fines, penalties or for other relief, and arising out of, based on or resulting from (a) the presence, or Release into the environment, of any Contaminant, or (b) any non-compliance or alleged non-compliance with any Environmental Law.

(48) "*Environmental Laws*" means all Applicable Laws relating to the protection and preservation of the environment, health, safety, product safety, product liability, natural resource damage or Contaminants, including the *Environmental Protection Act* (Ontario) and the *Canadian Environmental Protection Act, 1999*.

(49) "*Environmental Permits*" means Licences issued pursuant to an Environmental Law.

(50) "*Excluded Assets*" has the meaning given to it in Section 3.1.

(51) "*Failure to Pay*" means the failure to pay referred to in Recital E.

(52) "*Financial Records*" means all books of account and other financial data and information of CPI (including for greater certainty all books of account and other financial data and information of Canwest Books, Canwest GP and Canwest LP that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers) and all such records, data and information stored electronically, digitally or on computer-related media.

(53) "*Funds*" has the meaning given to it in Section 5.3(1).

(54) "*GAAP*" means, at any time, generally accepted accounting principles in effect in Canada at that time, including the accounting recommendations published in the Handbook of the Canadian Institute of Chartered Accountants.

(55) "*GST*" means goods and services or harmonized sales tax imposed under Part IX of the GST Act.

(56) "*GST Act*" means the *Excise Tax Act* (Canada).

(57) "*Good Standing*" when used in reference to a corporation, denotes that such corporation has not been discontinued or dissolved under the laws of its incorporating jurisdiction, that no steps or proceedings have been taken to authorize or require such discontinuance or dissolution and that such corporation has submitted all notices or returns of corporate information and all other filings required by Applicable Law to be submitted by it to any Governmental Authority.

(58) "*Goodwill*" means all goodwill of CPI including the goodwill related to the Business at the Acquisition Time (including the goodwill of Canwest Books, Canwest GP and Canwest LP that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers) and including the right to represent Acquireco as carrying on the Business in continuation of, and in succession to, Canwest Books, Canwest GP, Canwest LP and CPI.

(59) "*Governmental Authority*" means any domestic or foreign government, including any federal, provincial, state, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government.

(60) "*Guarantee*" of a Person means any absolute or contingent liability of that Person under any guarantee, agreement, endorsement (other than for collection or deposit in the ordinary course of business of that Person), discount with recourse or other obligation to pay, purchase, repurchase or otherwise be or become liable or obligated upon or in respect of any Indebtedness of any other Person and including any absolute or contingent obligation to:

(a) advance or supply funds for the payment or purchase of any Indebtedness of any other Person;

(b) purchase, sell or lease (as lessee or lessor) any property, assets, goods, services, materials or supplies primarily for the purpose of enabling any Person to make payment of Indebtedness or to assure the holder of the Indebtedness against loss; or

(c) indemnify or hold harmless any Person from or against any losses, liabilities or damages, in circumstances intended to enable the Person to incur or pay any Indebtedness or to comply with any agreement relating thereto or otherwise to assure or protect creditors against loss in respect of the Indebtedness.

(61) "*Hedging Agreements*" means the interest rate, currency and commodity hedging agreements entered into between an LP Entity and one or more Senior Lenders, in respect of which such LP Entity's obligations are secured *pari passu* with the obligations under the Senior Credit Agreement.

(62) "*ICA*" means the *Investment Canada Act*.

(63) "*Indebtedness*" of a Person means, without duplication:

(a) all debts and liabilities of that Person for borrowed money;

(b) all debts and liabilities of that Person representing the deferred acquisition cost of property and services; and

(c) all Guarantees given by that Person.

(64) "*Initial Order*" means the initial order issued by the CCAA Court in connection with the CCAA Case.

(65) "*Intellectual Property*" means:

(a) all patents, patent rights, patent applications, registrations, continuations, continuations in part, divisional applications or analogous rights thereto, and inventions owned or used by CPI;

(b) all trade-marks, trade names, trade-mark applications and registrations, trade name registrations, service marks, logos, slogans and brand names owned or used by CPI;

(c) all copyrights and copyright applications and registrations owned or used by CPI;

(d) all industrial designs and applications for registration of industrial designs and industrial design rights, design patents and industrial design registrations owned or used by CPI;

(e) all business names, corporate names, telephone numbers, domain names, domain name registrations, website names and worldwide web addresses and other communications addresses owned or used CPI;

(f) all Computer Systems and applications software, including all documentation relating thereto and the latest revisions of all related object and source codes therefor owned or used CPI;

(g) all rights and interests in and to processes, lab journals, notebooks, data, trade secrets, designs, know-how, product formulae and information, manufacturing, engineering and other technical drawings and manuals, technology, blue prints, research and development reports, technical information, technical assistance, engineering data, design and engineering specifications, and similar materials recording or evidencing expertise or information owned or used by CPI;

(h) all other intellectual property rights owned or used by CPI in carrying on, or arising from the operation of, the Business, and foreign equivalents or counterpart rights, in any jurisdiction throughout the world;

(i) all licences granted by CPI of the intellectual property described in paragraphs (a) to (h) above;

(j) all future income and proceeds from any of the intellectual property listed in paragraphs (a) to (h) above and the licences described in paragraph (i) above;

(k) all rights to damages and profits by reason of the infringement of any of the intellectual property described in items (a) to (h) above and the licences described in item (i) above; and

(l) all goodwill associated with any of the foregoing;

and, for greater certainty "Intellectual Property" includes all such property, rights, applications, registrations, licences, income, proceeds and goodwill of Canwest Books, Canwest GP and Canwest LP that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers.

(66) "*Intercompany Transfers*" means the transfer of certain assets by Canwest Books, Canwest GP and Canwest LP to CPI and the assumption of certain liabilities of Canwest LP by CPI as contemplated under Section 9.6.

(67) "*Interim Period*" means the period from and including the date of this Agreement to and including the Acquisition Date.

(68) "*ITA*" means the *Income Tax Act* (Canada).

(69) "*Inventory*" means all inventories of CPI including all finished goods, work in progress, raw materials, manufacturing supplies, spare parts, packaging materials and all other materials and supplies used or consumed in the production of finished goods.

(70) "Leased Premises" means the real or immovable property subject to the Real Property Leases.

(71) "*Liabilities*" of a Person means all Indebtedness, obligations and other liabilities of that Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due.

(72) "*Licence*" means any licence, permit, authorization, approval or other evidence of authority issued or granted to, conferred upon, or otherwise created for, CPI (including for greater certainty any licence, permit, authorization, approval or other evidence of authority issued or granted to, conferred upon, or otherwise created for Canwest Books, Canwest GP and Canwest LP that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers) by any Governmental Authority.

(73) "*LP Entities*" means collectively Canwest Books, Canwest GP, Canwest LP and CPI.

(74) "*Material Adverse Effect*" means any change, effect or circumstance that is materially adverse to the operations or condition of the Business, National Post or any newspaper operated as part of the Business, financial or otherwise, but excluding any change, effect or circumstance arising out of, resulting from or attributable to (a) an event or series of events or circumstances affecting (i) the Canadian or global economy generally or capital or financial markets generally, including changes in interest or exchange rates, (ii) political conditions generally of Canada or (iii) the newspaper or digital/online industry in general; (b) a decline in the price of the products of the Business or of National Post; (c) an increase in the price of raw materials used in or other costs or expenses incurred in the operation of the Business or the operation by National Post of its business; (d) the negotiation, execution, announcement or consummation of the transactions contemplated by, or the performance of obligations under, this Agreement; (e) the identity of, or the effects of any facts or circumstances relating to, Acquireco or its Affiliates; (f) any changes or prospective changes in Applicable Law or GAAP or the enforcement or interpretation thereof; (g) actions required to be taken or omitted pursuant to this Agreement or taken with Acquireco's consent or not taken, in each case, because Acquireco unreasonably withheld, delayed or conditioned its consent; (h) the effect of any action taken by

Acquireco or its Affiliates with respect to the transactions contemplated by this Agreement; (i) any hostilities, acts of war, sabotage, terrorism or military actions, or any escalation or worsening of any such hostilities, acts of war, sabotage, terrorism or military actions, (j) any change or development in the business, financial condition, results of operations or credit, financial strength or other ratings of the LP Entities or National Post, (k) the credit, financial strength or other ratings of, or the value of any of the investment assets of, the LP Entities or National Post, and (l) the commencement of the CCAA Case.

(75) "*Multi-Employer Plan*" means the defined benefit or defined contribution pension plans or other benefit plans described in Schedule 7.8(1), in each case to which an LP Entity is required to contribute pursuant to a collective agreement to which the LP Entity is a party but does not sponsor or administer such plan.

(76) "*Monitor*" means FTI Consulting Canada Inc., in its capacity as CCAA court-appointed Monitor of the LP Entities pursuant to the Initial Order.

(77) "*National Post*" means National Post Inc., a corporation formed under the laws of Canada.

(78) "*Non-Offer Employee Obligations*" means Liabilities of CPI for termination pay, pay in lieu of notice of termination expressly specified by contract or severance obligations (but for greater certainty excluding damage claims for wrongful dismissal or otherwise) owing to Employees who Acquireco elects pursuant to Section 5.1(2) to not make an offer of employment to and who cease to be employed by CPI by reason of Acquireco making such election.

(79) "*Notice*" means any notice, approval, demand, direction, consent, designation, request, document, instrument, certificate or other communication required or permitted to be given under this Agreement.

(80) "*Order*" means any order, directive, judgment, decree, injunction, decision, ruling, award or writ of any Governmental Authority.

(81) "*Ordinary Course of Business*" means the ordinary and usual course of the routine daily affairs of the Business, consistent with past practice, but having regard to the fact that the LP Entities are subject to the CCAA Case and the Shared Services Agreement.

(82) "*Other Amounts*" means any amounts owing to the Senior Lenders under the Senior Credit Agreement or Hedging Agreements other than on account of Principal, Unpaid Interest (as that term is defined in the Plan) or Administrative Agent Claims (as that term is defined in the Plan).

(83) "*Party*" means a party to this Agreement and any reference to a Party includes its successors and permitted assigns and "*Parties*" means every Party.

(84) "*Pension Assignment and Assumption Agreements*" has the meaning given to it in Section 5.3(1).

(85) "*Permitted Encumbrances*" means the Encumbrances described in Schedule 1.1(85).

(86) "*Person*" is to be broadly interpreted and includes an individual, a partnership, a corporation, a trust, a joint venture, any Governmental Authority, any trade union, any employee association or any incorporated or unincorporated entity or association of any nature and the executors, administrators, or other representatives of an individual in such capacity.

(87) "*Personal Information*" means any factual or subjective information, recorded or not, about an Employee, contractor, agent, consultant, officer, director, executive, client, customer, supplier, or about any other identifiable individual, including any record that can be manipulated, linked or matched by a reasonably foreseeable method to identify an individual, but does not include the name, title or business address or telephone number of an Employee.

(88) "*Personal Property Leases*" means the leases of personal property by CPI including all purchase options, prepaid rents, security deposits, licences and permits relating thereto and all leasehold improvements thereon.

(89) "*Plan*" means the plan of compromise and arrangement attached as a schedule to the Initial Order, as varied, amended, modified or supplemented in accordance with the provisions thereof.

(90) "*Plan Implementation Date*" means the date on which all of the conditions precedent to the implementation of the Acquisition set out in the Plan have been fulfilled or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by a certificate to that effect filed with the CCAA Court by the Monitor.

(91) "*Post-Filing Disposition*" means the sale, transfer, mortgage, encumbering or other disposition of, or the agreement to sell, transfer, mortgage, encumber or otherwise dispose of, any property or asset, real, personal or mixed, outside of the Ordinary Course of Business from and after the date the Initial Order is issued which (a) the Administrative Agent consents to in writing, (b) is completed in accordance with such consent of the Administrative Agent and (c) is approved by the CCAA Court.

(92) "*Post-Filing Trade Payables*" has the meaning given to it in the Plan.

(93) "*Prepaid Expenses*" means all prepayments, prepaid charges, deposits, sums and fees of GPI.

(94) "*Principal*" means, in the case of the Senior Credit Agreement, any principal amounts owing to the Senior Lenders pursuant to the terms thereof, and, in the case of any Hedging Agreement, the net amount that became payable by an LP Entity to the applicable Senior Lender on the date of termination of such Hedging Agreement by reason of the termination of such Hedging Agreement on or about June 1, 2009.

(95) "*QST*" means Québec sales tax imposed under the QST Act.

(96) "*QST Act*" means Title I of *An Act respecting the Québec sales tax*.

(97) "*RBCCM*" has the meaning given to it in Section 2.1(1)(e)(vii).

(98) "*RCA Plan*" means the CanWest MediaWorks Limited Partnership (now Canwest LP) and Related Companies Retirement Compensation Arrangement Plan.

(99) "*Real Property*" means the real or immovable property described in Schedule 7.5(2) and (i) all plant, buildings, structures, erections, improvements, appurtenances of every kind or nature situate therein or on thereof and (ii) all fixtures of every nature and kind incorporated therein, situate upon and used in connection therewith, including heating, ventilating, air-conditioning, plumbing, electrical, sprinkler and drainage systems, in each case other than fixtures and other property owned by any Tenant.

(100) "*Real Property Leases*" means all offers to lease, agreements to lease, leases, renewals of leases, subleases, tenancy agreements, rights of occupation, licenses or other occupancy agreements for real or immovable property, including all purchase options, prepaid rents, security deposits, licences and permits relating thereto and all leasehold improvements thereon, whether oral or written, where CPI is a tenant (including for greater certainty all offers to lease, agreements to lease, leases, renewals of leases, subleases, tenancy agreements, rights of occupation, licenses or other occupancy agreements for real or immovable property, including all purchase options, prepaid rents, security deposits, licences and permits relating thereto and all leasehold improvements thereon, whether oral or written, of Canwest Books, Canwest GP and Canwest LP that CPI acquired or will acquire from Canwest Books, Canwest GP and Canwest LP in connection with the Intercompany Transfers), the particulars of which are set forth on Schedule 1.1(100).

(101) "*Reference Date*" means September 1, 2009.

(102) "*Regulatory Approval*" means any approval, consent, ruling, authorization, notice, permit or acknowledgement that may be required from any Person pursuant to Applicable Law or under the terms of any Licence or the conditions of any Order in connection with the acquisition of the Acquired Assets by Acquireco on the terms contemplated in this Agreement, to permit Acquireco to carry on the Business and the business of National Post after the Acquisition Date or which is otherwise necessary to permit the Parties to perform their obligations under this Agreement, and includes the Competition Act Approval.

(103) "*Release*" means any release, spill, leak, emission, pumping, injection, deposit, discharge, dispersal, leaching, migration, spraying, abandonment, pouring, emptying, throwing, dumping, placing or exhausting of a Contaminant and when used as a verb has a like meaning.

(104) "*Remaining Cash and Equivalents*" has the meaning given to it in Section 2.1(1)(a).

(105) "*Sanction Order*" has the meaning given to "Credit Acquisition Sanction Order" in the Plan.

(106) "*Senior Credit Agreement*" means the Credit Agreement dated as of July 10, 2007 between CanWest MediaWorks Limited Partnership (now Canwest LP), as Borrower, the guarantors party thereto from time to time, as Guarantors, the lenders party thereto from time to time, as Senior Lenders, and the Administrative Agent on behalf of the Senior Lenders, as amended from time to time, which agreement and all rights, title and interests thereunder will have been assigned to Acquireco on or before the Acquisition Date.

(107) "*Senior Lenders*" means the lenders party to the Senior Credit Agreement from time to time.

(108) "*Senior Secured Claims Amount*" means, at any time, the aggregate amount at that time of Claims of the Senior Lenders arising under or in connection with the Senior Credit Agreement or a Hedging Agreement, in each case calculated based on the deemed conversion of Claims denominated in US dollars to Canadian dollars on the date on which the Initial Order is made, and, for greater certainty, does not include any Cash Management Claims (as that term is defined in the Plan).

(109) "*SERA*" means the Southam Executive Retirement Arrangement.

(110) "*Shared Services Agreement*" means the Agreement on Shared Services and Employees dated October 26, 2009 among Canwest Global Communications Corp., Canwest LP, Canwest Media Inc., CPI, Canwest Television Limited Partnership and The National Post Company/La Publication National Post (as subsequently assigned to National Post).

(111) "*Stayed Payables*" means the Accounts Payable which shall be subject to a stay pursuant to the CCAA Case.

(112) "*Tangible Personal Property*" means all of CPI's machinery, equipment, motor vehicles, office equipment, furniture, spare parts, dies, tooling, tools, computer hardware, supplies and accessories and other chattels.

(113) "*Taxes*" includes all present and future taxes, surtaxes, duties, levies, imposts, rates, fees, assessments, withholdings, dues and other charges of any nature imposed by any Governmental Authority, including income, capital (including large corporations), withholding, consumption, sales, use, transfer, goods and services or other value-added, excise, customs, anti-dumping, countervail, net worth, stamp, registration, franchise, payroll, employment, health, education, business, school, property, local improvement, development, education development and occupation taxes, surtaxes, duties, levies, imposts, rates, fees, assessments, withholdings, dues and charges, and other assessments or similar charges in the nature of a tax including Canada/Quebec Pension Plan and other provincial pension plan contributions, employment insurance and unemployment insurance premiums and workers compensation premiums, together with all fines, interest, penalties on or in respect of, or in lieu of or for non-collection of, those taxes, surtaxes, duties, levies, imposts, rates, fees, assessments, withholdings, dues and other charges.

(114) "*Tenant*" means any Person (other than an LP Equity or National Post) entitled to occupy premises located on the Real Property pursuant to a CPI Leased Property Lease.

(115) "*Third Party Approval*" has the meaning given to it in Section 9.3.

(116) "*Transferred Employees*" means Employees who accept offers of employment by Acquireco or who begin active employment with Acquireco as of the Acquisition Date or their next scheduled work day.

(117) "*Unresolved Senior Claims Reserve*" has the meaning given to it in the Plan.

Section 1.2 Actions on Non-Business Days

If any payment is required to be made or other action (including the giving of notice) is required to be taken pursuant to this Agreement on a day which is not a Business Day, then such payment or action shall be considered to have been made or taken in compliance with this Agreement if made or taken on the next succeeding Business Day.

Section 1.3 Currency and Payment Obligations

Except as otherwise expressly provided in this Agreement:

(a) all dollar amounts referred to in this Agreement are stated in Canadian Dollars;

(b) any payment contemplated by this Agreement shall be made by wire transfer of immediately available funds to an account specified by the payee or by certified cheque; and

(c) any payment due on a particular day must be received by and be available to the payee not later than 2:00 p.m. on the due date at the payee's address for notice under Section 14.3 or such other place as the payee may have specified in writing to the payer in respect of a particular payment and any payment made after that time shall be deemed to have been made and received on the next Business Day, other than for greater certainty payments due on the Acquisition Date which shall be paid by wire transfer as instructed by the payee in writing in connection with the closing of the Acquisition.

Section 1.4 Calculation of Time

In this Agreement, a period of days shall be deemed to begin on the first day after the event which began the period and to end at 5:00 p.m. Toronto time on the last day of the period. If any period of time is to expire hereunder on any day that is not a Business Day, the period shall be deemed to expire at 5:00 p.m. Toronto time on the next succeeding Business Day.

Section 1.5 Tender

Any tender of documents or money hereunder may be made upon the Parties or their respective counsel and money shall be tendered by official bank draft drawn upon a Canadian chartered bank or by negotiable cheque payable in Canadian funds and certified by a Canadian bank listed in Schedule 1 to the *Bank Act* (Canada).

Section 1.6 Best of Knowledge

Any statement in this Agreement expressed to be made to "the best of the LP Entities' knowledge" and any other references to the knowledge of the LP Entities shall be understood to be made oh the basis of the actual knowledge of Dennis Skulsky and Doug Lamb, after reasonable diligent inquiry, of the relevant subject matter or on the basis of such knowledge of the relevant subject matter as any of such Persons would have had if they had conducted such reasonable diligent inquiry.

Section 1.7 Additional Rules of Interpretation

(1) *Gender and Number*. In this Agreement, unless the context requires otherwise, words in one gender include all genders and words in the singular include the plural and vice versa.

(2) *Headings and Table of Contents*. The inclusion in this Agreement of headings of Articles and Sections and the provision of a table of contents are for convenience of reference only and are not intended to be full or precise descriptions of the text to which they refer.

(3) *Section References*. Unless the context requires otherwise, references in this Agreement to Articles, Sections or Schedules are to articles, sections or schedules of this Agreement.

(4) *Words of Inclusion*. Wherever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation" and the words following "include", "includes" or "including" shall not be considered to set forth an exhaustive list.

(5) *References to this Agreement*. The words "hereof, "herein", "hereto", "hereunder", "hereby" and similar expressions shall be construed as referring to this Agreement in its entirety and not to any particular Section or portion of it.

(6) *Statute References*. Unless otherwise indicated, all references in this Agreement to any statute include the regulations thereunder, in each case as amended, re-enacted, consolidated or replaced from time to time and in the case of any such amendment, re-enactment, consolidation or replacement, reference herein to a particular provision shall be read as referring to such amended, re-enacted, consolidated or replaced provision and also include, unless the context otherwise requires, all applicable guidelines, bulletins or policies made in connection therewith and which are legally binding.

(7) *Document References*. All references herein to any agreement (including this Agreement), document or instrument mean such agreement, document or instrument as amended, supplemented, modified, varied, restated or replaced from time to time in accordance with the terms thereof and, unless otherwise specified therein, include all schedules and exhibits attached thereto.

(8) *Writing*. References to "in writing", "written" and similar expressions include material that is printed, handwritten, typewritten, faxed, emailed, or otherwise capable of being visually reproduced a the point of reception.

Section 1.8 Schedules

The following are the schedules annexed to this Agreement and incorporated by reference and deemed to be part hereof:

Schedule 1.1(20) — Business

Schedule 1.1(39) — CPI Leased Property Leases

Schedule 1.1(85) — Permitted Encumbrances

Schedule 1.1(100) — Real Property Leases

Schedule 3.1(3) — Excluded Assets

Schedule 7.2(1) — Other Acquisition Agreements

Schedule 7.2(2) — Consents and Regulatory Approvals

Schedule 7.3(8) — Bank Accounts and Authorizations

Schedule 7.4(2) — Title to Shares

Schedule 7.4(3) — No Other Acquisition Agreements

Schedule 7.5(2) — Real Property

Schedule 7.5(5)(a) — Environmental Matters

Schedule 7.5(6) — Personal Property

Schedule 7.5(7) — Personal Property Leases

Schedule 7.5(11) — Intellectual Property

Schedule 7.6(5) — Non-Arm's Length Interests

Schedule 7.6(6) — Contracts

Schedule 7.6(7) — Licences

Schedule 7.6(8) — Location of Assets

Schedule 7.7(1) — Employees

Schedule 7.7(2) — Remuneration

Schedule 7.7(3) — Labour Matters and Employee Contracts

Schedule 7.7(4) — Employment Laws

Schedule 7.8(1) — CPI Benefit Plans

Schedule 7.9(3) — Litigation

Schedule 7.5(9) — Plants, Facilities and Equipment

ARTICLE 2 - ACQUISITIONS AND ASSUMPTIONS

Section 2.1 Acquisitions and Assumptions

The following shall occur at the stated times on the Acquisition Date pursuant to the Sanction Order, on the terms and subject to the conditions of this Agreement, the Plan and the Sanction Order:

(1) The acquisitions and assumptions provided for in (a) to (e) below shall occur immediately prior to the Acquisition Time free and clear of any withholdings for Taxes or otherwise:

(a) Cash and Equivalents less the Cash Reserve and less the Unresolved Senior Claims Reserve (the "*Remaining Cash and Equivalents*") shall be paid to Acquireco or as Acquireco may direct (subject to Section 2.1(3)), free and clear of all Encumbrances (other than Permitted Encumbrances):

(i) in payment, under the CPI Guarantee, of the Other Amounts, if any; and

(ii) as consideration for the assumption of the Deferred Revenue Obligations,

provided that if the amount of the Remaining Cash and Equivalents is less than or exceeds the sum of the amount of the Other Amounts and the amount of the Deferred Revenue Obligations,

(iii) in the case of a shortfall, the amount of the Remaining Cash and Equivalents shall be applied first in payment, under the CPI Guarantee, of the amount of the Other Amounts, followed by payment as consideration for the assumption of the Deferred Revenue Obligations; and

(iv) in the case of an excess, such excess shall, to the extent of such excess, be applied in payment, in each case under the CPI Guarantee of outstanding interest, if any, under the Hedging Agreements and Senior Credit Agreement, followed by outstanding Principal under the Hedging Agreements, and followed by outstanding Principal under the Senior Credit Agreement.

(b) All right, title and interest in and to the Accounts Receivable and/or other property of CPI, if any, (except for Excluded Assets) designated by Acquireco prior to the Acquisition Date shall be acquired by Acquireco or as Acquireco may direct (subject to Section 2.1(3)) free and clear of all Encumbrances (other than Permitted Encumbrances):

(i) in payment, under the CPI. Guarantee, of the portion, if any, of the amount of the Other Amounts and as consideration for the assumption of the Deferred Revenue Obligations not paid under (a) above; and

(ii) in the amount of, and as consideration for Acquireco assuming, the Assumed Liabilities identified in (d) below,

to the extent of the fair market value of such Accounts Receivable and other property provided that, if such fair market value is less than or exceeds the sum of the amounts under (i) and (ii) above,

(iii) in the case of a shortfall, such Accounts Receivable and other property shall, to the extent of their aggregate fair market value, be applied to the amount under (i) followed by the amount under (ii); and

(iv) in the case of an excess, such excess shall, to the extent of such excess, be applied in payment, in each case under the CPI Guarantee of outstanding interest, if any, under the Hedging Agreements and the Senior Credit Agreement, followed by outstanding Principal under the Hedging Agreements, followed by outstanding Principal under the Senior Credit Agreement, other than outstanding interest or Principal under the Hedging Agreements or the Senior Credit Agreement paid under (a) above, and for greater certainty, any amounts outstanding after such payments, if any, and payments under Section 2.2, if any, shall form part of the Senior Secured Claims Amount.

(c) In consideration for payments in respect of the Deferred Revenue Obligations under (a) and, if applicable, (b) above, Acquireco shall assume and agree to pay in full, perform and discharge when due such amount of the Deferred Revenue Obligations.

(d) In consideration for the acquisition of Accounts Receivable and/or other property of CPI, if any, under (b)(ii) above, Acquireco shall assume and agree to pay in full, perform and discharge when due an amount of Liabilities for the Post-Filing Trade Payables, the PID Cash Deficiency (as defined in the Plan) and, at Acquireco's option, the DIP Claims equal to the aggregate fair market value of such Accounts Receivable and/or other property of CPI, if any, as designated by Acquireco.

(e) Acquireco shall assume and agree to pay in full, perform and discharge when due the following additional Liabilities of CPI:

(i) *Residue*. Deferred Revenue Obligations, if any, not assumed under Section 2.1(1)(c) and Liabilities, if any, that are described, but for lack of consideration are not assumed, under Section 2.1(1)(d);

(ii) *Contracts, etc.* To the extent not assumed under Section 2.1(1)(d), all Liabilities of CPI accruing on or after the Acquisition Time under the Personal Property Leases, Real Property Leases, Contracts and Licences, other than Deferred Revenue Obligations, and, at Acquireco's option, the DIP Claims;

(iii) *Severance Liabilities*. To the extent not assumed under Section 2.1(1)(d), all Liabilities of CPI for termination pay, pay in lieu of notice and severance obligations owed to Employees or former employees of an LP Entity which are stayed during or by reason of the CCAA Case, including the Non-Offer Employee Obligations, subject to Section 3.2, Section 5.1(6) and Section 5.5;

(iv) *Unfunded Retirement Benefits*. To the extent not assumed under Section 2.1(1)(d), all Liabilities of CPI for post-retirement and post-employment benefits for Transferred Employees, other Employees who are entitled to such benefits and former employees of the LP Entities who are entitled to receive post-retirement or post-employment benefits from CPI as of the Acquisition Date, subject to Section 3.2 and Section 5.5;

(v) *CPI Pension Plans*. Except as specifically excluded in this Agreement, in respect of the CPI Pension Plans, all of the LP Entities' rights, duties, obligations and Liabilities under and in relation to the CPI Pension Plans and all related agreements as of the Acquisition Date, subject to Section 3.2 and Section 5.5;

(vi) *Other Employee Liabilities*. To the extent not assumed under Section 2.1(1)(d) or under Section 2.1(1)(e)(iii), (iv) or (v) above, all Liabilities of CPI in respect of the Transferred Employees and any Multi-Employer Plans, subject to Section 3.2 and Section 5.5;

(vii) *RBCCM Fees*. At Acquireco's option, all Liabilities for fees payable to RBC Dominion Securities Inc. ("*RBCCM*") pursuant to the engagement letter dated as of October 1, 2009 among Canwest LP, CPI and RBCCM to the extent not previously paid, provided that if any such fees are due and payable on or before the Acquisition Date Acquireco may assume the obligation to pay such amounts only with the prior consent of RBCCM; and

(viii) *Other Designated Liabilities*. Such other Liabilities of CPI, such as Liabilities for Claims ranking senior to Claims of the Senior Lenders, which Acquireco in writing identifies to the LP Entities not less than two Business Days prior to the Acquisition Date as Liabilities which Acquireco wishes to assume pursuant to this Agreement.

(2) All right, title and interest in and to the Acquired Assets (other than the Acquired Assets referred to in Section 2.1(1)) shall be acquired by Acquireco free and clear of all Encumbrances (other than Permitted Encumbrances) pursuant to the Sanction Order at the Acquisition Time as a consequence of the Failure to Pay, on the terms and subject to the conditions of this Agreement, the Plan and the Sanction Order.

(3) If Acquireco gives a direction under Section 2.1(1)(1)(a) or Section 2.1(1)(1)(b) for a payment to be made to any Person other than Acquireco (the "*Directed Recipient*") and such payment, if made, would be subject under Applicable Law to any withholdings for Taxes or otherwise which would not have to be withheld if the payment was made to Acquireco, (a) the payment may be made to the Directed Recipient net of such withholdings if prior to making the payment Acquireco consents to such withholdings or (b), failing Acquireco's consent, the payment shall be made to Acquireco notwithstanding any direction from Acquireco to the contrary.

Section 2.2 Residual Balances

The residual balance, if any, in the Cash Reserve owned by Acquireco pursuant to Section 12.2 of the Plan and the residual balance, if any, in the Unresolved Senior Claims Reserve owned by Acquireco pursuant to Section 6.5 of the Plan, shall each be deemed to have been received by Acquireco immediately prior to the Acquisition Time and applied

in payment, in each case under the CPI Guarantee, of outstanding Principal under the Hedging Agreements, followed by outstanding Principal under the Senior Credit Agreement.

Section 2.3 Designations

(1) Acquireco shall designate and provide Notice to CPI thereof within 30 Business Days following the Acquisition Date, (i) the amount of the Other Amounts, (ii) the amount of the Deferred Revenue Obligations, (iii) the amount of the Liabilities identified in Section 2.1(1)(d),(iv) the amount of Remaining Cash and Equivalents acquired and the amount of Other Amounts, the amount of Deferred Revenue Obligations and the amount of interest and Principal paid under Section 2.1(1)(a), and (v) the fair market value of the Accounts Receivable and/or other property of CPI, if any, acquired and the amount of Deferred Revenue Obligations paid, the amount of Liabilities assumed and the amount of interest and Principal paid under Section 2.1(1)(b).

(2) CPI and Acquireco shall adopt such designations for purposes of (i) Section 2.1 and (ii) the ITA and applicable provincial Tax legislation including as provided in Section 2.4.

Section 2.4 Tax Elections

Acquireco and CPI shall jointly execute and file an election pursuant to subsection 20(24) of the ITA and the corresponding provisions of any applicable provincial Tax legislation, in prescribed manner and within the prescribed time limits, in respect of the consideration paid by CPI for Acquireco to assume the Deferred Revenue Obligations.

ARTICLE 3 - EXCLUDED ASSETS

Section 3.1 Excluded Assets

Notwithstanding anything in this Agreement to the contrary the following assets, properties, rights and interests of CPI (the "*Excluded Assets*") shall be excluded from and shall not constitute Acquired Assets:

(1) *Avoidance claims*. All rights and claims against any Person other than the Senior Lenders or the Administrative Agent for any liability or obligation of any kind based on or arising out of the occurrence of any fraudulent conveyance, settlement, reviewable transaction, transfer at undervalue, fraudulent preference, preference or similar claim which rights or claims both (a) are not subject to Encumbrances of the Senior Lenders or Acquireco and (b) would not have been subject to Encumbrances of the Senior Lenders or Acquireco even if the Senior Lenders or Acquireco did not release any of their Encumbrances on or before the Acquisition Date.

(2) *Corporate Records*. The corporate charters, minute, share and partnership record books and corporate seals of CPI.

(3) *Scheduled Excluded* Assets. The property and assets described in Schedule 3.1(3).

(4) *Director and Officer Insurance Policies*. All rights of the LP Entities under any Director and Officer insurance policies.

(5) *Notified Excluded Assets*. Any assets, properties, rights of interests which on or before the 5th Business Day prior to the Acquisition Date Acquireco in writing advises the LP Entities that it wishes to be treated as an Excluded Asset under this Agreement.

(6) *Rights Under this Agreement*. The LP Entities' rights under this Agreement.

Section 3.2 Retained Liabilities

Except as specifically provided in this Agreement, Acquireco shall not assume and shall not be obliged to pay, perform or discharge any Liabilities of any LP Entity which arise or relate to the Business or otherwise. Without limiting the generality of the foregoing, Acquireco shall have no obligations in respect of any of the following Liabilities unless pursuant to Section 2.1(1)(e)(viii) Acquireco has specified in writing to the LP Entities that it wishes to assume any such Liability:

(1) *Transaction Expenses*. All Liabilities of the LP Entities for legal, accounting, audit and investment banking fees, brokerage commissions and any other expenses incurred by the LP Entities with respect to the transaction contemplated by this Agreement.

(2) *Banks, etc.* All Liabilities of the LP Entities to banks, financial institutions or other Persons with respect to borrowed money or otherwise.

(3) *Contracts, etc.* All Liabilities of the LP Entities accruing prior to the Acquisition Time under the Personal Property Leases, Real Property Leases, Contracts and Licences including all such Liabilities in respect of any breach of representation, warranty or covenant contained in, or for any claim for indemnification pursuant to, any Personal Property Lease, Real Property Lease, Contract or Licence to the extent that such breach or claim arose out of an LP Entity's performance or non-performance thereunder, prior to the Acquisition Time, regardless of when such breach or claim is asserted.

(4) *Product Liabilities*. All Liabilities in respect of injury to or death of Persons or damage to or destruction of property not constituting part of the Acquired Assets, including product liability claims and workers' compensation claims arising out of the conduct of the Business prior to the Acquisition Time, regardless of when any such Liability is asserted, including any Liability for consequential or punitive damages in connection with the foregoing.

(5) *Taxes*. All Liabilities for Taxes payable or remittable by an LP Entity.

(6) *Certain Trade Liabilities*. All Liabilities for trade and other accounts payable and in respect of accrued expenses other than such accounts payable and accrued expenses expressly assumed by Acquireco under Section 2.1(1)(d) and Section 2.1(1)(e).

(7) *Senior Management Compensation Arrangements*. All Liabilities in respect of (a) funded or unfunded retirement arrangements supplemental to a CPI Pension Plan whether registered or unregistered, including Liabilities relating to (i) the SERA (ii) the RCA Plan and (iii) other post-retirement arrangements, (b) stock options and (c) payments or other compensation which become payable by reason of a change of control of an LP Entity or the Business, in each case for senior executives of the LP Entities.

(8) *Certain Employee-Related Liabilities*. Liabilities that are retained by the LP Entities under Section 5.1(6) or that Acquireco elects not to assume pursuant to Section 5.5.

ARTICLE 4 — STATEMENT OF FAIR MARKET VALUE

Section 4.1 Designation of Fair Market Value

Acquireco shall be entitled to designate the fair market value of each of the Acquired Assets acquired under Section 2.1(2) at the Acquisition Time and shall provide Notice to the LP Entities thereof within 30 Business Days following the Acquisition Date. The LP Entities shall consult and cooperate with Acquireco in respect of Acquireco resolving such designations including promptly providing Acquireco all information, documents and other material pertaining thereto and in its or their custody and control. The LP Entities and Acquireco shall adopt such designations for purposes of the ITA and applicable provincial tax legislation.

ARTICLE 5 — EMPLOYEE MATTERS

Section 5.1 Offers

(1) Acquireco shall offer employment, effective as of the Acquisition Date and conditioned on the completion of the Acquisition, to all or substantially all individuals who are Employees immediately prior to the Acquisition Date on the following terms and conditions:

(a) to Employees who are part of a bargaining unit in respect of which a collective agreement is in force, or has expired and the terms and conditions of which remain in effect by operation of law (other than Employees identified in a Notice from Acquireco under Section 5.1(2)), the terms and conditions provided for in such collective agreement, or expired collective agreement if such terms and conditions remain in effect by operation of law, subject to any amendments or alterations to the terms thereof to which the bargaining agent under such collective agreement or expired collective agreement consents; and

(b) to all other Employees (other than Employees identified in a notice from Acquireco under Section 5.1(2)), on substantially similar terms and conditions as their then existing employment immediately prior to the Acquisition Date, subject to Section 5.5 and provided that:

(i) (A) senior executives of the LP Entities who are entitled to receive supplemental retirement compensation (including entitlements under the SERA, the RCA Plan or stock options, or any equivalent benefit or replacement thereof, shall not be offered any such supplemental retirement compensation or stocks options, (B) the offer of employment to such senior executives will confirm that Acquireco has no liability in respect of the SERA, the RCA Plan and stock options and (C) such offer will include a condition that the senior executive provide a confirmation and undertaking to Acquireco that (x) confirms that Acquireco has no liability in respect of the SERA, the RCA Plan and stock options and (y) undertakes not to assert or pursue a claim against Acquireco in respect of the SERA, the RCA Plan and stock options; and

(ii) Acquireco shall have no obligation to offer any change in control payment, supplemental retirement compensation arrangement or stock options, or any equivalent benefit or replacement thereof, to any Employee (including for greater certainty severance and other post-retirement arrangements for senior executives of the LP Entities which Acquireco in writing identifies to the LP Entities as Liabilities or obligations which Acquireco does not wish to assume or offer to such employees pursuant to this Agreement).

(2) If Acquireco does not intend to offer employment to all individuals who are Employees immediately prior to the Acquisition Date, on or before the fifth Business Day prior to the Acquisition Date (or such other date as Acquireco and CPI may agree) Acquireco shall in writing identify to CPI the names of the individuals to whom it does not intend to offer employment. Acquireco acknowledges that its right to not offer employment to all Employees is subject to the rights and benefits of any such Employee under any collective bargaining agreement which is in force, or has expired and the terms and conditions of which remain in effect by operation of law, to which CPI is a party.

(3) CPI will not take any act that is intended to impede, hinder or interfere with Acquireco's efforts to hire any Employee.

(4) Acquireco acknowledges and agrees that (i) the LP Entities make no representation or warranty that any Employee will accept employment with Acquireco and (ii), subject to Section 10.1(12), the acceptance by Employees of offers of employment with Acquireco shall not constitute a condition to Acquireco's obligation to complete the Acquisition.

(5) The LP Entities and Acquireco shall co-operate with each other in all respects relating to any actions to be taken pursuant to this Article 5 and, subject to Applicable Laws, CPI shall provide to Acquireco at Acquireco's request, any information or copies of any personnel records relating to the Transferred Employees.

(6) CPI shall be responsible for all termination, severance and other costs in respect of any Employee who is offered employment by Acquireco but does not accept or commence employment with Acquireco.

(7) No Employee or Person other than the LP Entities and Acquireco shall be entitled to any rights or privileges under this Section 5.1 or under any other provisions of this Agreement. Without limiting the foregoing, no provision of this Agreement shall: (i) create any third party beneficiary or other rights in any bargaining agent representing Employees or in any other Employee or former employee of an LP Entity (or on any beneficiary or dependant of any Employee or former employee of an LP Entity); (ii) constitute or create an employment agreement or collective agreement; or (iii) constitute or be deemed to constitute an amendment to any of the Acquireco Benefit Plans.

(8) Contracts with all independent contractors, including freelance writers and photographers, which are assignable shall be assigned by CPI to Acquireco effective on the Acquisition Date. Where consent to assignment of any independent contractor agreement is required, CPI shall use its commercial reasonable efforts to obtain such consent as soon as reasonably possible and prior to the Acquisition Date and Acquireco shall accept such assignments or offer contracts to all such independent contractors on substantially similar terms to the terms on which they are retained immediately prior to the Acquisition Time.

(9) In respect of independent contractor agreements where consent to assignment is refused or withheld, CPI, after advising Acquireco, shall be responsible for any and all Claims arising from the termination of any independent contractor agreements, whether asserted prior to, on or after the Acquisition Date. CPI shall also be solely responsible for any and all Claims by or in respect of any: (i) independent contractors or former independent contractors; or (ii) Governmental Authority in respect of any such independent contractors or former independent contractors, to the extent that such Claims are based on facts, circumstances or events that arose or existed prior to the Acquisition Date, whether such Claims are asserted prior to, on or after the Acquisition Date.

Section 5.2 CPI Benefit Plans

(1) Subject to Section 5.5:

(a) effective as of the Acquisition Date, CPI shall assign and transfer to Acquireco and Acquireco shall assume the CPI Benefit Plans and CPI's rights, duties, obligations, assets and Liabilities with respect to the CPI Benefit Plans and their related group policies, insurance contracts or other funding media, and all agreements related thereto. Effective as of the Acquisition Date, Acquireco shall accept the assignment and transfer and shall assume all obligations, Liabilities, duties, rights and responsibilities required of it as policy holder or plan sponsor of the CPI Benefit Plans and related agreements (the "*Acquireco Assumed Benefit Plans*") pursuant to the terms thereof and Applicable Law ("*Benefits Assignment and Assumption Agreement*");

(b) CPI agrees to do all things necessary to effect the assignment and transfer of the CPI Benefit Plans to Acquireco. Without limiting the generality of the foregoing, CPI agrees to advise and direct applicable insurers and service providers as soon as possible after the Acquisition Date, of the assumption of sponsorship of the CPI Benefit Plans and relevant agreements as provided hereunder. Acquireco shall do all things required of it under Applicable Law to assume sponsorship of the CPI Benefit Plans in accordance with the terms of policies, contracts or service agreements applicable to the CPI Benefit Plans as provided hereunder; and

(c) after the sponsorship, assets, Liabilities and administration of the CPI Benefit Plans, policies, contracts and agreements have been transferred to Acquireco, the LP Entities shall have no further obligation or Liability with respect to the CPI Benefit Plans. CPI shall be responsible for funding the CPI Benefit Plans and administration and payment of benefit claims applicable to the CPI Benefit Plans up to the Acquisition Date. Acquireco shall be responsible for satisfying any and all governmental reporting and disclosure requirements applicable to the Acquireco Assumed Benefit Plans and for claims administration, communication and completion of all other forms and reports required on and after the Acquisition Date. CPI shall cooperate with Acquireco with respect to such recording and reporting requirements in the plan year in which the Acquisition Date occurs. Prior to and following

the Acquisition Date, CPI shall use all reasonable efforts to provide Acquireco with such books, records, and other relevant data relating to the CPI Benefit Plans within its control or access that Acquireco shall reasonably request.

Section 5.3 CPI Pension Plans

(1) Subject to Section 5.5:

(a) effective as of the Acquisition Date, CPI shall assign and transfer to Acquireco and Acquireco shall assume the CPI Pension Plans and the rights, duties, obligations and Liabilities of the LP Entities of a successor employer and administrator with respect to the CPI Pension Plans and their related trust or other funding medium (the "*Funds*"), and all agreements related thereto. Effective as of the Acquisition Date, Acquireco shall accept the assignment and transfer and shall assume all obligations, Liabilities, duties, rights and responsibilities required of it as the successor employer and administrator of the CPI Pension Plans and Fund (the "*Acquireco Assumed Pension Plans*") pursuant to the terms thereof and Applicable Law ("*Pension Assignment and Assumption Agreements*");

(b) CPI agrees to do all things necessary to effect the assignment and transfer of its sponsorship of the CPI Pension Plans to Acquireco. Without limiting the generality of the foregoing, CPI agrees to cause to be filed with applicable federal and provincial regulatory authorities as soon as possible after the Acquisition Date, such documents as may be required by Applicable Law or under the terms of the CPI Pension Plans or Funds with respect to the assumption of sponsorship of the CPI Pension Plans and Funds as provided hereunder. Acquireco shall do all things required of it under Applicable Law to establish that it is the successor sponsor and administrator to CPI of the CPI Plans in accordance with the terms of the CPI Pension Plans as provided hereunder. Without limiting the generality of the foregoing, Acquireco shall file with the applicable federal and provincial authorities, as soon as possible following the Acquisition Date, such documentation as may be required to establish Acquireco in such capacity;

(c) with respect to the administration of the Acquireco Assumed Pension Plans from and after the Acquisition Date, Acquireco shall be entitled to direct, or cause to be directed, the funding agent of the CPI Pension Plans in accordance with the instructions given to CPI by Acquireco in connection herewith;

(d) after the sponsorship and administration of the CPI Pension Plans and Funds has been transferred to Acquireco, the LP Entities shall have no further obligation or Liability with respect to the CPI Pension Plans and Funds. CPI shall be responsible for satisfying any and all governmental reporting and disclosure requirements applicable to the CPI Pension Plans and Funds and for all benefit calculations, communication and completion of all other forms and reports in respects of the CPI Pension Plans up to the Acquisition Date. Acquireco shall be responsible for satisfying any and all governmental reporting and disclosure requirements applicable to the Acquireco Assumed Pension Plans and Funds and for all benefit calculations, communication and completion of all other forms and reports on and after the Acquisition Date. CPI shall cooperate with Acquireco with respect to reporting such requirements in the plan year in which the Acquisition Date occurs. Prior to and following the Acquisition Date, CPI shall use all reasonable efforts to provide Acquireco such books, records, and other relevant data relating to the CPI Pension Plans within its control or access, that Acquireco shall reasonably request; and

(e) if any Governmental Authority refuses to approve or permit the transactions contemplated herein:

(i) Acquireco shall, at its own expense, appeal such determination until all rights of appeal are exhausted or the parties agree in writing to abandon such appeals. CPI shall, at its own expense, provide all such information and documentation as Acquireco may reasonably require to prosecute any such appeal, and shall co-operate with Acquireco;

(ii) if required Governmental Authority approval in respect of the CPI Pension Plans cannot be obtained and Acquireco has exhausted or abandoned all appeals without obtaining the required approval, the CPI Pension Plans shall not be assigned to or assumed by Acquireco and Acquireco shall establish or amend, effective as of Acquisition Date, a pension plan or plans (the "*Acquireco Established Pension Plans*") to provide benefits

in compliance with all Applicable Laws applicable to the rights of the Transferred Employees and in respect of the employment of the Transferred Employees on and after the Acquisition Date on substantially similar terms and conditions as those provided under the CPI Pension Plans; and

(iii) for greater certainty, in the unlikely event that the Pension Assignment and Assumption Agreements do not receive regulatory approval, the parties agree and intend to use their best efforts to ensure that the rights of the Transferred Employees are protected in the transition from the CPI Pension Plans to the Acquireco Established Pension Plans.

Section 5.4 Unionized Employees

(1) The provisions of this Article 5 insofar as they relate to unionized Employees shall be subject and subordinate to the provisions of the relevant collective agreements (including expired collective agreements that continue by operation of law) and Acquireco shall be bound as a successor employer to such collective agreements to the extent required by Applicable Law.

(2) Effective as of the Acquisition Date, Acquireco shall assume all of CPI's obligations and Liabilities in the Multi-Employer Plans in which CPI participates, pursuant to the terms of the collective agreements applicable to its unionized Employees or as otherwise required under Applicable Law.

Section 5.5 Acquireco Election

(1) Notwithstanding anything in this Agreement to the contrary, after consultation with operational management of CPI, and provided Acquireco acts in a commercially reasonable manner, Acquireco may elect not to assume certain of (a) the CPI Pension Plans (including the LP Entities' rights, duties, obligations and Liabilities with respect to the CPI Pensions Plans or Funds and agreements related thereto), (b) the CPI Benefit Plans (including the LP Entities' rights, duties, obligations, assets and Liabilities with respect to the CPI Benefit Plans and any policies, contracts or agreements related thereto); (c) Liabilities of the LP Entities for post-retirement and post-employment benefit plans for both active Employees and Employees who are on an approved leave of absence; (d) Liabilities of the LP Entities for damages for termination pay, pay in lieu of notice of termination, severance payments, damages for wrongful dismissal and any related costs in respect of the termination of the employment of any employee or former employee of an LP Entity which are stayed during or by reason of the CCAA Case; and (e) any other Liabilities of an LP Entity to Employees or former employees, to the extent such election is permitted under Applicable Law and subject to any collective bargaining with unionized Employees that may occur on or before the Plan Implementation Date. If Acquireco exercises such election, it shall give written notice of such election to CPI not less than two Business Days prior to the Acquisition Date, which notice shall include details of the specific Liabilities which Acquireco has elected not to assume.

(2) For greater certainty, if Acquireco makes such election, any CPI Pension Plan (or part thereto) or CPI Benefit Plans (or part thereof) or any Liability which Acquireco elects not to assume shall not be an Assumed Liability under this Agreement.

(3) If Acquireco elects not to assume all or part of a CPI Pension Plan pursuant to Section 5.5(1), Acquireco may, but shall not have the obligation to, for each Transferred Employee who participated in the CPI Pension Plan (or the part thereto) which Acquireco elected not to assume, provide or establish a pension plan that provides pension benefits relating to the Transferred Employee's period of employment with Acquireco from the Acquisition Date on substantially similar terms and conditions as the CPI Pension Plan (or relevant part thereof) in which such Transferred Employee was a member immediately prior to the Acquisition Date ("*Acquireco Elected Pension Plans*"). Effective as of the Acquisition Date, such Transferred Employees shall cease to participate in the applicable CPI Pension Plan (or relevant part thereof) on the day immediately prior to the Acquisition Date and shall begin to participate in the applicable Acquireco Elected Pension Plan on the Acquisition Date. Such Transferred Employees will be credited under the applicable Acquireco Elected Pension Plan with periods of employment with CPI up to the Acquisition Date (including periods of employment with any other

employer, to the extent such service is recognized under the applicable CPI Pension Plan (or relevant part thereof)), immediately prior to the Acquisition Date, for purposes of determining, as applicable, eligibility for participation in, eligibility for early retirement and early retirement subsidy and for vesting under applicable Acquireco Elected Pension Plan. Such Transferred Employees will be credited under the applicable CPI Pension Plan (or relevant part thereof) with periods of employment with Acquireco from and after the Acquisition Date, for purposes of determining, as applicable, eligibility for participation in, eligibility for early retirement and early retirement subsidy and for vesting under, the applicable CPI Pension Plan. Acquireco shall be responsible for all pension benefits of such Transferred Employees accrued on and after the Acquisition Date pursuant to the terms of the applicable Acquireco Elected Pension Plan. If Acquireco elects not to assume all or part of a CPI Pension Plan pursuant to Section 5.5(2), CPI shall be responsible for all pension benefits of such Transferred Employees accrued prior to the Acquisition Date pursuant to the terms of the applicable CPI Pension Plan (or relevant part thereof).

(4) If Acquireco elects not to assume all or part of the CPI Benefit Plans pursuant to Section 5.5(1), Acquireco may, but shall not have the obligation, for each Transferred Employee who participated in the CPI Benefit Plans (or the part thereto) which Acquireco elected not to assume, to provide or establish a benefit plan that provides benefits relating to the Transferred Employee's period of employment with Acquireco from the Acquisition Date on substantially similar terms and conditions as the CPI Benefit Plans (or relevant part thereof) in which such Transferred Employee participated immediately prior to the Acquisition Date ("*Acquireco Elected Benefit Plans*"). Effective as of the Acquisition Date, such Transferred Employees shall cease to participate in the applicable CPI Benefit Plans (or relevant part thereof) on the day immediately prior to the Acquisition Date and shall, subject to Section 5.5(4)(a), commence, without interruption, to participate in and accrue benefits under the Acquireco Benefit Plans in accordance with and subject to, the membership, eligibility and coverage requirements of the Acquireco Benefit Plans:

(a) Where length of service is used to determine eligibility to participate in and vest in the Acquireco Benefit Plans, Transferred Employees who either participate in CPI Benefit Plans, or who do not participate in a corresponding CPI Benefit Plan solely because the Transferred Employee has not met the eligibility requirements under CPI Benefit Plan as at Acquisition Date, on the subsequent date that the Transferred Employee does become a participant in the relevant Acquireco Benefit Plan, shall receive service credit under the applicable Acquireco Benefit Plans to the same extent that such service credit was granted under the CPI Benefit Plans.

(b) From and after the Acquisition Date, Acquireco shall (i) cause to be waived all limitations as to pre-existing conditions, exclusions and waiting periods with respect to participation and coverage requirements under any Acquireco Benefit Plan in which such employees become eligible to participate after the Acquisition Date, to the extent such limitations, exclusions and waiting periods would have been waived or satisfied under the applicable CPI Benefit Plans and (ii) provide credit in the applicable Acquireco Benefit Plans in the plan year in which the Acquisition Date occurs, for any payments for deductibles or co-payments paid under the CPI Benefit Plans during the plan year in which the Acquisition Date occurs, in satisfaction of deductibles or co-payment limits under any Acquireco Benefit Plan in which such Transferred Employees become eligible to participate after the Acquisition Date, provided that CPI supplies to Acquireco information concerning the amount of such payments that the Transferred Employees have made in such plan year.

ARTICLE 6 — TAX MATTERS

Section 6.1 Goods and Services Tax and Québec Sales Tax

(1) CPI hereby represents and warrants

(a) that it is duly registered for the purposes of Part IX of the GST Act; and

(b) that it is duly registered for the purposes of the QST Act.

(2) Acquireco hereby represents and warrants

(a) that it is duly registered for the purposes of Part IX of the GST Act; and

(b) that it is duly registered for the purposes of the QST Act.

(3) Acquireco hereby represents and warrants that it is acquiring under this Agreement all or substantially all of the property that can reasonably be regarded as being necessary for it to carry on the Business as a business.

(4) Acquireco and CPI shall jointly make the elections provided for under subsection 167(1.1) of the GST Act and under section 75 of the QST Act so that no GST or QST will be payable in respect of the transactions contemplated by this Agreement. Acquireco and CPI shall jointly complete the election forms (more particularly described as form GST-44 and QST form FP-2044-V) in respect of such elections and Acquireco shall file the said election forms no later than the due date for Acquireco's GST and QST returns for the first reporting period in which GST or QST, as applicable, would, in the absence of such elections, become payable in connection with the transactions contemplated by this Agreement.

Section 6.2 Provincial Retail Sales Taxes

(1) On or before the Acquisition Date, Acquireco will provide CPI with Acquireco's retail sales tax registration numbers and prescribed exemption certificates to substantiate exemptions from the Taxes for qualifying production equipment and machinery, and with respect to inventories of goods held for sale or resale or for incorporation, processing and manufacturing into goods to be held for sale for the purposes of substantiating exemptions from the Tax exigible under the *Retail Sales Tax Act* (Ontario) and provincial Tax legislation in British Columbia, Saskatchewan, Manitoba and Prince Edward Island. At the Acquisition Time, Acquireco shall pay to CPI any such Taxes exigible under provincial sales tax legislation in the foregoing provinces in respect of any Acquired Assets and CPI shall remit such Taxes to the appropriate Governmental Authorities in each province in accordance with the applicable legal and administrative requirements, provided that, if the harmonized sales tax regime is applicable in Ontario or British Columbia on the Acquisition Date, Section 6.1, rather than this Section 6.2(1), shall apply in respect of any Acquired Assets that would have otherwise been subject to taxes under the *Retail Sales Tax* (Ontario) or the *Social Services Tax Act* (British Columbia), respectively.

(2) If Acquireco has not, as of the Acquisition Time, designated the fair market value of the Acquired Assets as at me Acquisition Time in accordance with Section 4.1, Acquireco shall pay to CPI the provincial retail sales taxes under this Section 6.2 based on an assumed fair market value of the Acquired Assets and other assets acquired by Acquireco under this Agreement equal to the net book value thereof in the Financial Records. Within 30 days thereafter, Acquireco shall be entitled to designate the fair market value of such acquired assets in accordance with Section 4.1, which designation shall supersede the preceding assumed fair market value of net book value (to the extent of any discrepancies). Once Acquireco has notified the LP Entities of its designation made under Section 4.1, (a) to the extent any additional provincial sales taxes are payable in respect of the Acquired Assets, Acquireco shall remit such additional provincial sales taxes directly to the appropriate taxing authority (b) to the extent provincial sales taxes have been collected by CPI in excess of the amount required to be remitted in respect of the Acquired Assets, CPI shall return such excess to Acquireco and (c) to the extent provincial sales taxes have been collected and remitted by CPI in excess of the amount required to be remitted in respect of the Acquired Assets, Acquireco shall apply for a refund of such excess taxes directly to the appropriate taxing authority.

Section 6.3 Land Transfer Taxes

Acquireco shall prepare and file (a) any affidavits or returns required under the *Land Transfer Tax Act* (Ontario) and other applicable provincial legislation and (b) any municipal land transfer taxes applicable in the City of Toronto and any other applicable city or municipal land transfer taxes, at its cost and expense and pay to the prescribed Governmental Authority any Tax exigible in respect thereof.

Section 6.4 Rejected Elections and Indemnity

(1) If any Governmental Authority refuses to accept an election contemplated in Section 6.1(4), after exhausting any challenges to and appeals of such refusal which Acquireco in its sole discretion (and at its sole expense) may chose to initiate and prosecute, Acquireco shall pay to the relevant Governmental Authority any Tax which would, in the absence of such elections, become payable in connection with the transactions contemplated by this Agreement.

(2) If any Tax is imposed on CPI or its directors by reason of Acquireco failing to comply with any obligation under this Article 6 (other than Taxes which are imposed by reason of any of the LP Entities' non-compliance, delinquency or delay in remitting any Taxes collected from Acquireco), Acquireco shall indemnify and hold harmless CPI and its directors for such Taxes.

ARTICLE 7 — REPRESENTATIONS AND WARRANTIES OF THE LP ENTITIES

Each of the LP Entities jointly and severally represents and warrants to Acquireco as stated below and acknowledges that Acquireco is relying on the accuracy of each such representation and warranty in entering into this Agreement and completing the Acquisition.

Section 7.1 Corporate Matters

(1) *Status and Capacity of the LP Entities*. Each of Canwest Books, Canwest GP, CPI and National Post has been duly incorporated and organized, is a subsisting corporation in Good Standing under the laws of their jurisdiction of incorporation, and each has the corporate power and capacity and is duly qualified to own or lease its property and to carry on the Business and the business of National Post, as the case may be, as now conducted in each jurisdiction in which any of them own or lease property or carry on the Business or the business of National Post. Each of Canwest Books, Canwest GP and CPI has full corporate power and capacity to execute and deliver this Agreement and to consummate the Acquisition and otherwise perform its obligations under this Agreement. Canwest LP is a subsisting limited partnership under the *Limited Partnerships Act* (Ontario). Canwest GP has the corporate power and capacity to act as the general partner of Canwest LP, to enter into and perform its obligations under this Agreement, and to execute and deliver this Agreement on behalf of Canwest LP.

(2) *Authorization of Acquisition*. The execution and delivery of this Agreement and, subject to the making of the Sanction Order, as of the Acquisition Date the consummation of the Intercompany Transfers and the Acquisition have been duly and validly authorized by all necessary corporate action on the part of the LP Entities (other than Canwest GP and Canwest LP). The execution and delivery of this Agreement and, subject to the making of the Sanction Order, as of the Acquisition Date the consummation of the Intercompany Transfers and the Acquisition have been duly and validly authorized by all necessary corporate action on the part of Canwest GP on its own behalf and on behalf of Canwest LP.

(3) *Enforceability*. This Agreement has been duly and validly executed and delivered by each of the LP Entities (other than Canwest LP) and has been duly and validly executed and delivered by Canwest GP on behalf of Canwest LP. This Agreement is a valid and legally binding obligation of each of the LP Entities enforceable against each of the LP Entities in accordance with its terms, except as may be subject to applicable bankruptcy, insolvency, moratorium or other similar laws, now or hereafter in effect, relating to or affecting the rights of creditors generally and by legal and equitable limitations or the enforceability of specific remedies.

(4) *Residence*. CPI is not a non-resident of Canada within the meaning of the ITA. Canwest LP is a "Canadian partnership" for purposes of the ITA.

(5) *Investments*. CPI is not subject to any obligation or requirement to provide funds to or make any investment in any Person by loan, capital contribution or otherwise, except in respect of advances to National Post in accordance with CPI's existing credit agreement with National Post.

(6) *Books and Records*. The Books and Records (other than the corporate and other records specifically referenced in Section 7.1(7)), all of which have been or prior to the Acquisition Date will be provided to Acquireco, are complete and accurate records of the information purported to be reflected therein in all material respects.

(7) *Corporate Records*. The corporate records, minute books and share record books of National Post, all of which have been or prior to the Acquisition Date will be provided to Acquireco, contain complete and accurate minutes of all meetings of and corporate actions or written resolutions of the directors, committees of directors and shareholders of National Post, including all by-laws and resolutions passed by the directors, committees of directors and shareholders of National Post, since the date National Post was formed. All such meetings were duly called and held, all such corporate actions and written resolutions were duly taken or validly signed and all such by-laws and resolutions were duly passed. The share certificate books, register of shareholders, register of transfers, register of directors and similar corporate records of National Post are complete, accurate and current.

(8) *Shareholders' Agreements, etc.* There are no shareholders' agreements, pooling agreements, voting trusts or other similar agreements with respect to the ownership or voting of any of the shares of National Post.

Section 7.2 Consents, etc.

(1) *No Other Acquisition Agreements*. Except as disclosed in Schedule 7.2(1), no Person has any agreement, option, understanding or commitment, or any right or privilege (whether by law, or by any pre-emptive or other contractual right) capable of becoming an agreement, option or commitment for the purchase or other acquisition from an LP Entity of any of the Acquired Assets, other than in the Ordinary Course of Business.

(2) *Consents and Regulatory Approvals*. Except as specified in Schedule 7.2(2), neither an LP Entity nor National Post is under any obligation, contractual or otherwise, to request or obtain any Consent or Regulatory Approval or to give any notice to any Governmental Authority or other Person:

(a) by virtue of or in connection with the execution, delivery or performance by me LP Entities of this Agreement or the completion of the Acquisition;

(b) to avoid the loss of any Licence or to avoid the violation, breach or termination of, or any default under, or the creation of any Encumbrance under the terms of, any Applicable Law; or

(c) in order that the authority and ability of Acquireco to carry on the Business and for National Post to carry on its business in the Ordinary Course of Business and in the same manner as presently conducted by the LP Entities and National Post remains in good standing and in full force and effect as of and following the Acquisition.

All Contracts, Real Property Leases, Personal Property Leases and Licences which are material to the Business or the operation of the National Post newspaper or any newspaper which is part of the Business under which an LP Entity or National Post is obligated to request or obtain any such Consent or Regulatory Approval or to give any such notice are identified in Schedule 7.2(2).

Section 7.3 Financial Matters

(1) *Financial Records*. All financial transactions of the Business which are material to the Business or the operation of any newspaper which is part of the Business have been properly recorded in the Financial Records, which have been maintained in accordance with sound business and financial practice. The Financial Records accurately reflect in all material respects the basis for the financial condition and the revenues, expenses and results of operations of the Business. No information, records, systems, controls or data pertaining to or required for the operation or administration of the Business are recorded, stored, maintained by, or are otherwise dependent upon, any computerized or other system, program or device that is not exclusively owned and controlled by an LP Entity or National Post and on the Acquisition

Date CPI or National Post will have originals or copies of all such records, systems, controls or data in its possession or control, including where applicable, copies of all computer software and documentation relating thereto.

(2) *Accounts Receivable*. The Accounts Receivable arose from *bona fide* transactions in the Ordinary Course of Business and are good, valid, enforceable and fully collectible at the aggregate recorded amounts thereof (subject to a reasonable allowance for doubtful accounts consistent with past practice). The Accounts Receivable are not subject to any defence, set-off or counterclaim. None of such Accounts Receivable is due from an Affiliate of an LP Entity except Accounts Receivable which arose in the Ordinary Course of Business pursuant to and in accordance with the Shared Services Agreement.

(3) *Inventories*. The Inventory conforms in all material respects to applicable designs and specifications, is free from material defects in workmanship and material. The Inventory of the Business is in good and merchantable condition in all material respects and is usable in the Ordinary Course of Business for the purposes for which it is intended.

(4) *Absence of Certain Changes or Events*. Since the Reference Date and except as approved by an Order of the CCAA Court, neither an LP Entity nor National Post has:

(a) incurred any Liability which is material to the Business, the business of National Post or the operation of any newspaper which is part of the Business, except normal trade or business obligations incurred in the Ordinary Course of Business, none of which is materially adverse to the Business, the business of National Post or any newspaper which is part of the Business;

(b) created any Encumbrance upon any of the Acquired Assets, except in the Ordinary Course of Business or as described in this Agreement or pursuant to, or as a result of, the CCAA Case;

(c) sold, assigned, transferred, leased or otherwise disposed of any of the Acquired Assets, except in the Ordinary Course of Business or as contemplated by this Agreement;

(d) purchased, leased or otherwise acquired any properties or assets, except in the Ordinary Course of Business or as contemplated by this Agreement;

(e) waived, cancelled or written off any rights, Claims, Accounts Receivable or any amounts payable to an LP Entity which alone or together are material to the Business or any newspaper which is part of the Business, except in the Ordinary Course of Business;

(f) entered into any transaction, contract, agreement or commitment which is material to the Business, the business of National Post or the operation of any newspaper which is part of the Business, except in the Ordinary Course of Business or as contemplated by this Agreement;

(g) terminated, discontinued, closed or disposed of any plant, facility or Business operation other than in connection with the a Post-Filing Disposition;

(h) had a supplier of the Business or the business of National Post terminate, or communicate to an LP Entity or National Post the intention or threat to terminate, its relationship with an LP Entity or National Post, or the intention to reduce substantially the quantity of products or services it sells to an LP Entity or National Post, except for such terminations or reductions which are not, in the aggregate, material to the Business, the business of National Post or the operation of any newspaper which is part of the Business;

(i) had any customer of the Business terminate, or communicate to an LP Entity or National Post the intention or threat to terminate, its relationship with an LP Entity or National Post, or the intention to reduce substantially the quantity of products or services it purchases from an LP Entity or National Post, or its dissatisfaction with the products or services sold by an LP Entity or National Post, except for terminations or reductions in the Ordinary

Course of Business which are not, in the aggregate, material to the Business, the business of National Post or the operation of any newspaper which is part of the Business;

(j) made any material change in the method of billing customers of the Business or the business of National Post or the credit terms made available by an LP Entity or National Post to customers of the Business or National Post;

(k) made any material change with respect to any method of management, operation or accounting in respect of the Business or the business of National Post, except as contemplated under the Shared Services Agreement and except for the proposed stay of the Stayed Payables pursuant to the CCAA Case;

(l) suffered any damage, destruction or loss (whether or not covered by insurance) which has had a Material Adverse Effect or which would reasonably be expected to have a Material Adverse Effect.

(m) increased any form of compensation or other benefits payable or to become payable to any Employees or employees of National Post, or to any contractors, consultants or agents of the Business or National Post, except increases made in the Ordinary Course of Business and consistent with past practice or for "KERP" or "MIP" payments due to certain senior Employees disclosed in writing to the Administrative Agent prior to the date the Initial Order was issued;

(n) suffered any extraordinary loss;

(o) made or incurred any material change in, or become aware of any event or condition which is likely to result in a material change in, the Business, the business of National Post, the operation of any newspaper which is part of the Business, or its relationships with its customers, suppliers or Employees, except as a direct result of the CCAA Case; or

(p) authorized, agreed or otherwise become committed to do any of the foregoing.

(5) *Taxes*. There are no Encumbrances for Taxes upon any of the Acquired Assets and no event has occurred with which the passage of time or the giving of notice, or both, could reasonably be expected to result in an Encumbrance for Taxes on any of the Acquired Assets in each case other than Permitted Encumbrances.

(6) *National Post - Certain Tax Matters*.

(a) National Post has duly and on a timely basis prepared and filed with each Governmental Authority as required by Applicable Law all Tax returns, elections, filings, forms and other documents required to be filed by it in respect of all Taxes ("*Tax Returns*"), and such Tax Returns are complete and correct in all material respects.

(b) National Post has paid, collected and remitted all Taxes which are due and payable, collectible or remittable, as the case may be, by it on or before the date hereof. Without limiting the foregoing, National Post has withheld from each amount paid or credited to any Person the amount of Taxes required to be withheld therefrom and has remitted such Taxes to the proper Governmental Authority within the time required under Applicable Law.

(c) There are no Encumbrances for Taxes upon any of National Post's assets and no event has occurred with which the passage of time or the giving of notice, or both, could reasonably be expected to result in an Encumbrance for Taxes on any of National Post's assets in each case other than Permitted Encumbrances.

(d) There are no actions, suits, proceedings, investigations, audits or claims now pending or to the knowledge of the LP Entities, threatened, against National Post in respect of Taxes and there are no matters under discussion, dispute, audit or appeal with any Governmental Authority relating to Taxes. No reassessments of National Post's Taxes have been issued and are outstanding. Neither National Post nor any of the LP Entities has received any indication from any Governmental Authority that an assessment or reassessment of National Post is proposed in respect of any Taxes, regardless of its merits.

(e) There are no agreements, waivers or other arrangements providing for any extension of time with respect to the filing of any Tax Return or the payment of any Taxes by National Post or the period for any assessment or reassessment of Taxes.

(f) Provided that the amount paid under Section 2.1 for each of the debts owed by National Post to CPI exceeds 80% of the principal amount of such debt, no debt or other obligation of National Post has been or will be settled or extinguished on or prior to the Acquisition Time such that the provisions of Sections 80 to 80.04 of the ITA applies or would apply thereto and National Post has not entered, and will not enter, into an agreement to have a forgiven amount transferred to it under section 80.04 of the ITA.

(g) The value of consideration paid or received by National Post in respect of the acquisition, sale or transfer of any property or the provision of any services to or from any person with whom they do not deal at "arm's length" (as defined for purposes of the ITA) has been equal to the fair market value of such property acquired, sold or transferred or services provided.

(h) For all transactions, if any, between National Post and any Person that is a nonresident of Canada for purposes of the ITA with whom National Post was not dealing at arm's length and to which subsection 247(3) of the ITA would apply, National Post has made or obtained records or documents that meet the requirements of paragraphs 247(4)(a) to (c) of the ITA.

(7) *Canadian Newspapers*. Each newspaper to be acquired from an LP Entity pursuant to this Agreement and the newspaper published by National Post is a "Canadian newspaper" for purposes of section 19 of the ITA.

(8) *Bank Accounts and Authorizations*. Attached as Schedule 7.3(8) is a list of all safe deposit boxes and bank accounts of the LP Entities and the names of all Persons having access or signing authority and of all powers of attorney given by an LP Entity or National Post.

(9) *Insurance*. The LP Entities and National Post maintain such policies of insurance, issued by responsible insurers, as are appropriate to the Business, the business of National Post and the Acquired Assets, in such amounts and against such risks as are customarily carried and insured against by owners of comparable businesses, properties and assets. All such policies of insurance are in full force and effect and the LP Entities and National Post are not in material default, as to the payment of premiums or otherwise, under the terms of any such policy.

(10) *Capital Expenditures*. Neither an LP Entity nor National Post is committed to make any capital expenditures in respect of the Business or the business of National Post, nor have any capital expenditures in respect of the Business or National Post been authorized by an LP Entity or National Post at any time since the Reference Date, except for capital expenditures made in the Ordinary Course of Business as reflected in the cash flows of the Business provided to the Administrative Agent pursuant to and in accordance with the LP Support Agreement made among the LP Entities and the Administrative Agent dated January 8, 2010.

Section 7.4 Share Capital, Dividends and Shares

(1) *Authorized and Issued Share Capital*. The authorized capital of National Post is an unlimited number of common shares of which one common share has been duly issued and is outstanding as a fully paid and non-assessable share in the capital of National Post. No shares or other securities of National Post have been issued in violation of any Applicable Law, the articles of incorporation, by-laws or other constating documents of National Post or the terms of any shareholders' agreement or any agreement to which National Post is a party or by which it is bound. National Post has not issued or authorized the issue of any shares except the share which forms part of the Acquired Assets.

(2) *Title to Shares*. Except as disclosed in Schedule 7.4(2), CPI legally and beneficially owns and controls all shares of National Post, with a good and marketable title thereto free of any Encumbrances, adverse claims or claims of others.

(3) *No Other Acquisition Agreements*. Except as disclosed in Schedule 7.4(3), no Person has any agreement, option, understanding or commitment, or any right or privilege (whether by law, pre-emptive or contractual) capable of becoming an agreement, option or commitment, including a right of conversion or exchange attached to convertible securities, warrants or convertible obligations of any nature, for:

(a) the purchase, subscription, allotment or issuance of, or conversion into, any of the unissued shares in the capital of National Post or any securities of National Post;

(b) the purchase or other acquisition from CPI of any shares of National Post; or

(c) the purchase or other acquisition from National Post of any of its undertaking, property or assets, other than in the Ordinary Course of Business.

(4) *Dividends*. Since the Reference Date, National Post has not, directly or indirectly, authorized, declared or paid any dividends or declared or made any other distribution or return of capital in respect of any of its shares of any class and has not, directly or indirectly, redeemed, purchased or otherwise acquired any of its shares of any class or agreed to do so.

Section 7.5 Assets

(1) *Title to Assets*. The LP Entities are the owners of and have good and marketable title to the Acquired Assets (other than the shares of National Post), and on the Acquisition Date CPI will be the owner of and have good and marketable title to all of the Acquired Assets which as of the date hereof are owned by Canwest GP, Canwest LP or Canwest Books, free and clear of all Encumbrances, except for:

(a) the properties and assets disposed of, utilized or consumed by the LP Entities since the Reference Date in the Ordinary Course of Business or as permitted under this Agreement;

(b) the Permitted Encumbrances; and

(c) the fact that legal title to the Real Property known municipally as 2575 McCullogh Road, Nanaimo, British Columbia and 4918 Napier Street, Port Alberni, British Columbia is held by Canwest Media Inc., as nominee for CPI.

There are no agreements or commitments to purchase property or assets by an LP Entity or National Post for use in the Business or the business of National Post, other than in the Ordinary Course of Business.

(2) *Real Property*.

(a) The Real Property and the Leased Premises listed in Schedule 7.5(2) are the only real property held or used in connection with the Business or the business of National Post.

(b) CPI is the absolute, legal and beneficial owner of, and has good and marketable title in fee simple to, the Real Property, free and clear of any and all Encumbrances, except for:

(i) the Permitted Encumbrances;

(ii) liens for current Taxes not yet due; and

(iii) the fact that legal title to the Real Property known municipally as 2575 McCullogh Road, Nanaimo, British Columbia and 4918 Napier Street, Port Alberni, British Columbia is held by Canwest Media Inc., as nominee for CPI.

Complete and correct copies of all documents creating Permitted Encumbrances affecting the Real Property have been provided to Acquireco other than those that can be obtained from the relevant registry or land titles offices.

(c) There are no agreements, options, contracts or commitments to sell, transfer or otherwise dispose of the Real Property or which would restrict the ability of CPI to transfer the Real Property to Acquireco other than Permitted Encumbrances or as set out on Schedule 7.2(2) or as contemplated by this Agreement.

(d) The Real Property and the conduct of the Business and the business of National Post as presently conducted do not violate, and the use thereof in the manner in which presently used is not adversely affected by, any Applicable Laws including zoning and building by-laws, ordinances, regulations, covenants and official plans, nor does the Real Property or such use violate any covenant, restriction or easement affecting the Real Property or its use, except as would not have a Material Adverse Effect. CPI has not received any notification alleging any such violation from any Governmental Authority or other Person entitled to enforce the same.

(e) The buildings and other structures on or appurtenant to the Real Property are located wholly within their boundaries and do not encroach upon any registered or unregistered easement or right-of-way affecting the Real Property except as permitted by agreement or law and except to the extent any such encroachments alone or in the aggregate are not material to the Business, the business of National Post or the operation of any newspaper which is part of the Business. There is no encroachment onto any of the Real Property by buildings and improvements from any adjoining lands other than pursuant to Permitted Encumbrances, except for any such encroachments that, alone or in the aggregate, are not materially adverse to the Business, the business of National Post or the operation of any newspaper which is part of the Business.

(3) *Real Property Leases and Leased Premises*.

(a) Schedule 1.1(100) describes all Real Property Leases. Complete and correct copies of the Real Property Leases have been provided to Acquireco.

(b) Except as disclosed in Schedule 1.1(100), as of the date hereof the LP Entities are and on the Acquisition Date CPI will be exclusively entitled to all rights and benefits as lessee under the Real Property Leases, and no LP Entity has sublet, assigned, licensed or otherwise conveyed any rights in the Leased Premises or in the Real Property Leases to any other Person.

(c) Except as disclosed in Schedule 1.1(100) or as may be approved by Order of the CCAA Court, all rental and other payments and other obligations required to be paid and performed by an LP Entity pursuant to the Real Property Leases have been duly paid and performed. Except as disclosed in Schedule 1.1(100) or as may be approved by Order of the CCAA Court, no LP Entity is in default of any of its obligations under the Real Property Leases and, to the best of the LP Entities' knowledge, none of the landlords or other parties to the Real Property Leases are in default of any of their obligations thereunder in each case except for defaults that, alone or in the aggregate, are not material to the Business, the business of National Post or the operation of any newspaper which is part of the Business.

(4) *Status of Real Property and Leased Premises*. The Real Property and Leased Premises are zoned so as to permit their current use in all material respects. The use by CPI of the Real Property and the Leased Premises is in compliance with Applicable Laws and, in particular, is not in breach of any building, zoning or other statute by-law, ordinance, regulation, covenant, restriction or official plan and CPI has adequate and lawful rights of ingress and egress to and from public roads for the operation of the Business in the Ordinary Course of Business, except to the extent any breaches or lack of rights in the aggregate are not material to the Business, the business of National Post or the operation of any newspaper which is part of the Business and, specifically:

(a) no material alteration, repair, improvement or other work that has not been completed has been ordered, directed or requested in writing by any Governmental Authority to be done in respect of the Real Property or, to the extent CPI is responsible therefore, under the applicable Real Property Lease in respect of the Leased Premises;

(b) except for pre-filing amounts stayed by the Initial Order, all accounts for work and services performed and materials furnished in respect of the Real Property or the Leased Premises at the request of CPI have been paid and no Person is entitled to claim a lien under the *Construction Lien Act* (Ontario) and similar legislation in any other jurisdiction against the Real Property, the Leased Premises or any part thereof, other than for current accounts in respect of which the due date has not yet passed;

(c) except for pre-filing amounts stayed by the Initial Order, there is nothing owing by CPI in respect of the Real Property or the Leased Premises to any municipal corporation, or to any other corporation or commission owning or operating a public utility for water, gas, electrical power or energy, steam or hot water, or for the use thereof, other than current accounts in respect of which the due date has not yet passed; and

(d) no material part of the Real Property or the Leased Premises has been taken or expropriated by any Governmental Authority nor has any notice or proceeding in respect thereof been given, threatened or commenced.

(5) *Environmental Matters*.

(a) Except as disclosed in Schedule 7.5(5)(a), (i) the LP Entities, the operation of the Business and the business of National Post, the Acquired Assets and the use, maintenance and operation thereof have been and are in compliance with all Environmental Laws; (ii) the LP Entities have complied with all reporting and monitoring requirements under all Environmental Laws; and (iii) LP Entities have not received any notice of any non-compliance with any Environmental Law, and LP Entities have never been convicted of an offence for non-compliance with any Environmental Law or been fined or otherwise sentenced or settled any prosecution under any Environmental Law short of conviction.

(b) Except as disclosed in Schedule 7.5(5)(a), there is no pending or, to the best of the LP Entities' knowledge, threatened Environmental Claim against the LP Entities or against any prior owner or occupant of any Real Property or Leased Premises.

(c) The LP Entities have obtained all Environmental Permits necessary to conduct the Business and to own, use and operate the Acquired Assets, where failure to obtain such Environmental Permits would have a Materially Adverse Effect. All such Environmental Permits are listed in Schedule 7.5(5)(a) and complete and correct copies thereof have been provided to Acquireco. All such Environmental Permits are valid and are in full force and effect, there have been no violations thereof and there are no legal proceedings pending or threatened to alter or revoke any of them.

(d) Except as disclosed in Schedule 7.5(5)(a),

(i) except in compliance with Environmental Laws and to the extent not material to the Business, the business of National Post or the operation of any newspaper which is part of the Business, (A) there are no Contaminants located in, on or under any of the Acquired Assets, and (B) no Release of any Contaminant has ever occurred on or from any of the Acquired Assets nor has any Release resulted from the operation of the Business;

(ii) the LP Entities have not used any of the Acquired Assets to produce, generate, store, handle, transport or dispose of any Contaminant except in compliance with Environmental Laws and none of the Real Property or Leased Premises has been or is being used as a landfill or waste disposal site;

(iii) the LP Entities are not, and there is no basis upon which an LP Entity would reasonably be expected to become, responsible to undertake any clean-up, corrective action, or governmental response, under any Environmental Laws; and

(iv) without limiting the generality of the foregoing, there are no underground or surface storage tanks, pits or lagoons, waste disposal sites or urea formaldehyde foam insulation, asbestos, polychlorinated biphenyls or radioactive substances located in, on or under any of the Acquired Assets.

(e) All material environmental assessments and environmental studies and reports relating to any of the Acquired Assets generated on behalf of any LP Entity within the last ten years and in the possession of the LP Entities (or which with reasonable effort could be brought into the possession of the LP Entities) have been made available to Acquireco.

(f) The LP Entities have delivered to Acquireco true and complete copies of all material written communications dated after January 1, 2005, between an LP Entity and any Governmental Authority having authority under Environmental Laws which relate to the Business or any of the Acquired Assets. The LP Entities are not in breach of any Environmental Law in any jurisdiction where the Business is carried on.

(6) *Personal Property*. Schedule 7.5(6) lists or identifies all items of Tangible Personal Property which are material to the Business, the business of National Post or the operation of any newspaper which is part of the Business and the location where such items are situate, including a brief description of the property situate at each location and an indication of whether such property is owned or leased. Each item of Tangible Personal Property is, in all material respects, in good working order and repair, fully operational and free of any material defect, except for normal wear and tear, and is suitable and adequate for the purpose for which it has been designed in all material respects.

(7) *Personal Property Leases*. Schedule 7.5(7) lists or identifies all Personal Property Leases which are material to the Business, the business of National Post or the operation of any newspaper which is part of the Business. Except as may be affected by an Order of the CCAA Court (i) each Personal Property Lease is in full force and effect and has not been amended, and an LP Entity is entitled to the full benefit and advantage of each Personal Property Lease in accordance with its terms; and (ii) each Personal Property Lease is in good standing and there has not been any default by any party under any Personal Property Lease nor any dispute between an LP Entity and any other party under any Personal Property Lease.

(8) *Work Orders and Deficiencies*. There are no material outstanding work orders, noncompliance orders, deficiency notices or other such notices relating to the Real Property, the Leased Premises, the other Acquired Assets or the Business which have been issued by any or Governmental Authority including any police or fire department, sanitation, environment, labour or health authority. There are no material matters under discussion with any Governmental Authority relating to work orders, non-compliance orders, deficiency notices or other such notices.

(9) *Plants, Facilities and Equipment*. Except as set out in Schedule 7.5(9), the buildings and structures comprising the Real Property and, to the best of the LP Entities' knowledge, those comprising the Leased Premises, are free of any material structural defect. The heating, ventilating, plumbing, drainage, electrical and air conditioning systems and all other systems used in the Real Property and the Leased Premises and all related fixtures, machinery, equipment, tools, furniture, furnishings and materials are in good working order and repair, fully operational and free of any defect, except for normal wear and tear and for defects that, alone or in the aggregate, are not materially adverse to the Business, the business of National Post or the operation of any newspaper which is part of the Business.

(10) *Computer Systems*.

(a) The Computer Systems meet the data processing and other computing needs of the Business and its Operations as presently conducted in all material respects. The Computer Systems function, operate, process and compute in accordance with all Applicable Laws, current industry standards and trade practices consistent with those that would reasonably and ordinarily be expected from qualified, skilled and experienced persons engaged in a similar type of undertaking under the same or similar circumstances.

(b) To the knowledge of the LP Entities, the Computer Systems are free from viruses and disabling codes and devices, and the LP Entities have taken, and will continue to take, all industry standard steps and procedures necessary to ensure, so far as reasonably possible, that such systems are free from viruses and disabling codes and devices and will remain so until the Acquisition Date.

(c) The LP Entities have in place appropriate back up systems and disaster recovery plans, procedures and facilities necessary to ensure the continuing availability and functionality provided by the Computer Systems in the event of any malfunction or other form of disaster affecting the Computer Systems and has taken all steps and implemented all procedures to safeguard its Computer Systems and restrict unauthorized access thereto.

(d) All the source codes for proprietary software (other than off-the-shelf applications software) constituting part of the Computer Systems are subject to escrow arrangements that would enable Acquireco to have access to such source codes in the event of the applicable licensor's insolvency or failure or refusal to maintain or provide support for the software.

(11) *Intellectual Property*.

(a) Schedule 7.5(11) sets forth a complete list and a brief description of (a) all Intellectual Property whether or not such Intellectual Property has been registered or whether applications for registration have been filed by or on behalf of an LP Entity; and (b) particulars of all registrations and applications for registration in respect of such Intellectual Property. The Intellectual Property disclosed in Schedule 7.5(11) is valid, enforceable and subsisting and includes all of the Intellectual Property used in, or necessary to carry on, the Business.

(b) Each LP Entity, as applicable, has good and valid title to all of the Intellectual Property, free and clear of any and all Encumbrances (other than Permitted Encumbrances), except in the case of any Intellectual Property licensed to an LP Entity as disclosed in Schedule 7.5(11). Complete and correct copies of all agreements whereby any rights in any of the Intellectual Property have been granted or licensed to an LP Entity have been provided to Acquireco. All such agreements are in good standing and in full force and effect. No royalty or other fee is required to be paid by an LP Entity to any other Person in respect of the use of any of the Intellectual Property except as provided in such agreements delivered to Acquireco.

(c) Schedule 7.5(11) lists any agreements whereby any rights in any of the Intellectual Property have been granted or licensed by an LP Entity to any other Person. Complete and correct copies of all such agreements have been provided to Acquireco. Except in the case of Intellectual Property licensed to or by an LP Entity as indicated in Schedule 7.5(11), each LP Entity, as applicable, has the exclusive right to use all of the Intellectual Property and has not granted any license or other rights to any other Person in respect of the Intellectual Property.

(d) Except as disclosed in Schedule 7.5(11), there are no restrictions on the ability of an LP Entity or any successor to or assignee from an LP Entity to use and exploit all rights in the Intellectual Property. All statements contained in all applications for registration of the Intellectual Property were true and correct as of the date of such applications. Each of the trade-marks and trade names included in the Intellectual Property is in use. None of the rights of an LP Entity in the Intellectual Property will be impaired or affected in any way by the Acquisition.

(e) Except as disclosed in Schedule 7.5(11), there are no claims pending, or to the knowledge of the LP Entities threatened, against the LP Entities relating to any of the Intellectual Property.

(f) The Employees, and all consultants and contractors retained by an LP Entity, have agreed to maintain the confidentiality of confidential Intellectual Property, have agreed to assign any copyrights in the Intellectual Property which may arise in their name, and have provided written, unrestricted waivers of all moral rights in copyrighted works included in the Intellectual Property, which waivers may be invoked by any person authorized by an LP Entity to use the copyrighted works.

Section 7.6 Conduct of Business

(1) *No Material Adverse Change*. Except as disclosed in writing to the Administrative Agent or as approved by Order of the CCAA Court, since the Reference Date, there has not been any change in the affairs, prospects, operations, assets or financial condition of the Business and the business of National Post other than changes in the Ordinary Course of Business or as otherwise contemplated in this Agreement, which has had or reasonably could have a Materially Adverse Effect or a materially adverse effect on National Post or any newspaper which is part of the Business, nor has there been any damage, destruction or loss or other event, development or condition of any character (whether or not covered by insurance) affecting the Business, National Post or the Acquired Assets which would constitute a Material Adverse Effect or be materially adverse to the operation any newspaper which is part of the Business.

(2) *Ordinary Course*. Except as disclosed in writing to the Administrative Agent or as approved by an Order of the CCAA Court, the Business and the business of National Post has been carried on in the Ordinary Course of Business since the Reference Date, and will be carried on in the Ordinary Course of Business after the date of this Agreement or as otherwise contemplated in this Agreement and up to the Acquisition Date, subject to the CCAA Case.

(3) *Necessary Assets*. The Acquired Assets together with the properties and assets owned by National Post are sufficient to permit the continued operation of the Business after the Acquisition Date as currently conducted in all material respects and include all proprietary rights, trade secrets and other property and assets, tangible and intangible, applicable to or used in connection with the Business. No Person other than an LP Entity or National Post owns any properties or assets which are being used in or are reasonably necessary to carry on the Business in the Ordinary Course of Business except assets subject to Real Property Leases, Personal Property Leases or Contracts and other assets that the applicable LP Entity or National Post has the right to possess and use pursuant to a valid legal right which is an Acquired Asset under this Agreement.

(4) *Restrictions on Doing Business*. Neither an LP Entity nor National Post is a party to or bound by any agreement or commitment which would restrict or limit the rights of Acquireco to carry on or compete in any business or activity or to solicit business from any Person or in any geographical area or otherwise to conduct the Business as currently conducted and as proposed to be conducted. To the best of the LP Entities' knowledge, there are no facts or circumstances which could materially adversely affect the ability of Acquireco to continue to operate the Business, the National Post newspaper or any newspaper which is part of the Business as presently conducted following the completion of the Acquisition.

(5) *Non-Arm's Length Interests*. Except as disclosed in Schedule 7.6(5), neither an LP Entity nor any Person not dealing at arm's length with an LP Entity within the meaning of the ITA nor any officer or director of an LP Entity or of any such Person nor, to the best of the LP Entities' knowledge, any relative of any such officer or director, is a party to or has an interest with respect to any Contract or commitment which relates to or affects the Business or by which any of the Acquired Assets may be bound or has any material interest in any property, real or personal, tangible or intangible, used in or pertaining to the Business, in either case which is material to the Business or the operation of any newspaper which is part of the Business.

(6) *Contracts*. Schedule 7.6(6) lists or identifies all Contracts which are material to the Business, the business of National Post or the operation of any newspaper which is part of the Business. Except as contemplated by or resulting from the CCAA Case, (i) no LP Entity is, nor to the best of the LP Entities' knowledge is any other party to any such Contract in default under any such Contract and there has not occurred any event which, with the lapse of time or giving of notice or both, would constitute a default under any such Contract by an LP Entity or any other party to any such Contract, in each case except where such default is material to the Business, National Post or the operation of any newspaper which is part of the Business; (ii) each such Contract is in full force and effect, unamended by written or oral agreement, except as set out in Schedule 7.6(6) and an LP Entity is entitled to the full benefit and advantage of each Contract in accordance with its terms; (iii) a notice of default has not been received by any LP Entity under any such Contract or

of a dispute between an LP Entity and any other Person in respect of any such Contract; and (iv) the completion of the Acquisition will not afford any party to any such Contract or any other Person the right to terminate such Contract nor will the completion of such transactions result in any additional or more onerous obligation on an LP Entity or Acquireco under any such Contract.

(7) *Licences and Compliance with Law*. Schedule 7.6(7) lists all Licences which are material to the operation of the Business, National Post or the operation of any newspaper which is part of the Business. Such Licences are held by an LP Entity free and clear of any and all Encumbrances other than Permitted Encumbrances. The Business, the business of National Post and each newspaper which is part of the Business is being conducted and operated by the LP Entities and National Post, as the case may be, in all material respects in accordance with all terms and conditions of such Licences. Except as contemplated by or resulting from orders made in the CCAA Case, all such Licences are valid and are in full force and effect, and no LP Entity is in material violation of any term or provision or requirement of any such Licence, and to the knowledge of the LP Entities no Person has threatened to revoke, amend or impose any condition in respect of, or commenced proceedings to revoke, amend or impose conditions in respect of, any such Licence.

(8) *Operations and Assets*. Attached as Schedule 7.6(8) is a list of each jurisdiction in which the Business and the business of National Post is carried on and a brief description of the nature of the operations carried on in each such jurisdiction and a list of each jurisdiction in which tangible assets owned or used by an LP Entity or National Post in the Business are located.

Section 7.7 Employment Matters

(1) *Employees*. Schedule 7.7(1) states the age, location of employment, job title, length of service, commission and bonus entitlements, CPI Benefit Plan participation and salary or wage rate of each Employee and each other Person receiving remuneration for work or services being provided to an LP Entity in respect of the Business including contactors, consultants, agents and agency employees, and indicates any Employee who is on an approved leave of absence together with the reason for such Person's leave and such Person's expected date of return to work. Schedule 7.7(1) also identifies any Employees and other Persons who have advised CPI in writing that they will resign or retire or cease to provide work or services as a result of the Acquisition. Except as set out in Schedule 7.7(1), no Employee is on long-term disability leave, extended absence or receiving benefits pursuant to the *Workplace Safety and Insurance Act, 1997* (Ontario) or comparable legislation of any other jurisdiction.

(2) *Remuneration*. Since the Reference Date, except as described in Schedule 7.7(2), to the best of the LP Entities' knowledge no payments have been made or authorized by an LP Entity or by National Post to directors, officers, Employees, employees of National Post, contractors, consultants or agents except at regular rates of remuneration or increases made in the Ordinary Course of Business and consistent with past practice or for "KERP" or "MIP" payments disclosed in writing to the Administrative Agent prior to the date the Initial Order was issued. There are no outstanding loans or advances made or granted by an LP Entity or National Post to any Employee, employee of National Post, contractor, consultant or agent, except for travel advances made to Employees or employees of National Post in the Ordinary Course of Business.

(3) *Labour Matters and Employee Contracts*. Except as disclosed in Schedule 7.7(3), neither an LP Entity nor National Post is a party to or bound by any collective agreement, labour contract, letter of understanding, memorandum of understanding, letter of intent, voluntary recognition agreement or other legally binding commitment to any labour union, trade union, employee association or similar entity in respect of any Employees, employees of National Post or contractors rendering services to an LP Entity or National Post, nor is an LP Entity or National Post currently conducting negotiations with any labour union, trade union, employee association or similar entity. Except as disclosed in Schedule 7.7(3), during the period of five years preceding the date of this Agreement there has been no attempt to organize, certify or establish any labour union, employee association or similar entity in relation to any of the Employees or employees of National Post. Except as disclosed in Schedule 7.7(3), neither an LP Entity nor National Post are a party to any employment agreement, termination or severance agreement, consulting contract, independent contractor

agreement, agency contract or similar agreement or arrangement, and there is no agreement for the employment of any Employee or employee of National Post which cannot be terminated on reasonable notice and without penalty. There is no agreement, policy, plan or practice relating to the payment of any management, consulting or other fee or any bonus, retention payment, change of control or golden parachute payment, pension, share of profits or retirement allowance, or any insurance, health or other employee benefit, except as disclosed in Schedule 7.8(1). Each LP Entity and National Post have complied with all provisions of the collective agreements and other agreements disclosed in Schedule 7.7(3) and there are no existing or, to the best of the LP Entities' knowledge, threatened labour strikes, cessations or suspensions of work or labour disputes, lockouts, slowdowns, disturbances, grievances, arbitrations, unfair labour practice complaints, controversies or other labour troubles affecting an LP Entity, National Post or the Business, nor have there been any material labour disturbances within the period of five years preceding the date of this Agreement, except as disclosed in Schedule 7.7(3).

(4) *Employee Laws*. Each LP Entity and National Post has complied with all Employment Laws and, except as disclosed in Schedule 7.7(4), and there are no threatened, pending or outstanding charges, applications, claims, Orders, investigations, audits or complaints against an LP Entity or National Post under any Employment Laws, nor have there been any charges, applications, claims, Orders or complaints against an LP Entity or National Post under any Employment Laws within the period of five years preceding the date of this Agreement. Each LP Entity and National Post have paid in full all amounts owing under the *Workplace Safety and Insurance Act, 1997* (Ontario) and comparable applicable legislation of other jurisdictions and there are no circumstances, related to the workers' compensation claims experience of an LP Entity or National Post or otherwise, which would permit or require a reassessment, penalty, surcharge or other additional payment under such legislation. There are no outstanding charges or orders requiring an LP Entity or National Post to comply with the *Occupational Health and Safety Act* (Ontario) or comparable applicable legislation of any other jurisdiction. All obligations of the LP Entities and National Post in respect of vacation pay and banked vacation entitlement, holiday pay, overtime pay or time-off entitlement, sick pay or banked sick leave, premiums for employment or unemployment insurance, employer health tax, Canada/Quebec Pension Plan premiums, accrued employee compensation and Benefit Plan payments or premiums will have been paid or discharged as of the Acquisition Date or, if unpaid, are accurately reflected in the Books and Records.

(5) *WSIB Premiums*. The LP Entities have (a) reported appropriate premiums based on actual or estimated earnings for all past reporting periods and (b) paid all amounts owing to the Workplace Safety and Insurance Board (Ontario) and comparable agencies of other applicable jurisdictions to and including the Acquisition Date.

Section 7.8 Pension and Other Benefit Plans

(1) *CPI Benefit Plans*. Schedule 7.8(1) lists all of the CPI Pension Plans, CPI Benefit Plans and Multi-Employer Plans.

(2) *Disclosure*. True, current and complete copies of all written CPI Benefit Plans as amended to date, or where oral, a written summary of the material terms thereof together with current and complete copies of all material documents related to the CPI Benefit Plans have been delivered or made available to Acquireco, including, where applicable:

(i) trust agreements and funding agreements applicable to the CPI Pension Plans;

(ii) insurance contracts and policies, investment management agreements, statements of investment policies and procedures, subscription and participation agreements, benefit administration contracts and any financial administration contracts;

(iii) booklets, summaries, manuals and communications of a general nature, distributed or made available to any Employees or former employees concerning any CPI Benefit Plans;

(iv) the most recent financial and accounting statements and reports together with the four most recent quarterly investment reports;

(v) the most recent actuarial reports required to be filed with a Governmental Authority; and

(vi) all reports, statements, valuations, returns and correspondence for each of the last three years which affect premiums, contributions, refunds, deficits or reserves under any of CPI Benefit Plan.

(3) *Compliance*. Each of the CPI Benefit Plans is registered, qualified, invested and administered, in all material respects, in compliance with the terms of such CPI Benefit Plan, with all Applicable Laws, and any applicable collective agreements. None of the LP Entities has received in the last six years, any notice from any Person questioning or challenging such compliance (other than a claim relating solely to that Person), and none of the LP Entities has any knowledge of such notice whether written or otherwise, from any Person questioning or challenging such compliance record beyond the last six years.

(4) *Amendments*. No amendments have been made to any CPI Benefit Plan and no improvements to any CPI Benefit Plan have been promised that are not disclosed in the plan documents provided to Acquireco, except as may be required, or are reasonably anticipated to be required, by Applicable Law or the terms of a collective agreement.

(5) *Obligations under Multi-Employer Plans*. The obligations of CPI to any Multi-Employer Plans in which CPI participates or to which CPI is required to contribute are restricted to providing information and making contributions in accordance with Applicable Laws and the terms of the collective agreements listed in Schedule 7.7(3).

(6) *Employee Data*. To the knowledge of CPI, all employee data necessary to administer the CPI Benefit Plans is true and correct in all material respects.

(7) *Penalties, Taxes*. To the best of the LP Entities' knowledge, there are no outstanding defaults or violations by any LP Entity in respect of any CPI Pension Plan or CPI Benefit Plan and no Taxes, penalties or fees are owing or exigible under any of the CPI Pension Plans and the CPI Benefit Plans.

(8) *Contributions*. All contributions or premiums required to be paid or remitted by an LP Entity under the terms of each CPI Benefit Plan or by any Applicable Law or collective agreement or other labour union contract have been paid or remitted in accordance with the terms of the CPI Pension Plans and the CPI Benefit Plans and any Applicable Law or collective agreement or other labour union contract. All Employee contributions to the CPI Benefit Plans required to be made by way of payroll deduction have been authorized by the Employees and properly withheld by an LP Entity and fully paid into the CPI Pension Plan funds or remitted in connection with the CPI Pension Plans.

(9) *Investigations*. To the best of the LP Entities' knowledge, as applicable, the CPI Pension Plans and the CPI Benefit Plans or any related trust or other funding medium thereunder, are not subject to any pending threatened or anticipated investigation, examination or other proceeding, action or claim initiated by any Governmental Authority or by any Employee or beneficiary covered under a CPI Pension Plan or CPI Benefit Plan, involving any CPI Pension Plan or CPI Benefit Plan or by any other party (other than routine claims for benefits).

(10) *Post-Retirement Benefits*. Except as disclosed in Schedule 7.8(1), none of the CPI Benefit Plans, other than the CPI Pension Plans, provide benefits beyond retirement or other termination of service to Employees or former employees or beneficiaries or dependants of such employees.

(11) *CPI Pension Plans*. In respect of each of the CPI Pension Plans,

(a) to the best of the LP Entities' knowledge, no adverse change has occurred that would have a material effect on the current funded status of any of the CPI Pension Plans;

(b) there are no entities other than the LP Entities participating in any CPI Pension Plans or participating employers that are so designated by a participation agreement between the participating employer and the applicable CPI Pension Plan, participating in any CPI Pension Plans. All Employee participants in each CPI Pension Plan are

eligible for membership in the applicable CPI Pension Plan pursuant to the terms of the CPI Pension Plan and Applicable Law; and

(c) all assets of the pension funds related to the CPI Pension Plans are available to meet the liabilities and claims of the applicable CPI Pension Plan.

Section 7.9 General Matters

(1) *Compliance with Constating Documents, Agreements and Applicable Laws*. The execution, delivery and performance of this Agreement and each of the other agreements contemplated or referred to herein by the LP Entities, and the completion of the Acquisition, will not constitute or result in a violation or breach of or default under, or cause the acceleration of any obligations of an LP Entity or National Post under:

(a) any term or provision of any of the articles, by-laws or other constating documents of the LP Entities or National Post;

(b) subject to obtaining the Consents, the terms of any Contract, Personal Property Lease or Real Property Lease, in each case, that is material to the Business, the business of National Post or the operation of any newspaper which is part of the Business; and

(c) subject to obtaining the Regulatory Approvals, any term or provision of any (i) Licence or Order that is material to the Business, the business of National Post or the operation of any newspaper which is part of the Business or (ii) Applicable Law.

(2) *Compliance with Laws*. None of the LP Entities or National Post is carrying on the Business (or, in the case of National Post, its business) in violation of any Applicable Law, including laws relating to its operations, products, manufacturing processes, advertising, sales or employment practices, wages and hours, product safety or civil rights, where such violation is material to the Business, the business of National Post or the operation of any newspaper which is part of the Business.

(3) *Litigation*. Except for the matters referred to in Schedule 7.9(3), there are no actions, applications, complaints, claims, suits or proceedings, judicial or administrative (whether or not purportedly on behalf of an LP Entity or National Post) pending or, to the best of the LP Entities' knowledge, threatened, by or against or affecting an LP Entity or National Post, at law or in equity, or before or by any court or other Governmental Authority, which might result in a Material Adverse Effect or which might adversely affect the ability of the LP Entities to enter into this Agreement or to consummate the Acquisition, nor are there grounds on which any such action, suit or proceeding might be commenced with any reasonable likelihood of success.

(4) *Copies of Documents*. True and complete copies of all contracts, leases, collective agreements, pension plans, benefit plans, policies of insurance and other documents identified in any schedule to this Agreement have been delivered to Acquireco.

(5) *Full Disclosure*. The representations and warranties of the LP Entities contained in this Agreement and in any certificate or other agreement delivered in connection with completion of the Acquisition are accurate and complete, do not contain any untrue statement of a Material fact or, considered in the context in which presented, omit to state a material fact necessary in order to make the statements and information contained herein or therein not misleading. Without restricting the generality of the foregoing, there are no facts known to the LP Entities or National Post which should be disclosed to Acquireco in order to make any of the representations and warranties contained in this Agreement not misleading or which may have a Material Adverse Effect and no facts are known to the LP Entities or National Post which might reasonably constitute a Material Adverse Effect or would operate to prevent Acquireco from using the Acquired Assets to operate the Business, the business of National Post and the newspapers which is part of the Business

in the manner in which the LP Entities and National Post have operated the Business, the business of National Post and such newspaper prior to the date of this Agreement.

(6) *National Post Transition Agreement*. There are no facts or circumstances known to the LP Entities which, if had been known to National Post on the Closing Date (as that term is defined in the National Post Transition Agreement made between National Post and CPI as of October 26, 2009 (the "*NP Transition Agreement*")) would have made any representation or warranty of National Post under the NP Transition Agreement or under any document delivered by National Post pursuant to the NP Transition Agreement untrue.

ARTICLE 8 — REPRESENTATIONS AND WARRANTIES OF ACQUIRECO

Acquireco represents and warrants to each of the LP Entities as stated below and acknowledges that each of the LP Entities is relying on the accuracy of each such representations and warranties in entering into this Agreement and completing the Acquisition.

Section 8.1 Status

Acquireco is a subsisting corporation in Good Standing under the laws of Canada and has full corporate power and authority to execute and deliver this Agreement and to consummate the Acquisition.

Section 8.2 Due Authorization

The execution and delivery of this Agreement and the consummation of the Acquisition have been duly and validly authorized by Acquireco and no other corporate proceedings on the part of Acquireco are necessary to authorize this Agreement or the Acquisition.

Section 8.3 Enforceability

This Agreement has been duly and validly executed and delivered by Acquireco and is a valid and legally binding agreement of Acquireco enforceable against Acquireco in accordance with its terms except as may be subject to applicable bankruptcy, insolvency, moratorium or other similar laws, now or hereafter in effect, relating to or affecting the rights of creditors generally and by legal and equitable limitations or the enforceability of specific remedies.

Section 8.4 Investment Canada Act

Subject to a contrary determination by the Heritage Minister, Acquireco is not a "non-Canadian" within the meaning of the ICA.

ARTICLE 9 — COVENANTS

Section 9.1 General Covenants

(1) During the Interim Period, except as contemplated in the Initial Order or the CCAA Case or as otherwise consented to by Acquireco, the LP Entities shall, and shall cause National Post to:

(a) *Operations*. Carry on the Business and the business of National Post (including carrying on the operation of all newspapers) in the usual and ordinary course in substantially the same manner as heretofore conducted and preserve intact their present business organization, use all reasonable efforts to keep available the services of their present officers and employees and preserve their relationships with customers, suppliers and others having business dealings with them and take any and all such further actions reasonably requested by Acquireco to the end that the Business and the business of National Post shall not be impaired in any material respect at the Acquisition Date, subject to the CCAA Case and the Shared Services Agreement;

(b) *Insurance*. Keep in full force their current insurance policies relating to the Acquired Assets and the assets and properties of National Post or without permitting any termination, cancellation or lapse thereof, enter into replacement policies providing coverage equal to or greater than the coverage under those cancelled, terminated or lapsed for substantially similar premiums;

(c) *Agreements*. Perform in all material respects their obligations under agreements, contracts and instruments related to or affecting the Business, the business of National Post or the Acquired Assets;

(d) *Books and Records*. Maintain the Books and Records, including the Financial Records, in the Ordinary Course of Business and not make any material change in their accounting principles, policies, practices or methods;

(e) *Compliance with Laws*. Comply in all material respects with all Applicable Laws applicable to the Business, the business of National Post and with all Orders made by the CCAA Court in respect of the CCAA Case;

(f) *Additional Agreements*. Not enter into or assume any agreement, contract or commitment, except (a) purchases of supplies and sales of Inventories in the Ordinary Course of Business and (b) agreements, contracts or commitments which, individually or in the aggregate, are not material to the Business taken as a whole, nor otherwise make any material change in the conduct of the Business or the business of National Post;

(g) *Inconsistent Activities*. Not solicit or encourage any inquiries or proposals or initiate discussions or negotiations with, or provide any information to any third party (other than Acquireco) concerning, or enter into any transaction involving, the acquisition of all or any part of the Business, the business of National Post or the Acquired Assets, other than in connection with a Post-Filing Disposition.

(h) *Employee Remuneration*. Except for increases in the Ordinary Course of Business or as may otherwise be required by any Contract that is listed in a schedule to this Agreement, not (a) increase the compensation of any Employee or employee of National Post or of any director, officer, consultants contractor, agency employee or agent of an LP Entity or National Post; (b) improve the CPI Benefit Plans in any manner, (c) pay to or for the benefit of, or agree to pay to or for the benefit of, any Employee or employee of National Post, or of any director, officer, consultant, contractor, agency employee or agent of an LP Entity or National Post any pension or retirement allowance or other benefit not required by the CPI Benefit Plans or Contracts with Employees or employees of National Post; or (d) Commit to any new or renewed employee pension, disability, bonus, commission, deferred or incentive compensation, salary continuation, supplemental unemployment, termination or severance, profit sharing, share purchase, stock option, stock appreciation, phantom stock option, retirement, group insurance, hospitalization, death benefit, sick leave, holiday, vacation, overtime, medical, dental, health and welfare or other employee benefit plan, agreement, policy, practice or other arrangement; nor will an LP Entity or National Post amend any of the arrangements referred to in this Section 9.1(1)(h) now in existence;

(i) *Undertaking*. Operate the Business and the business of the National Post in accordance with the undertaking made to the Administrative Agent dated as of October 30, 2009;

(j) *Disposition of Assets*. Except in the Ordinary Course of Business, not sell, transfer, mortgage, encumber or otherwise dispose of, or agree to sell, transfer, mortgage, encumber or otherwise dispose of any properties or assets, real, personal or mixed, other than in connection with a Post-Filing Disposition;

(k) *Intercompany Business*. Not make any change, except in the Ordinary Course of Business or as provided in the Shared Services Agreement, in the manner of conducting business with any Affiliate;

(l) *Intercompany Payments*. Not make any payment or distribution to any Affiliate except (i) pursuant to and in accordance with existing share services agreements, as amended by the Agreement on Shares Services and Employees

dated as of October 26, 2009 to which the LP Entities are party and (ii) advances by CPI to National Post in accordance with CPI's existing credit agreement with National Post; or

(m) *Representations and Warranties*. Not do anything that would cause any of the representations and warranties of the LP Entities under this Agreement or under any document delivered pursuant to this Agreement to be untrue.

(n) *CPI Pension Plans*. Subject to Section 5.5:

(i) As soon as practicable after the Acquisition Date, seek and use commercially reasonable efforts to obtain all required approvals from Governmental Authorities to amend the CPI Pension Plans to transfer sponsorship of the CPI Plans to Acquireco as set out in Section 5.3;

(ii) Transfer to Acquireco all employee data and documentation in CPI's possession and the possession of National Post, as the case may be related to the administration of the CPI Pension Plans; and

(iii) Prior to the assumption by Acquireco of the CPI Pension Plans, take whatever reasonable action is necessary to confirm that only those Transferred Employees who meet the eligibility criteria to qualify for membership in an applicable CPI Pension Plan in accordance with the terms of the applicable CPI Pension Plan and Applicable Law are members of the applicable CPI Pension Plan.

(2) Each of the Parties shall comply with legislative requirements or, as applicable, use commercially reasonable efforts to cause each of the conditions contained in this Agreement to be fulfilled or performed by it on or before the Acquisition Date as contemplated hereunder.

Section 9.2 Competition Act Filings

CPI shall fully co-operate and communicate with Acquireco in respect of all dealings with the Commissioner, including the filing of notices required under the *Competition Act* (Canada) and the satisfaction of requests from the Commissioner for additional information respecting the transactions contemplated by this Agreement.

Section 9.3 Non-Assignable Assets

(1) If any of the Acquired Assets shall not be assignable, or shall only be assignable with the Consent of a third party ("*Third Party Approval*"), the LP Entities shall at the request of Acquireco, during the Interim Period, use commercially reasonable efforts, in co-operation with Acquireco, to secure any Third Party Approval required in connection with the assignment of such Acquired Asset prior to the Acquisition Date.

(2) Where such Acquired Asset is not assignable or any Third Party Approval in respect of such Acquired Asset has not been obtained prior to the Acquisition Date, in accordance with the terms of the Sanction Order, on the Acquisition Date the LP Entities shall assign the relevant Acquired Asset to Acquireco without the Third Party Approval notwithstanding any restriction or prohibition on assignment in respect of such Acquired Asset.

Section 9.4 Access

(1) The LP Entities shall provide Acquireco, its auditors, consultants, counsel and other representatives (a) such information about the Business and the business of National Post as Acquireco may reasonably require from time to time and (b) reasonable access to the LP Entities and National Post's premises, corporate, financial and other books and records, all policies of insurance, contracts, leases, deeds, property and other assets within the possession or control of the LP Entities or National Post, wherever they may be located, which right of access shall include the right to inspect and appraise such property and assets and to enable Acquireco, its auditors, consultants, counsel and other representatives to continue to investigate the affairs of the Business and the business of National Post on an ongoing basis. No such investigation shall prejudice the rights of Acquireco under this Agreement.

(2) Acquireco shall preserve and keep all Books and Records and all information relating to the accounting, business, and financial affairs that relate to the Business and the business of National Post for a period of five years after the Acquisition Date (or such longer period as Acquireco and CPI may agree) (the "*Retention Period*"). During the Retention Period, Acquireco shall provide the LP Entities and the Monitor with reasonable access to any information in its possession or control relating to the Business and the business of National Post as the LP Entities or the Monitor may reasonably require to meet legal, regulatory, accounting and auditing requirements. If requested by the Monitor, acting reasonably, employees of Acquireco shall assist the Monitor in the performance of its duties and obligations including the preparation and service of notices to creditors and preparation of the LP Entities' tax returns, provided such request for assistance does not (a) require a material amount of effort by any employee, (b) preclude any employee from performing its normal duties for Acquireco or (c) result in Acquireco incurring any additional cost or expense. During the Retention Period, if reasonably requested by any trustee in bankruptcy appointed in respect of the estates of the LP Entities, Acquireco agrees to (i) provide such trustee in bankruptcy with reasonable access to any information in its possession or control relating to the Business and the business of National Post, and (ii) direct any requested Transferred Employees to assist the trustee in bankruptcy in the performance of its duties and obligations including the preparation and service of notices to creditors, in each case as the trustee in bankruptcy may reasonably require to comply with its statutory duties and obligations on or before the first meeting of creditors and/or in connection with the final completion of the estate and, for greater certainty, not in relation to the investigation or pursuit of claims or remedies pursuant to sections 95 to 101 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, or any similar claims under any Applicable Law.

Section 9.5 Personal Information Privacy

Acquireco shall at all times comply with all Applicable Law governing the protection of personal information, with respect to Personal Information disclosed or otherwise provided to Acquireco by the LP Entities or National Post under this Agreement. Acquireco shall only use or disclose such Personal Information for the purposes of reasonably investigating the affairs of the Business and the business of National Post as contemplated in Section 9.4 and completing the Acquisition or, in the case of Employees, offering employment to Employees in accordance with this Agreement. Acquireco shall safeguard all Personal Information collected from the LP Entities or National Post in a manner consistent with the degree of sensitivity of the Personal Information and, furthermore, maintain at all times the security and integrity of the Personal Information. Acquireco shall not make any copies of the Personal Information or any excerpts thereof or in any way re-create the substance or contents of the Personal Information if the Acquisition is not completed for any reason, and shall return all Personal Information to the LP Entities or National Post, or destroy such Personal Information at the LP Entities' request.

Section 9.6 Intercompany Transfers

On the Acquisition Date and in accordance with the Plan on such terms and conditions as may be specified in the Plan, CPI shall (a) pursuant to the Sanction Order, acquire from Canwest Books, Canwest GP and Canwest LP all assets or property of or used by or in the possession or control of Canwest Books, Canwest GP and Canwest LP (other than, in respect of Canwest GP, partnership interests in Canwest LP and special voting shares of CPI, in respect of Canwest LP, shares of CPI and the CPI Debt, and, in respect of CPI, shares of Canwest Books), (b) assume from Canwest LP all Liabilities of Canwest LP that would be Assumed Liabilities under the terms of this Agreement and (c) offer to employ all employees of Canwest LP who provide services to the Business, all on terms and conditions satisfactory to Acquireco, such that immediately prior to the Acquisition Time, CPI is the sole owner of such Acquired Assets, such Liabilities are obligations of CPI and all Employees are employees of CPI.

Section 9.7 Certain Additional Information

Without limiting the generality of Section 9.4(1), not less than 10 Business Days prior to the Acquisition Date the LP Entities shall provide to Acquireco such information as Acquireco may reasonably request about Liabilities of CPI which Acquireco is obligated or has the option to assume under this Agreement, to enable Acquireco to determine the extent

of such Liabilities and whether, among other things, to exercise any option to assume any such Liabilities or any election under this Agreement not to assume any such Liabilities.

ARTICLE 10 — CONDITIONS

Section 10.1 Acquireco's Conditions

The obligations of Acquireco under this Agreement are subject to the conditions set out in this Section 10.1, which are for the exclusive benefit of Acquireco and all or any of which may be waived, in whole or in part, by Acquireco in its sole discretion by Notice given to the LP Entities. The LP Entities shall take all actions, steps and proceedings as are reasonably within its control to cause each of the conditions to be fulfilled or performed at or before the Acquisition Time.

(1) *Truth of Representation and Warranties*. All representations and warranties of the LP Entities contained in this Agreement shall have been true in all material respects, except for representations and warranties that contain a materiality qualification which shall be true in all respects, as of the date of this Agreement and shall be true in all material respects, except for representations and warranties that contain a materiality qualification, which shall be true in all respects, as of the Acquisition Date with the same effect as though made on and as of that date (except to the extent that any representation or warranty is affected by the occurrence of events or transactions expressly contemplated and permitted by this Agreement, or otherwise consented to in wilting by Acquireco) and the LP Entities shall have delivered to Acquireco a certificate addressed to Acquireco to the foregoing effect dated as of the Acquisition Date.

(2) *The LP Entities' Obligations*. Each of the LP Entities shall have performed each of its respective obligations under this Agreement in all material respects to the extent required to be performed on or before the Acquisition Date, including delivery of all documents, instruments and other items specified elsewhere in this Agreement and delivery of the following:

(a) a certificate of status or the equivalent for each LP Entity (other than Canwest LP) and National Post issued by the appropriate Governmental Authority in its jurisdiction of incorporation;

(b) certified copies of (i) the articles and by laws of each LP Entity (other than Canwest LP) and National Post; (ii) all resolutions of shareholders and directors of LP Entity (other than Canwest LP) and National Post approving the entering into of this Agreement and the completion of the Acquisition; and (iii) a list of directors and officers LP Entity (other than Canwest LP) authorized to sign this Agreement and any other documents required to be delivered hereunder; and

(c) certified copies of (i) the limited partnership agreement, as amended of Canwest LP; (ii) all resolutions of the directors of Canwest GP, as general partner of Canwest LP, approving the entering into of this Agreement; and (iii) a list of directors and officers of Canwest GP, as general partner of Canwest LP, authorized to sign this Agreement and any other documents required to be delivered hereunder.

(3) *Adverse Proceedings*, (a) No action or proceeding shall be pending or threatened which could reasonably be expected to enjoin, impair or prohibit the completion of the Acquisition or which could prevent or impair the operation of the Business or the business of National Post after the Acquisition Date in substantially the same manner as it was operated before the Acquisition Date and (b) no Governmental Authority shall have issued any preliminary or final decision, order or decree in consequence of or in connection with the Plan or the Acquisition which restrains or prohibits the Acquisition or the Plan or requires or purports to require a variation of this Agreement or the Plan that is not acceptable to the Administrative Agent acting in consultation with the steering committee of Senior Lenders formed by the Administrative Agent from time to time.

(4) *Material Adverse Change*. No damage to or destruction of a material part of Acquired Assets shall have occurred and no Material Adverse Effect shall have occurred, other than (i) changes in the Ordinary Course of Business which, in the reasonable business judgement of Acquireco, are not expected to be materially adverse to the Business or the business

of National Post; and (ii) changes in connection with the CCAA Case which Acquireco does not, acting reasonably, consider to be materially adverse.

(5) *Status of Real Property Leases and Personal Property Leases*. Except in respect of Real Property Leases and Personal Property Leases which the CCAA Court has ordered be assigned to Acquireco, CPI shall have delivered to Acquireco (a) acknowledgements from the lessors under (i) the Real Property Leases and (ii) the Personal Property Leases which are material to the Business, the business of National Post or to the operation of any newspaper which is part of the Business that such leases are in full force and effect and CPI is not in breach of any of the terms thereof (other than as approved by Order of the CCAA Court) and (b) any Consent to the change in ownership effected by the Acquisition as may be required by the terms of any Real Property Leases.

(6) *Concurrent Transactions*. Concurrently with the completion of the Acquisition, the Parties shall have, or shall have caused to be, executed and delivered and shall have completed or caused to be completed the transactions contemplated by the following the documents contemplated under Section 12.2.

(7) *Corporate Action*. All appropriate action of the shareholders, partners, directors and officers of the LP Entities and National Post shall have been taken.

(8) *Approvals, Consents, etc.* All Consents and Regulatory Approvals shall have been received and shall be absolute or on terms reasonably acceptable to Acquireco, except where any failure to obtain any such Consent or Regulatory Approval could have a materially adverse effect on the Business or the operation of the National Post newspaper or any newspaper which is part of the Business.

(9) *Workplace Safety and Insurance Act Certificate*. The LP Entities shall have delivered to Acquireco a Purchase Certificate issued under section 146 of the *Workplace Safety and Insurance Act* (Ontario) and equivalent documentation of workers' compensation coverage and, subject to any policy of the Workplace Safety and Insurance Board (Ontario) and comparable agencies of other applicable jurisdictions which limit the availability of such certificates in the context of CCAA proceedings, up to date payment of premiums under the *Workplace Safety and Insurance Act* (Ontario) and comparable legislation of other applicable jurisdictions.

(10) *Intercompany Transfers*. The Intercompany Transfers shall have been completed.

(11) *Environmental Assessments*. CPI shall have provided Phase 1 environmental assessments on each parcel of Real Property that are satisfactory to Acquireco.

(12) *Employees*. With respect to the Employees who received the offer contemplated by Section 5.1, not more than 10% shall have indicated to CPI or Acquireco that they do not intend to accept such offers.

(13) *CCAA Case*. The CCAA Court shall not have (a) amended the Initial Order or (b) issued an Order in the CCAA Case containing terms which the Administrative Agent, in consultation with the Steering Committee (as defined in the Plan), considers to be unacceptable and no Order in the CCAA Case (including the Initial Order) shall have been stayed, reversed or varied in whole or in part on terms which the Administrative Agent, in consultation with the Steering Committee, considers to be unacceptable.

Section 10.2 The LP Entities' Conditions

The obligations of the LP Entities under this Agreement are subject to the conditions set out in this Section 10.2 which are for the exclusive benefit of the LP Entities and all or any of which may be waived by the LP Entities in their sole discretion, by Notice given to Acquireco. Acquireco shall take all actions, steps and proceedings as are reasonably within its control to cause each of such conditions to be performed at or before the Acquisition Time.

(1) *Confirmation of Representation and Warranties*. All representations and warranties of Acquireco contained in this Agreement shall be true as of the Acquisition Date with the same effect as though made on and as of that date and

Acquireco shall have delivered to the LP Entities a certificate addressed to Acquireco to the foregoing effect dated the Acquisition Date.

(2) *Acquireco's Obligations*. Acquireco shall have performed each of its obligations under this Agreement in all material respects to the extent required to be performed on or before the Acquisition Date including delivery of all documents, instruments and other items specified elsewhere in this Agreement and delivery of the following:

(a) a certificate of compliance issued by the appropriate Governmental Authority in its jurisdiction of incorporation; and

(b) certified copies of (i) the articles and by laws of Acquireco; (ii) all resolutions of directors of Acquireco approving the entering into of this Agreement and the completion of the Acquisition; and (iii) a list of directors and officers Acquireco authorized to sign mis Agreement and any other documents required to be delivered hereunder.

(3) *Corporate Action*. All appropriate action of the directors and officers of Acquireco shall have been taken.

Section 10.3 Investment Canada Act

If the Heritage Minister makes a determination that Acquireco is not a "non-Canadian" within the meaning of the ICA, Acquireco shall have expeditiously completed and filed with the Investment Review Division of Industry Canada an application with respect to the review of the Acquisition and shall have obtained confirmation from the Minister of Industry (or such other minister as may be appointed under the ICA (the "*Minister*") under Sections 21, 22 or 23 of the ICA indicating that the Minister is, or is deemed to be, satisfied that the acquisition is likely to be of net benefit to Canada. The LP Entities shall provide such relevant information and documentation to assist with such notice or application as Acquireco may consider necessary or desirable to comply with the ICA.

ARTICLE 11 — SURVIVAL

Section 11.1 Survival

All provisions contained in this Agreement (other than under Section 6.4, Section 9.3 and Section 9.4) and in any other agreement, certificate or instrument executed and delivered hereunder shall merge immediately after the Acquisition and not survive past the Acquisition Time.

ARTICLE 12 — COMPLETION

Section 12.1 Completion

The completion of the Acquisition shall take place at the offices of McMillan LLP, Suite 4400, 181 Bay Street, Toronto, Ontario, at the Acquisition Time.

Section 12.2 Procedures

At the Acquisition Time, subject to the satisfaction or waiver by the relevant Party of the conditions set forth in Article 10, the LP Entities shall assign and transfer to Acquireco all right, title and interest in, to and under the Acquired Assets pursuant to the Sanction Order. To further evidence that the LP Entities have assigned and transferred to Acquireco all of their right, title and interest in, to and under the Acquired Assets, they shall execute and deliver to Acquireco:

(a) a general conveyance and assumption agreement in respect of the Acquired Assets and the Assumed Liabilities;

(b) deeds of sale or transfer in proper form for recording the conveyance of title to the Real Property (including deeds from Canwest Media Inc. in respect of the Real Properties municipally known as 2575 McCullough Road, Nanaimo, British Columbia and 4918 Napier Street, Port Alberni, British Columbia); and

(c) such other instruments of conveyance, assignment and transfer as are necessary to vest in Acquireco all of the LP Entities' right, title and interest in, to and under the Acquired Assets.

Section 12.3 Designated Acquireco

Prior to the Plan Implementation Date, Acquireco shall be entitled to designate one or more Affiliates to (i) acquire specified Acquired Assets; (ii) assume specified Assumed Liabilities; and/or (iii) employ specified Transferred Employees on or after the Acquisition Date (each a "*Designated Acquireco*"); provided such designation does not result in the elections contemplated in Section 6.1(4) ceasing to be available and provided each such Designated Acquireco agrees in writing to be bound jointly and severally with Acquireco by the terms of this Agreement.

ARTICLE 13 — TERMINATION

Section 13.1 Termination Rights

This Agreement may be terminated on or prior to the Acquisition Date:

(a) by mutual written agreement of the LP Entities and Acquireco;

(b) by Notice given by Acquireco to the LP Entities as permitted in Section 10.1 for failure of a condition to be satisfied if Acquireco has not waived such condition at or prior to the Acquisition Time;

(c) by Notice given by the LP Entities to Acquireco as permitted by Section 10.2 for failure of a condition to be satisfied if the LP Entities have not waived such condition at or prior to the Acquisition Time; and

(d) by Notice given by any Party of a specific right of termination to the other Party in this Agreement or if there has been a material breach of any provision of this Agreement by the other Party and such breach has not been waived by the non-breaching Party.

Section 13.2 Effect of Termination

(1) Each Party's right of termination under this Article 13 is in addition to any other rights it may have under this Agreement or otherwise, and the exercise of a right of termination will not be an election of remedies. Nothing in this Article limits or affects any other rights or causes of action any Party may have with respect to the representations, warranties, covenants and indemnities in its favour contained in this Agreement. If a Party waives compliance with any of the conditions, obligations or covenants contained in this Agreement, the waiver will be without prejudice to any of its rights of termination in the event of non-fulfilment, non-observance or non-performance of any other condition, obligation or covenant in whole or in part.

(2) If this Agreement is terminated pursuant to Section 13.1, all obligations of the Parties under this Agreement will terminate, except that if this Agreement is terminated by a Party because of a breach of this Agreement by the other Party or because a condition for the benefit of the terminating Party has not been satisfied because the other Party has failed to perform any of its obligations or covenants under this Agreement, the terminating Party's right to pursue all legal remedies will survive such termination unimpaired.

ARTICLE 14 — MISCELLANEOUS

Section 14.1 Planning Act

This Agreement shall be effective to create an interest in the Real Property located in Ontario only if the subdivision control provisions of the *Planning Act* (Ontario) are complied with by CPI.

Section 14.2 Further Assurances

Each Party shall from time to time promptly execute and deliver all further documents and take all further action necessary or appropriate to give effect to the provisions and intent of this Agreement and to complete the Acquisition, including cooperating to obtain such recognition orders of any order issued in connection with the CCAA Case as may reasonable be required.

Section 14.3 Notice

Unless otherwise specified, each Notice to a party must be given in writing and delivered personally or by courier, or transmitted by fax or email to the party as follows:

If to the LP Entities:

Name:	c/o Canwest Limited Partnership
Address:	1450 Don Mills Road Don Mills, Ontario M3B 2X7
Attention:	Doug Lamb, Executive Vice President and Chief Financial Officer
Fax No.:	416-442-2135
Email:	dlamb@canwest.com

with a required copy (which shall not constitute notice) to:

Name:	Osler, Hoskin & Harcourt LLP
Address:	100 King Street West 1 First Canadian Place Suite 6100 Toronto, Ontario M5X 1B8
Attention:	Edward Sellers
Fax no.:	416-862-6666
Email:	esellers@osler.com

If to Acquireco:

Name:	c/o The Bank of Nova Scotia
Address:	62nd Floor 40 King Street West, Scotia Plaza Toronto, Ontario M5W 2X6
Attention:	Robert King
Fax No.:	416-866-2010
Email:	rob_king@scotiacapital.com

with a required copy (which shall not constitute notice) to:

Name:	McMillan LLP
Address:	Brookfield Place Suite 4400, 181 Bay Street Toronto, Ontario M5J 2T3
Attention:	Andrew J.F. Kent

Fax No: 416-865-7048
Email: andrew.kent@mcmillan.ca

or to any other address, fax number or Person that the party designates. Any Notice, if delivered personally or by courier, will be deemed to have been given when actually received, if transmitted by fax before 3:00 p.m. on a Business Day, will be deemed to have been given on that Business Day, and if transmitted by fax after 3:00 p.m. on a Business Day, will be deemed to have been given on the Business Day after the date of the transmission.

Section 14.4 Time

Time shall be of the essence in all respects of this Agreement.

Section 14.5 Governing Law

This Agreement and each document contemplated by or delivered under or in connection with this Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario, and each of the Parties irrevocably attorns to the nonexclusive jurisdiction of the courts of Ontario.

Section 14.6 Entire Agreement

This Agreement and the attached Schedules constitute the entire agreement between the Parties with respect to the subject matter and supersede all prior agreements, negotiations discussions, undertakings, representations, warranties and understandings, whether written or oral. There are no representations, warranties, covenants, conditions or other agreements, express or implied, collateral, statutory or otherwise, between the Parties in connection with the subject matter of this Agreement, except as specifically set forth herein. The Parties are not relying on any other information, discussion or understanding in entering into this Agreement and completing the Acquisition.

Section 14.7 Amendment

No amendment, supplement, restatement or termination of any provision of this Agreement is binding unless it is in writing and signed by each Person that is a party to this Agreement at the time of the amendment, supplement, restatement or termination.

Section 14.8 Waiver

No waiver of any provision of this Agreement is binding unless it is in writing and signed by all the Parties to this Agreement entitled to grant the waiver. No failure to exercise, and no delay in exercising, any right or remedy, under this Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Agreement will be deemed to be a waiver of any subsequent breach of that provision.

Section 14.9 Severability

If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect:

(a) the legality, validity or enforceability of the remaining provisions of this Agreement; or

(b) the legality, validity or enforceability of that provision in any other jurisdiction.

Section 14.10 Remedies Cumulative

The rights and remedies under this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise. No single or partial exercise by a Party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that Party may be entitled.

Section 14.11 Assignment and Enurement

Other than one or more assignments by Acquireco to one or more Designated Acquireco(s), which shall not require the consent of the LP Entities, no Party may assign this Agreement without the prior written consent of the other Parties, which consent may not be unreasonably withheld or delayed. This Agreement enures to the benefit of and binds the Parties and their respective successors and permitted assigns.

Section 14.12 No Third Party Rights

This Agreement is not intended and shall not be construed to create any rights in any Person other than the Parties and no Person shall any rights as a third party beneficiary hereunder.

Section 14.13 Counterparts and Facsimile

This Agreement may be executed and delivered in any number of counterparts, each of which when executed and delivered is an original but all of which taken together constitute one and the same instrument. To evidence its execution of an original counterpart of this Agreement, a Party may send a copy of its original signature on the execution page hereof to the other Party by facsimile or electronic transmission and such transmissions shall constitute delivery of an executed copy of this Agreement to the receiving Party.

The Parties have executed this Agreement.

7272049 CANADA INC.

By: .....

Name: •

Title: •

By: .....

Name: •

Title: •

CANWEST BOOKS INC.

By:

. . . . .

Name: •

Title: •

By: .....

Name: •

Title: •

CANWEST (CANADA) INC.

By: .....

Name: •

Title: •

By: .....

Name: •

Title: •

CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC.

By: .....

Name: •

Title: •

By: .....

Name: •

Title: •

CANWEST LIMITED PARTNERSHIP / CANWEST SOCIÉTÉ EN COMMANDITE by its general partner *CANWEST (CANADA) INC.*

By: .....

Name: •

Title: •

By: .....

Name: •

Title: •

Schedule 1.1(20) — Business

Schedule 1.1(39) — CPI Leased Property Leases

Schedule 1.1(85) — Permitted Encumbrances

Schedule 1.1(100) — Real Property Leases

Schedule 3.1(3) — Excluded Assets

Schedule 7.2(1) — Other Acquisition Agreements

Schedule 7.2(2) — Consents and Regulatory Approvals

Schedule 7.3(8) — Bank Accounts and Authorizations

Schedule 7.4(2) — Title to Shares

Schedule 7.4(3) — No Other Acquisition Agreements

Schedule 7.5(2) — Real Property

Schedule 7.5(5)(a) — Environmental Matters

Schedule 7.5(6) — Personal Property

Schedule 7.5(7) — Personal Property Leases

Schedule 7.5(11) — Intellectual Property

Schedule 7.6(5) — Non-Arm's Length Interests

Schedule 7.6(6) — Contracts

Schedule 7.6(7) — Licences

Schedule 7.6(8) — Location of Assets

Schedule 7.7(1) — Employees

Schedule 7.7(2) — Remuneration

Schedule 7.7(3) — Labour Matters and Employee Contracts

Schedule 7.7(4) — Employment Laws

Schedule 7.8(1) — CPI Benefit Plans

Schedule 7.9(3) — Litigation

Schedule 7.5(9) — Plants, Facilities and Equipment

Schedule "1.1(43)" — CREDIT ACQUISITION SANCTION ORDER

See attached.

Court File No. 10-CL-.....

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE	)	
	)	
JUSTICE	)	....., 2010

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 AND ARRANGEMENT OF CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

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

CREDIT ACQUISITION SANCTION, APPROVAL AND VESTING ORDER

THIS MOTION, made by Canwest Publishing Inc. / Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (collectively, the "*Applicants*") for an Order approving and sanctioning the plan of compromise and arrangement dated January 8, 2010 and attached as Schedule "A" to this Order (the "*Plan*") and for ancillary relief associated with the implementation of the Plan, was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the report of FTI Consulting Canada Inc. (the "*Monitor*") dated •, 2010 (the "*Monitor's Report*"), and upon hearing submissions of counsel to the Applicants and Canwest Limited Partnership / Canwest Societe en Commandite ("*Canwest Limited Partnership*"), the Monitor, The Bank of Nova Scotia in its capacity as Administrative Agent for the Senior Lenders to Canwest Limited Partnership (the "*Administrative Agent*") and others:

DEFINITIONS

1. *THIS COURT ORDERS* that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed thereto in the Plan and/or the initial order (the "*Initial Order*") made by this Court under the *Companies' Creditors Arrangement Act* (the "*CCAA*") dated January 8, 2010.

SERVICE AND MEETING

2. *THIS COURT ORDERS AND DECLARES* that there has been good and sufficient service and notice of the Plan to all Senior Lenders.

3. *THIS COURT ORDERS* that there has been good and sufficient service of the Meeting Materials upon all Senior Lenders, and that the Senior Lenders Meeting was duly called, held and conducted in conformity with the CCAA and the Initial Order.

4. *THIS COURT ORDERS AND DECLARES* that there has been good and sufficient service and notice of this Sanction Hearing, and that this motion is properly returnable today and further service of the Notice of Motion and the Motion Record upon any interested party is unnecessary and is hereby dispensed with.

PLAN SANCTION

5. *THIS COURT ORDERS AND DECLARES* that:

(a) the Plan has been approved by the requisite majority of Senior Lenders of the Applicants and Canwest Limited Partnership (collectively, the "*LP Entities*") entitled to vote on the Plan in conformity with the CCAA and the terms of the Initial Order;

(b) the LP Entities have acted in good faith and with due diligence and have complied and acted in accordance with the provisions of the CCAA and the Orders of this Honourable Court made in these proceedings in all respects;

(c) this Honourable Court is satisfied that the LP Entities have not done or purported to do anything that is not authorized by the CCAA; and

(d) the Plan and the transactions contemplated thereby are fair and reasonable and are in the best interests of the Senior Lenders and do not unfairly prejudice the interests of any Person.

6. *THIS COURT ORDERS* that the Plan (including, without limitation, the Credit Acquisition, compromises, arrangements and releases set out therein) is hereby sanctioned and approved pursuant to Section 6 of the CCAA and, on the Credit Acquisition Plan Implementation Date (as defined below), shall be effective and shall enure to the benefit

of and be binding upon the LP Entities and the Senior Lenders, including their respective heirs administrators, executors, legal personal representatives, successors, and assigns but will not affect Unaffected Claims.

APPROVAL AND VESTING

7. *THIS COURT ORDERS AND DECLARES* the Acquisition and Assumption Agreement attached as Schedule "1.1(8)" to the Plan (the "*Acquisition Agreement*") is hereby approved, and that the transactions contemplated thereby (the "*Transactions*") are commercially reasonable and are fair and reasonable in respect of the LP Entities and their stakeholders. The execution of the Acquisition Agreement by the LP Entities is hereby authorized and approved without any requirement of further actions by shareholders, directors or officers of the LP Entities, and the LP Entities and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions and for the conveyance of the Acquired Assets to 7272049 Canada Inc. ("*Acquireco*") in accordance with the Plan and the Acquisition Agreement.

8. *THIS COURT ORDERS* that, upon being provided with evidence satisfactory to the Monitor of the satisfaction (or, where applicable, waiver) of the conditions set out in section 8.2 of the Plan, the Monitor shall deliver to the Administrative Agent and the LP Entities and promptly thereafter file with this Court a certificate stating that all conditions precedent set out in section 8.2 of the Plan have been satisfied (or, where applicable, waived by the LP Entities and/or the Administrative Agent in accordance with the terms of the Plan) (the "*Monitor's Certificate*"), and the date of the delivery of such certificate to the Administrative Agent and the LP Entities shall be the date upon which the Plan shall be and be deemed to have been implemented (the "*Credit Acquisition Plan Implementation Date*").

9. *THIS COURT ORDERS* that upon the filing of a Monitor's Certificate, the following shall take place, in the order in which they appear below and in accordance with the Plan:

(a) all right, title and interest in and to the Canwest Books Assets shall vest absolutely in CPI free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement (collectively, the "*Canwest Books Encumbrances*") and, for greater certainty, this Court orders that Canwest Books Encumbrances affecting or relating to the Canwest Books Assets are hereby expunged and discharged as against the Canwest Books Assets;

(b) all right, title and interest in and to the Canwest GP Assets shall vest absolutely in CPI free and clear of any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement (collectively, the "*Canwest GP Encumbrances*") and, for greater certainty, this Court orders that Canwest GP Encumbrances affecting or relating to the Canwest GP Assets are hereby expunged and discharged as against the Canwest GP Assets;

(c) all right, title and interest in and to the CLP Assets shall vest absolutely in CPI free and clear of any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts

(whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement (collectively, the "*CLP Encumbrances*") and, for greater certainty, this Court orders that CLP Encumbrances affecting or relating to the CLP Assets are hereby expunged and discharged as against the CLP Assets;

(d) the right, title and interest in and to the Senior Secured Claims (for greater certainty, net of amounts paid to the Senior Lenders under the terms of the Acquisition Agreement (defined herein) and the Plan on or before the Credit Acquisition Plan Implementation Date that would reduce the outstanding Senior Secured Claims) shall vest absolutely in Acquireco free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute (collectively, "*Senior Claim Encumbrances*") and, for greater certainty, this Court orders that Senior Claim Encumbrances affecting or relating to the Senior Secured Claims are hereby expunged and discharged as against the Senior Secured Claims; and

(e) all of the right, title and interest of any Person in and to the Acquired Assets described in the Acquisition Agreement shall vest absolutely in Acquireco, (including without limitation any amounts in the Cash Reserve Account that are not used by the Monitor in accordance with the Cash Reserve Order to pay Cash Reserve Costs), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "*Encumbrances*") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement and real property permitted encumbrances as set out in Schedule D and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Acquired Assets are hereby expunged and discharged as against the Acquired Assets.

10. *THIS COURT ORDERS* that in accordance with the Plan, the Acquireco Equity and the Acquireco Debt to be distributed in. respect of each Senior Lender's Senior Secured Claim (the "*Acquireco Debt/Equity*") shall stand in place and stead of such Senior Secured Claim and all Senior Claim Encumbrances on or against such Senior Secured Claim shall attach to and may be asserted against the Acquireco Debt/Equity with the same priority as has they had immediately prior to the implementation of the Plan, as if such Senior Secured Claim had not been transferred to Acquireco and had remained the property of such Senior Lenders immediately prior to the implementation of the Plan.

11. *THIS COURT ORDERS* that, without limiting the other provisions in this Order, on the Credit Acquisition Implementation Date, the license of the LP Entities to use the "Canwest" name and trademarks under a Trademarks License Agreement dated October 13, 2005 (the "*License*") shall be assigned to Acquireco and, following that assignment, Canwest Global Communications Corp. shall not be entitled to exercise any right of termination of the License unless the termination is to take effect after February 28, 2011.

REAL PROPERTY

Ontario

12. *THIS COURT ORDERS* that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) (the "*Toronto Land Registry Office*") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Toronto Property (as defined in Schedule B), the Land Registrar for the Toronto Land Registry Office is hereby directed to enter Acquireco as the owner of the Toronto Property in fee simple, and is hereby directed to delete and expunge from title to the Toronto Property all of the real property encumbrances relating to the Toronto Property, including but not limited to, the real property encumbrances listed in Schedule C, subject only to the real property permitted encumbrances relating to the Toronto Property listed in Schedule D.

13. *THIS COURT ORDERS* that upon registration in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) (the "*Ottawa Land Registry Office*") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Ottawa Property (as defined in Schedule B), the Land Registrar for the Ottawa Land Registry Office is hereby directed to enter Acquireco as the owner of the Ottawa Property in fee simple, and is hereby directed to delete and expunge from title to the Ottawa Property all of the real property encumbrances relating to the Ottawa Property, including but not limited to, the real property encumbrances listed in Schedule C, subject only to the real property permitted encumbrances relating to the Ottawa Property listed in Schedule *D*.

14. *THIS COURT ORDERS* that upon registration in the Land Registry Office for the Land Titles Division of Essex (No. 12) (the "*Windsor Land Registry Office*") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Windsor Properties (as defined in Schedule B), the Land Registrar for the Windsor Land Registry Office is hereby directed to enter Acquireco as the owner of the Windsor Properties in fee simple, and is hereby directed to delete and expunge from title to the Windsor Properties all of the real property encumbrances relating to the Windsor Properties, including but not limited to, the real property encumbrances listed in Schedule C, subject only to the real property permitted encumbrances relating to the Windsor Properties listed in Schedule D.

Alberta

15. THIS COURT ORDERS that, upon presentation for registration in either of the North Alberta Land Titles Office or the South Alberta Land Titles Office (collectively, the "*Alberta LTO*"), as the case may be, a certified copy of this Order and an Affidavit of Value as prescribed by the *Land Titles Act* (Alberta), the Alberta LTO be and is hereby authorized and directed to cancel the existing certificates of title to the Alberta Properties as defined in Schedule B and to issue new certificates of title for those Alberta Properties in the name of Acquireco. The Alberta LTO be and is hereby directed to delete and expunge from such new titles to the Alberta Properties all of the real property encumbrances relating to the Alberta Properties, including but not limited to the real property encumbrances listed on Schedule C, subject only to the real property permitted encumbrances relating to the Alberta Property listed in Schedule D being carried forward to the new Alberta Property titles.

16. THIS COURT ORDERS that the cancellation of titles and issuance of new titles and discharge of instruments as set out in paragraph 15 shall be registered notwithstanding the requirements of Section 191(1) of the *Land Titles Act* (Alberta).

British Columbia

17. THIS COURT ORDERS that, for greater certainty, those lands and premises defined in Schedule B hereto as the BC Properties (the "*BC Properties*") be sold to Acquireco, and that the BC Properties, together with all buildings, fixtures, systems, interests, licences, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, do vest

in Acquireco in fee simple, free from all encumbrances, subject nevertheless to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown, and subject to the real property permitted encumbrances relating to the BC Properties listed in Schedule D hereto, upon the filing of the Monitor's Certificate.

18. THIS COURT ORDERS that the BC Properties do vest in Acquireco as set out herein, and that all of the encumbrances registered against the titles to the BC Properties, including but not limited to the real property encumbrances relating to the BC Properties and listed in Schedule C hereto, but subject to the real property permitted encumbrances relating to the BC Properties listed in Schedule D hereto, be discharged immediately upon the registration in the appropriate Land Title Offices of a certified copy of the Order made upon this Motion, together with a letter from Bull, Housser & Tupper LLP, permitting registration of the Order made upon this Motion.

Saskatchewan

19. THIS COURT ORDERS that, pursuant to the Acquisition Agreement, upon payment of the required registration fee, the Registrar of Titles of the Saskatchewan Land Titles Registry is hereby authorized and directed pursuant to Section 109 of *The Land Titles Act, 2000* S.S. 2000, c. L-5.1 and Section 6.5 of *The Land Titles Conversion Facilitation Regulations*, c. L-5.1, Reg. 2 to cancel the existing titles to the Saskatchewan Properties identified in Schedule B and the new titles to such Saskatchewan Properties shall be issued in the name of Acquireco, free and clear of all real property encumbrances related to the Saskatchewan Properties listed in Schedule C, subject only to the real property permitted encumbrances related to the Saskatchewan Properties listed in Schedule D.

Quebec

20. THIS COURT ORDERS AND DIRECTS, in order to give effect to this Order prior to closing of the Transactions, CPI and Acquireco to enter into a deed of transfer with respect to the Quebec Property (as defined in Schedule B), upon the same terms and conditions substantially as those set forth in the draft deed of transfer attached hereto as Schedule E (the "*Deed of Transfer*"), which Deed of Transfer shall be effective upon the delivery of the Monitor's Certificate to Acquireco.

21. THIS COURT ORDERS AND DIRECTS, in order to give effect to this Order prior to closing of the Transaction, CIBC Mellon Trust Company to execute a deed of mainlevée with respect to the real property encumbrances listed in Schedule C relating to only the Quebec Property, subject only to the real property permitted encumbrances related to the Quebec Property listed in Schedule D (the "*Deed of Mainlevée*"), which Deed of Mainlevée shall be effective only upon the delivery of the Monitor's Certificate to Acquireco.

22. *THIS COURT ORDERS* that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the parties to the Acquisition Agreement are authorized and permitted to disclose and transfer to Acquireco all human resources and payroll information in the LP Entities' records pertaining to the LP Entities' past and current employees. The recipient of such information shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the applicable party to the Acquisition Agreement.

23. *THIS COURT ORDERS* that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the LP Entities or any of the Senior Lenders (herein collectively the "*Vesting Entities*") and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Vesting Entities;

(i) the entering into of the Acquisition Agreement; (ii) the vesting of rights, titles and interests as set out in paragraph 9 above and (iii) the assignment of the Contracts (as defined below) pursuant to this Order, shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Vesting Entities and shall not be void or voidable by creditors of any of the Vesting Entities, nor shall any of them constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or transfer at undervalue under the *Bankruptcy and Insolvency Act* (Canada), the CCAA or any other applicable federal or provincial legislation, nor shall any of them constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

24. *THIS COURT ORDERS AND DECLARES* that the Plan, the Credit Acquisition and the other transactions contemplated thereby are exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent or applicable legislation under any other province or territory in Canada.

PLAN IMPLEMENTATION

25. *THIS COURT ORDERS* that the LP Entities, Acquireco, the Administrative Agent, the Collateral Agent (as defined below) and the Monitor are hereby authorized and directed to take all steps and actions and execute such additional documents as may be necessary or appropriate (as determined by each party in consultation with the other parties) to implement the Plan, the Credit Acquisition and the Transactions in accordance with and subject to their terms and such steps and actions are hereby approved.

SENIOR SECURED CLAIMS

26. *THIS COURT ORDERS* that, without limiting the Initial Order, the Principal amount of the Senior Secured Claims shall be determined in accordance with the claims process set out at paragraph 68 of the Initial Order. To the extent that any Senior Lender (the "*Claimant*") asserts a claim in respect of Other Amounts that arose after the Filing Date but prior to the date of this Order (a "*Post-Filing Other Amounts Claim*"):

(a) such Claimant shall within ten (10) Business Days from the making of this Order, send to the Monitor (with a copy to the LP Entities and the Administrative Agent) a notice (the "*Claim Notice*") setting out the amount of its Post-Filing Other Amounts Claim in the form attached hereto as Schedule "F". If no such notice is received by the Monitor from the Claimant within ten (10) Business Days of the making of this Order, the Claimant's Post-Filing Other Amounts Claim shall be and is hereby extinguished and forever barred;

(b) if the Monitor, with the consent of the Administrative Agent acting in consultation with the Steering Committee, confirms the Post-Filing Other Amounts Claim set out in the Claim Notice or if the Monitor, with the consent of the Administrative Agent acting in consultation with the Steering Committee, does not deliver a Notice of Dispute, indicating that the Monitor disputes the Post-Filing Other Amounts Claim within five (5) Business Days of receipt of the Claim Notice, then the amount set out in the Claim Notice shall be deemed to be finally determined ("*Finally Determined*") and accepted for the purpose of calculating the Claimant's entitlement to distributions under the Senior Lenders CCAA Plan;

(c) if the Monitor delivers a Notice of Dispute in accordance with subparagraph (b) above, then the Monitor, the Administrative Agent and the particular Senior Lender shall have five (5) Business Days from the date of delivery of the Notice of Dispute to reach an agreement in writing as to the Post-Filing Other Amounts Claim that is subject to the Notice of Dispute, in which case such agreement shall govern and the Post-Filing Other Amounts Claim shall be deemed to be Finally Determined in accordance with the agreement;

(d) if a Notice of Dispute is unable to be resolved in the manner and within the time period set out in subparagraph (c) above, then the Claim of such Claimant shall be determined by the Court on a motion for advice and directions brought by the Monitor (the "*Dispute Motion*") on notice to the Administrative Agent and all other interested parties. The Monitor and the Claimant shall each use reasonable efforts to have the Dispute Motion, and any

appeals therefrom, disposed of on an expedited basis with a view to having the Post-Filing Other Amounts Claim of the Claimant Finally Determined on a timely basis.

If there are any Senior Secured Claims (including for greater certainty, for Principal or Other Amounts) or any portion thereof that have not been Finally Determined pursuant to the terms of the Initial Order or this Order (an "*Unresolved Senior Claim*"), as of the Credit Acquisition Plan Implementation Date, the Monitor shall establish a Unresolved Senior Claims Reserve. The Unresolved Senior Claims Reserve shall be comprised of Acquireco Debt, Acquireco Equity and cash reserved out of the LP Entity Cash and Cash Equivalents. The aggregate value of the Acquireco Debt and Acquireco Equity to be included in the Unresolved Senior Claims Reserve shall be equal to the value of Acquireco Debt and Acquireco Equity that would have been distributed in respect of the Unresolved Senior Claims if the full amounts of such Unresolved Senior Claims were Proven Senior Secured Claims on the Credit Acquisition Plan Implementation Date. The aggregate amount of the cash to be included in the Unresolved Senior Claims Reserve shall be equal to the amount of all Unpaid Interest on Unresolved Senior Claims as of the Credit Acquisition Plan Implementation Date that would have been paid to the Senior Lenders holding such Unresolved Senior Claims if the full amounts of such Unresolved Senior Claims were Proven Senior Secured Claims on the Credit Acquisition Plan Implementation Date.

27. *THIS COURT ORDERS* that provided that the Monitor receives from the LP Entities and Acquireco, respectively, the cash and Acquireco Debt and Acquireco Equity required for the Monitor to establish the Unresolved Senior Claims Reserve in accordance with the Plan, not later than fifteen days (or such later date as may be specified by Order of the Court) following the Final Determination Date, the Monitor shall distribute from the Unresolved Senior Claims Reserve:

(a) to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet, Acquireco Debt and Acquireco Equity in respect of any Senior Secured Claims that were Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date and that subsequently became Proven Senior Secured Claims, together with any interest, dividends, distributions or other payments actually received by the Monitor on account or in respect thereof;

(b) following the distribution referred to in subparagraph (a) above, any balance of Acquireco Debt and Acquireco Equity that forms part of the Unresolved Senior Claims Reserve shall be distributed to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet such that all Acquireco Debt and Acquireco Equity shall have been distributed in accordance with the Plan and the Acquireco Capitalization Term Sheet and any interest, distributions or other payments actually received by the Monitor on account or in respect of the Acquireco Debt and Acquireco Equity referred to in this subparagraph (b) shall be distributed to the Persons receiving the applicable Acquireco Debt or Acquireco Equity pursuant to this subparagraph (b),

(c) to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet, cash in an amount equal to the aggregate amount of all Unpaid Interest on Senior Secured Claims that were Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date that subsequently became Proven Senior Secured Claims, together with any interest actually received by the Monitor on account or in respect thereof, and following this distribution, any balance of cash that forms part of the Unresolved Senior Claims Reserve together with any interest actually received by the Monitor on account or in respect thereof shall be paid to Acquireco.

For the purposes of calculating the various distributions to be made pursuant to this paragraph 25, each Senior Lender's Pro Rata Share shall be calculated as if (i) the Senior Secured Claims that became Proven Senior Secured Claims after the Credit Acquisition Plan Implementation Date were Proven Senior Secured Claims and not Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date, (ii) the Unresolved Amount was zero as of the Credit Acquisition Plan Implementation Date, and (iii) Unpaid Interest on Senior Secured Claims that became Proven Senior Secured Claims after the Credit Acquisition Plan Implementation Date was paid on the Credit Acquisition Plan Implementation Date.

EFFECT OF PLAN IMPLEMENTATION

28. *THIS COURT ORDERS* that, effective on the Credit Acquisition Plan Implementation Date each Senior Secured Claim shall be dealt with in accordance with the Plan and the ability of the holder of a Senior Secured Claim (other than Acquireco) to proceed against the LP Entities or the LP Property (including any amounts now or hereafter held by the Monitor in respect of the LP Entities) in respect of a Senior Secured Claim and all suits, actions, proceedings or other enforcement processes by the holder of a Senior Secured Claim (other than Acquireco) with respect to, in connection with or relating to such Senior Secured Claims are permanently stayed and restrained, subject only to the right of the holder of such a Senior Secured Claim to receive distributions in accordance with the Plan.

29. *THIS COURT ORDERS AND DECLARES* that, effective on the Credit Acquisition Plan Implementation Date, all Senior Secured Claims determined in accordance with the Plan, the Initial Order and this Order are final and binding on the LP Entities, the Monitor and all Senior Lenders and that, as of the Credit Acquisition Plan Implementation Date, the Plan shall enure to the benefit of and be binding upon the Senior Lenders and all other Persons affected thereby and their respective heirs, administrators, executors, legal personal representatives, successors and assigns.

30. *THIS COURT ORDERS* that, except as provided in the terms of the Plan and subject to the restrictions in Section 11.3 of the CCAA, the LP Entities are authorized and directed to assign all contracts, leases, agreements and other arrangements of which Acquireco takes an assignment on closing pursuant to the terms of the Acquisition Agreement (the "*Contracts*") and that such assignments are hereby approved and are valid and binding upon the counterparties notwithstanding any restriction or prohibition on assignment contained in any such Contract.

31. *THIS COURT ORDERS* that from and after the Credit Acquisition Plan Implementation Date, subject to the CCAA, all Persons shall be deemed to have waived all defaults then existing or previously committed by the LP Entities under, or caused by the LP Entities under, and the non-compliance by the LP Entities with, any of the Contracts arising solely by reason of the insolvency of the LP Entities or as a result of any actions taken pursuant to the Plan or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or non-compliance with, the Contracts shall be deemed to have been rescinded and shall be of no further force or effect.

ROLE OF THE MONITOR

32. *THIS COURT ORDERS* that, notwithstanding any other terms of this Order or of the Plan, the appointment of the Monitor pursuant to the terms of prior Orders made by this Honourable Court shall not expire or terminate on the Credit Acquisition Plan Implementation Date and shall continue for purposes of the following:

(a) the completion by the Monitor of all of its duties in connection with the Plan; and

(b) the completion by the Monitor of all other matters for which it is responsible in these proceedings and pursuant to the Plan, the Initial Order and the CCAA.

33. *THIS COURT ORDERS* that all claims of any Person, whether such claims are direct, indirect, derivative or otherwise, against the Monitor arising from or relating to the services provided by the Monitor in respect of the LP Entities prior to the date of this Order, save and except claims of gross negligence or wilful misconduct, shall be and are hereby forever barred from enforcement and are extinguished.

34. *THIS COURT ORDERS* that the Monitor shall be discharged of its duties and obligations with respect to the LP Entities pursuant to the Plan, this Order and all other Orders made in these proceedings with respect to the LP Entities from time to time upon the filing with this Honourable Court of a certificate of the Monitor certifying that the matters set out in paragraph 33 above are completed to the best of the Monitor's knowledge.

35. *THIS COURT ORDERS* that the Monitor's Report together with all exhibits and appendices thereto and the activities of the Monitor described therein are accepted and approved.

36. *THIS COURT ORDERS* that the Monitor's fees and disbursements, including the fees and disbursements of its counsel as set forth in the Reports of the Monitor filed with this Court, are approved.

CHARGES

37. *THIS COURT ORDERS* that, on the Credit Acquisition Plan Implementation Date following the making of the Cash Reserve Order and the establishment of the Cash Reserve in accordance with the Plan, all charges against the LP Entities or the LP Property created by the Initial. Order or any subsequent Orders shall be terminated, discharged and released.

38. *THIS COURT ORDERS AND DECLARES* that, notwithstanding any of the terms of the Plan or this Order, the LP Entities shall not be released or discharged from its obligations to pay the fees and expenses of the Monitor, the Monitor's counsel or the LP Entities' counsel in respect of the Plan and the implementation thereof, which obligations shall be in addition to any such obligations under the Plan.

RELEASES. EXCULPATION AND LIMITATION OF LIABILITY

39. *THIS COURT ORDERS* that on the Credit Acquisition Plan Implementation Date, the LP Entities shall be deemed to have released each of the Senior Lenders, each individual, corporation or other entity that was at any time a Senior Lender, each member and former member of the Steering Committee or any other committee of holders of Senior Secured Claims, the Administrative Agent, the DIP Lenders, Acquireco and the Collateral Agent, and their respective agents, affiliates, directors, officers, employees, and representatives, including counsel and its financial advisor (collectively, the "*Indemnitees*") and the Monitor, from any and all claims, obligations, rights, causes of action, and liabilities, of whatever kind or nature, whether based on contract, negligence or other tort, fiduciary duty, common law, equity, statute or otherwise, whether known or unknown, whether foreseen or unforeseen, arising on or before the Credit Acquisition Implementation Date (other than any claims, obligations, rights, causes of action, and liabilities arising from fraud as determined by a final judgment of a court of competent jurisdiction) which such LP Entities may have for, upon or by reason of any matter, cause or thing whatsoever, which are based upon, arise under or are related to the Senior Credit Agreement, Hedging Agreements, Collateral Agency Agreement or Senior Secured Claims.

40. *THIS COURT ORDERS* that on the Credit Acquisition Plan Implementation Date the Senior Lenders shall be deemed to have released the Monitor and the present and former officers and directors of the LP Entities from any and all claims, obligations, rights, causes of action, and liabilities, of whatever kind or nature, whether known or unknown, whether foreseen or unforeseen, arising on or before the Credit Acquisition Plan Implementation Date, which such Senior Lenders may have for, upon or by reason of any matter, cause or thing whatsoever, which are based upon, arise under or are related to the Senior Credit Agreement, Hedging Agreements, Collateral Agency Agreement or Senior Secured Claims, provided that nothing herein will release any of the present or former officers or directors of the LP Entities in respect of any claim, obligations right, cause of action, or liability referred to in section 5.1(2) of the CCAA.

41. *THIS COURT ORDERS* that none of the LP Entities, the Monitor, the Administrative Agent, the Senior Lenders, Acquireco, any individual, corporation or other entity that was at any time formerly a Senior Lender, the Steering Committee or any other committee of holders of Senior Secured Claims, the DIP Lenders, Collateral Agent, or any of their respective present or former members, officers, directors, employees, direct or indirect advisors, attorneys, or agents, shall have or incur any liability to any holder of a Senior Secured Claim, or any of their respective agents, employees, representatives, financial advisors, attorneys, or affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of, the LP Entities' CCAA proceedings initiated by the Initial Order, formulating, negotiating or implementing the Plan or the Support Agreement, the solicitation of acceptances of the Plan or the Support Agreement, the pursuit of confirmation of the Plan, the confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for their wilful misconduct, and in all respects shall be entitled to rely reasonably upon the advice of counsel with respect to their duties and responsibilities under the Plan.

42. *THIS COURT ORDERS* that the LP Entities hereby jointly and severally fully indemnify each of the Indemnitees against any manner of actions, causes of action, suits, proceedings, liabilities and claims of any nature, costs and expenses (including reasonable legal fees) which may be incurred by such Indemnitee or asserted against such Indemnitee arising out of or during the course of, or otherwise in connection with or in any way related to, the negotiation, preparation, formulation, solicitation, dissemination, implementation, confirmation and consummation of the Plan, other than any liabilities to the extent arising from the gross negligence or willful or intentional misconduct of any Indemnitee or any breach by Acquireco of the terms of the Acquisition Agreement as determined by a final judgment of a court of competent jurisdiction. If any claim, action or proceeding is brought or asserted against an Indemnitee in respect of which indemnity may be sought from any of the LP Entities, the Indemnitee shall promptly notify the LP Entities in writing, and the LP Entities may assume the defence thereof, including the employment of counsel reasonably satisfactory to the Indemnitee, and the payment of all costs and expenses. The Indemnitee shall have the right to employ separate counsel in any such claim, action or proceeding and to consult with the LP Entities in the defence thereof and the fees and expenses of such counsel shall be at the expense of the LP Entities unless and until the LP Entities shall have assumed the defence of such claim, action or proceeding. If the named parties to any such claim, action or proceeding (including any impleaded parties) include both the Indemnitee and any of the LP Entities, and the Indemnitee reasonably believes that the joint representation of such entity and the Indemnitee may result in a conflict of interest, the Indemnitee may notify the LP Entities in writing that it elects to employ separate counsel at the expense of the LP Entities, and the LP Entities shall not have the right to assume the defence of such action or proceeding on behalf of the Indemnitee. In addition, the LP Entities shall not affect any settlement or release from liability in connection with any matter for which the Indemnitee would have the right to indemnification from the LP Entities, unless such settlement contains a full and unconditional release of the Indemnitee, or a release of the Indemnitee satisfactory in form and substance to the Indemnitee.

EXTENSION OF STAY PERIOD

43. *THIS COURT ORDERS* that the Stay Period (as defined in paragraph 21 of the Initial Order) is hereby extended until the Credit Acquisition Plan Implementation Date.

44. *THIS COURT ORDERS* that, except to the extent that the Initial Order has been varied by or is inconsistent with this Order, the Plan or any other Order in these proceedings, the provisions of Initial Order shall remain in full force and effect until the Credit Acquisition Plan Implementation Date, when all but paragraphs 65-97 of the Initial Order shall terminate. Notwithstanding the termination of certain provisions of the Initial Order, the Monitor shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in its favour, except as varied herein.

45. *THIS COURT ORDERS* that paragraphs 65-97 of the Initial Order and all other Orders made in these CCAA proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by or inconsistent with this Order or any further Order of this Honourable Court.

OTHER PROVISIONS

46. *THIS COURT ORDERS* that this Court shall retain jurisdiction in respect of any matter in dispute arising out of anything relating to the interpretation or implementation of the Plan.

47. *THIS COURT ORDERS* that the LP Entities, the Monitor, Acquireco or the Administrative Agent may apply to this Honourable Court for further advice, directions or assistance as may be necessary to give effect to the terms of the Plan.

48. *THIS COURT ORDERS* that this Order shall have full force and effect in all provinces and territories in Canada and abroad and as against all other Persons against whom it may otherwise be enforceable.

49. *THIS COURT HEREBY REQUESTS* the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the LP Entities,

the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the LP Entities 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 LP Entities and the Monitor and their respective agents in carrying out the terms of this Order.

50. *THIS COURT ORDERS* that each of the LP Entities, the Monitor, Acquireco and the Administrative Agent 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 that 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.

51. *THIS COURT ORDERS* that this Order shall be posted on the website maintained by the Monitor and shall only be required to be served upon those parties who have either formally entered an appearance in these proceedings or those parties who appeared at the hearing of the motion for this Order.

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Schedule "A" — Plan of Compromise and Arrangement

See Attached

Schedule "B"

[NTD: List of legal descriptions to be added prior to the application for the Sanction Order for each of the properties listed below.]

Toronto Property

Ottawa Property

Windsor Property

Alberta Properties

BC Properties

Saskatchewan Properties

Quebec Properties

Schedule "C"

[NTD: List of Real Properties Encumbrances to be added prior to the application for the Sanction Order for each of the properties listed below.]

Toronto Property

Ottawa Property

Windsor Property

Alberta Properties

BC Properties

Saskatchewan Properties

Quebec Properties

Schedule "D"

[NTD: List of Real Properties Permitted Encumbrances to be added prior to the application for the Sanction Order for each of the properties listed below.]

Toronto Property

Ottawa Property

Windsor Property

Alberta Properties

BC Properties

Saskatchewan Properties

Quebec Properties

Schedule "E"

[NTD: Insert form of draft deed of transfer for Quebec Property prior to application for the Sanction Order.]

Schedule "E"

[NTD: Insert form of draft deed of transfer for Quebec Property prior to application for the Sanction Order.]

Schedule "C"

Court File No. [•]

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 CANWEST PUBLISHING INC/PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. and CANWEST (CANADA) INC. APPLICANTS

NOTICE OF CLAIM — SYNDICATE CLAIMS AND PRO RATA NOTICE

TO: CANWEST LIMITED PARTNERSHIP, on behalf of the LP Entities

COPY TO: SENIOR LENDERS (by way of posting to Senior Lenders Website)

COPY TO: FTI Consulting Canada Inc., Monitor of the LP Entities

This notice is issued pursuant to the Senior Lenders Claims Process for Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (the "*Applicants*") and Canwest Limited Partnership (collectively, with the Applicants, the "*LP Entities*") approved by the Order of the Honourable Madam Justice Pepall granted January

8, 2010 (the "*Initial Order*"). Capitalized terms used herein are as defined in the Initial Order unless otherwise noted. A copy of the Initial Order can be obtained from the website of FTI Consulting Canada Inc., the Monitor of the LP Entities, at *http://cfcanada.fticonsulting.com/clp*.

The Agent sets out below the aggregate amount of the Syndicate Claims [1] , against the following LP Entities, based upon its records:

LP Entity	***Amount***
Canwest Limited Partnership	[•]
Canwest Publishing Inc./Publications Canwest Inc.	[•]
Canwest Books Inc.	[•]
Canwest (Canada) Inc.	[•]

Each Senior Lender's *pro rata* share of the Syndicate Claims as at the Filing Date, based upon the Agent's records, is set out in Schedule "A" attached hereto.

If you agree with the amounts set out in this Notice of Claim - Syndicate Claims and Pro Rata Notice, you are not required to respond. If you disagree with the amounts set out in this Notice of Claim - Syndicate Claims and Pro Rata Notice, you must deliver a Notice of Dispute -Syndicate Claims and Pro Rata Notice to the Monitor (with a copy to the Agent), by no later than 5:00 pm (Toronto time) on January 19, 2010.

IF YOU FAIL TO DELIVER A NOTICE OF DISPUTE OF SYNDICATE CLAIMS AND PRO RATA NOTICE BY 5:00 PM (TORONTO TIME) ON JANUARY 19, 2010, THEN YOU SHALL BE DEEMED TO HAVE ACCEPTED THE AMOUNTS DESIGNATED AS THE AGGREGATE AMOUNT OF THE SYNDICATE CLAIMS SET OUT IN THIS NOTICE OF CLAIM - SYNDICATE CLAIMS AND PRO RATA NOTICE AS THE AGGREGATE AMOUNT OF THE SYNDICATE CLAIMS AGAINST THE LP ENTITIES AND YOU SHALL BE DEEMED TO HAVE ACCEPTED THE AMOUNT DESIGNATED AS EACH SENIOR LENDER'S PRO RATA SHARE OF THE SYNDICATE CLAIMS SET OUT IN THIS NOTICE OF CLAIM - SYNDICATE CLAIMS AND PRO RATA NOTICE AS THE PROVEN SENIOR SECURED CLAIM OF SUCH SENIOR LENDER FOR THE PURPOSES OF VOTING AND DISTRIBUTION UNDER THE SENIOR LENDERS CCAA PLAN.

DATED at Toronto, this 12th day of January, 2010.

THE BANK OF NOVA SCOTIA, in its capacity as Administrative Agent

Scotia Plaza

40 King Street West

Box 4085

Station "A"

Toronto, Ontario

M5N 2X6

Attention: Rob King

Fax: 416-866-2010

Email: rob_king@scotiacapital.com

Schedule "A" — SENIOR LENDER'S PRO RATA SHARE OF SYNDICATE CLAIMS

SEE ATTACHED

Schedule "D"

Court File No. [•]

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 CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. and CANWEST (CANADA) INC. APPLICANTS

NOTICE OF DISPUTE — SYNDICATE CLAIMS AND PRO RATA NOTICE

1. Particulars of the Disputing Claimant [2] :

(a) Canwest Limited Partnership by its general partner, Canwest (Canada) Inc. on behalf of the LP Entities.

or,

(b) Senior Lender

(i) Full legal name: .....
(ii) Full Mailing Address .....
.....
.....
(iii) Telephone Number: .....
(iv) Facsimile: .....
(v) E-mail Address: .....
(vi) Attention: .....

2. *DISPUTE OF VALUATION OF SYNDICATE CLAIMS:*

The Disputing Claimant disputes the amounts set out in the Notice of Claim - Syndicate Claims and Pro Rata Notice.

3. *REASONS FOR DISPUTE:*

(Provide full particulars of the dispute, including the amount in dispute, the reasons for dispute and supporting documentation)

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THIS NOTICE OF DISPUTE - SYNDICATE CLAIMS AND PRO RATA NOTICE MUST BE RETURNED TO AND RECEIVED BY THE MONITOR WITH A COPY TO THE AGENT BY NO LATER THAN 5:00 PM (TORONTO TIME) ON JANUARY 19, 2010 AT THE FOLLOWING ADDRESS OR FACSIMILE:

TO:

FTI CONSULTING CANADA INC., in its capacity as Monitor of the LP Entities

TD Waterhouse Tower

79 Wellington Street West

Suite 2010, P.O. Box 104

Toronto, Ontario, M5K 1G8

Attention: Jodi Porepa

Telephone: 416-649-8070

Fax: 416-649-8101

Email: jodi.porepa@fticonsulting.com

COPY TO:

THE BANK OF NOVA SCOTIA, in its capacity as Administrative Agent

Scotia Plaza

40 King Street West

Box 4085

Station "A"

Toronto, Ontario

M5N 2X6

Attention: Rob King

Fax: 416-866-2010

Email: rob_king@scotiacapital.com

Dated at ..... this ..... day of ....., 2010

Per: .....

Schedule "E"

Court File No. [•]

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 CANWEST PUBLISHING INC/PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. and CANWEST (CANADA) INC. APPLICANTS

NOTICE OF CLAIM — HEDGING AGREEMENTS

TO: [insert name of Hedging Creditor]

COPY TO: FTI Consulting Canada Inc., in its capacity as Monitor

COPY TO: Bank of Nova Scotia, in its capacity as Administrative Agent

This notice is issued pursuant to the Senior Lenders Claim Process for Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (the "*Applicants*") and Canwest Limited Partnership (collectively, with the Applicants, the "*LP Entities*") approved by the Initial Order of the Honourable Madam Justice Pepall granted January 8, 2010 (the "*Initial Order*"). Capitalized terms used herein are as defined in the Initial Order unless otherwise noted. A copy of the Initial Order can be obtained from the website of FTI Consulting Canada Inc., the Monitor of the LP Entities, at http://cfcanada.fticonsulting.com/clp.

According to the books and records of the LP Entities, the Principal amount of your Senior Secured Claim [3] pursuant to one or more Hedging Agreements against the LP Entity(ies) (the "Hedging Claim") is:

Entity	**Amount**
[•]	[•]

Such Hedging Claim bears interest at the rate of .....% per annum (the "Interest Rate").

If you agree with the Principal amount of the Hedging Claim and the Interest Rate, you need not respond to this Notice. If you disagree with the Principal amount of the Hedging Claim or the Interest Rate as set out herein, you must deliver a Notice of Dispute - Hedging Agreements to the Monitor, by no later than 5:00 pm (Toronto time) on January 19, 2010.

IF YOU FAIL TO DELIVER A NOTICE OF DISPUTE - HEDGING AGREEMENTS BY 5:00 PM (TORONTO TIME) ON JANUARY 19, 2010, THEN YOU SHALL BE DEEMED TO HAVE ACCEPTED THE PRINCIPAL AMOUNT OF THE HEDGING CLAIM AND THE INTEREST RATE FOR THE PURPOSES OF VOTING AND DISTRIBUTION UNDER THE SENIOR LENDERS CCAA PLAN.

DATED at Toronto, this 12th day of January, 2010.

Canwest Limited Partnership, by its general partner Canwest (Canada) Inc., on behalf of the LP Entities.

Address: [•]

Attention: [•]

Telephone: [•]

Fax: [•]

Email: [•]]

Schedule "F"

Court File No. [•]

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 CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. and CANWEST (CANADA) INC. APPLICANTS

NOTICE OF DISPUTE — HEDGING AGREEMENTS

1. Particulars of the Disputing Claimant [4]

(a)	Full legal name:	.....
(b)	Full Mailing Address	.....
		.....
		.....
(c)	Telephone Number:	.....
(d)	Facsimile:	.....
(e)	E-mail Address:	.....
(f)	Attention:	.....

2. DISPUTE OF NOTICE OF CLAIM - HEDGING AGREEMENTS:

Insert as applicable:

The Disputing Claimant disagrees with the Principal amount of its Senior Secured Claim pursuant to one or more Hedging Agreements as set out in the Notice of Claim — Hedging Agreements dated January 12, 2010 delivered to it.

The Disputing Claimant disagrees with the Interest Rate as set out in the Notice of Claim — Hedging Agreements dated January 12, 2010 delivered to it.

3. REASONS FOR DISPUTE:

(Provide full particulars of dispute, including amount in dispute, the reasons for dispute and supporting documentation)

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.....

THIS NOTICE OF DISPUTE - HEDGING AGREEMENTS MUST BE RETURNED AND RECEIVED BY THE MONITOR BY NO LATER THAN 5:00 PM (TORONTO TIME) ON JANUARY 19, 2010 AT THE FOLLOWING ADDRESS OR FACSIMILE:

FTI Consulting Canada Inc., Monitor of Canwest Publishing Inc./Publications Canwest Inc. et al. Claims Process

TD Waterhouse Tower

79 Wellington Street West

Suite 2010, P.O. Box 104

Toronto, Ontario, M5K 1G8

Attention: Jodi Porepa

Telephone: 416-649-8070

Fax: 416-649-8101

Email: jodi.porepa@fticonsulting.com

Dated at ..... this ..... day of ....., 2010

Per: .....

Schedule "G"

Form of Proxy

CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. CANWEST (CANADA) INC. AND CANWEST LIMITED PARTNERSHIP

PROXY FOR USE AT THE SENIOR LENDERS MEETING TO BE HELD AT [9:00 A.M.], ON JANUARY 27, 2010 AT [LOCATION], AND AT ANY ADJOURNMENT THEREOF

All capitalized terms not otherwise defined herein shall have the meanings given to them in the Plan of Compromise and Arrangement of Canwest Publishing Inc. / Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) Inc. and Canwest Limited Partnership (collectively, the "LP Entities") initially filed January[8], 2010 (the "*Plan*") or the initial order under the *Companies' Creditors Arrangement Act* (the "*CCAA*") dated January *[8]*, 2010 as applicable.

The undersigned Senior Lender hereby revokes any and all proxies previously given and appoints *[Paul Bishop]* of FTI Consulting Canada Inc., in its capacity as Monitor or, instead of the foregoing, ... with power of substitution as proxyholder for and on behalf of the undersigned at the Senior Lenders Meeting to be held on January 27, 2010 at [*LOCATION*], in Toronto, Ontario, at *[9:00 a.m.]*, (Toronto time) and at any adjournment or postponement thereof and on every ballot that may take place in consequence thereof. Without limiting the general powers hereby conferred, the undersigned hereby directs the said proxy to cast all votes of the undersigned in the manner indicated below:

1. With respect to the approval of the Plan (mark one only):

   VOTE FOR APPROVAL OF THE PLAN [ ]; OR

   VOTE AGAINST APPROVAL OF THE PLAN [ ]

2. At the discretion of the said proxy, on any variation or amendment to the Plan or on any other matters that may properly come before the Senior Lenders Meeting or any adjournment thereof.

This form of proxy is solicited on behalf of the LP Entities.

NOTE: THIS PROXY MUST BE DEPOSITED WITH THE MONITOR IN ADVANCE OF THE MEETING IN ACCORDANCE WITH THE DEADLINES INDICATED BELOW UNDER THE INSTRUCTIONS FOR COMPLETION OF PROXY

EXECUTED on the..... day of ....., 2010.

.....

Signature of Creditor

.....

Name of Creditor *(Please print clearly)*

.....

Address

.....

City/Province/Postal Code

Instructions for Completion of Prosy:

1. Each Senior Lender with an Accepted Senior Secured Claim has the right to appoint an individual or individuals (who need not be a Creditor) other than [Paul Bishop], to attend and act for him or her and on his or her behalf at the Senior Lenders Meeting. In order to do so, the name of the Senior Lender's nominee(s) must be legibly printed in the blank space provided above, or another appropriate instrument of proxy may be submitted.

2. This form of proxy must be signed by the Senior Lender, or such Senior Lender's lawyer duly authorized in writing or, if such Senior Lender is a corporation by an officer or lawyer thereof duly authorized. Persons signing as executors, administrators, trustees, etc. should so indicate and give their full title as such. A partnership should sign in the partnership name by an authorized persons(s). A person signing on behalf of a Senior Lender must provide satisfactory proof of such authority with this proxy.

3. To be voted at the Senior Lenders Meeting or any adjournment thereof, this proxy must be deposited with the Monitor at FTI Consulting Canada Inc., c/o Jodi Porepa, TD Waterhouse Tower, 79 Wellington St West, Suite 2010, P.O. Box 104, Toronto, Ontario, M5K 1G8 or by facsimile at (416) 649-8101, not later than 5:00 pm Toronto time on January 25, 2010 or 2 days prior to any adjournment of the Senior Lenders Meeting.

4. This proxy should be dated and signed. If this proxy is not dated, it shall be deemed to bear the date on which it was received.

5. Senior Lenders requiring assistance with completion of proxy documentation may call 1-888-310-7626 to request assistance of the Monitor.

Note: This proxy will only be effective if the Senior Lender has established a right to vote at the Senior Lenders Meeting in accordance with the Plan or the Initial Order.

Schedule "H"

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.,

NOTICE TO SENIOR LENDERS OF PLAN OF COMPROMISE AND ARRANGEMENT AND THE SENIOR LENDERS MEETING

Notice of CCAA Proceeding

NOTICE IS HEREBY GIVEN that, Canwest Publishing Inc. / Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (collectively, the "*Applicants*") obtained an initial order (the "*Initial Order*") under the *Companies' Creditors Arrangement Act* (the "*CCAA*") dated January 8, 2010 from the Ontario Superior Court of Justice (Commercial List) (the "*Court*"). Capitalized terms used herein are as defined in the Initial Order unless otherwise noted.

A copy of the Initial Order is attached as Exhibit "A" to this notice of meeting (the "*Meeting Notice*").

NOTICE IS ALSO HEREBY GIVEN that the Applicants and Canwest Limited Partnership, (collectively, the "*LP Entities*") have filed with the Court a plan of compromise and arrangement (the "*Plan*") pursuant to the CCAA. A copy of the Plan is set out as Exhibit "B" to this Meeting Notice.

Notice of Senior Lenders Meeting

NOTICE IS ALSO HEREBY GIVEN to Senior Lenders that the Senior Lenders Meeting (as defined in the Plan) will be held at [*9:00*] a.m. (Toronto time), on January 27, 2010 at [*LOCATION*], Toronto, Ontario, Canada [*Postal Code*] for the purposes of:

(i) considering and, if thought advisable, adopting a resolution to approve the Plan (the full text of which resolution is set out in Exhibit "C" to this Meeting Notice), with or without variation; and

(ii) transacting such other business as may properly come before the Senior Lenders Meeting.

The Senior Lenders Meeting is being held pursuant to the Initial Order.

Claims Procedure

The procedure for determining Proven Senior Secured Claims for the purposes of voting and distribution under the Plan is set out in the Initial Order, attached.

Plan Approval

In order for the Plan to become effective: (i) the Plan must be approved at the Senior Lenders Meeting by the affirmative vote of a majority in number of Senior Lenders holding Accepted Senior Voting Claims and representing a two-thirds majority in value of the Accepted Senior Voting Claims present and voting at the Senior Lenders Meeting (in person or by Proxy); and (ii) the conditions to the implementation and effectiveness of the Plan as described in the Plan must be satisfied or waived.

Form of Proxy

Any Senior Lender who is entitled to vote at the Senior Lenders Meeting but is unable to attend the Senior Lenders Meeting may vote by dating, signing and returning the enclosed Form of Proxy (the "*Proxy*") in the return envelope provided in accordance with the instructions accompanying the Proxy. In order to be used at the Senior Lenders Meeting,

a Proxy must be deposited with the Monitor *at any time prior to 5:00 p.m. (Toronto time) on 25 January, 2010 or by 5:00 p.m. (Toronto time) 2 days prior to any adjournment, postponement or rescheduling thereof*.

Senior Lenders are responsible for obtaining proof of delivery, if required, of such Proxies through their choice of delivery method. The Monitor will only accept Proxies that relate to the Plan.

The Monitor's coordinates for the purpose of filing Proxies and for obtaining any additional information or materials related to the Senior Lenders Meeting are:

By telephone:	(416) 649-8070
By mail/courier:	FTI Consulting Canada Inc. TD Waterhouse Tower 79 Wellington St. West Suite 2010, P.O. Box 104 Toronto, Ontario M5K 1G8 Attention: Jodi Porepa
By facsimile:	(416) 649-8101
By email:	jodi.porepa@fticonsulting.com

NOTICE IS ALSO HEREBY GIVEN that in accordance with the provisions of paragraph 23(1)(d.1) of the CCAA, the Monitor will file a report on the Plan and on the affairs of the LP Entities with the Court.

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved at the Senior Lenders Meeting by the Senior Lenders and all other necessary conditions are met, the Applicants intend to file a motion presentable before the Court on a date to be fixed at 10:00 a.m. (Toronto time) at 330 University Avenue, Toronto, Ontario, (the "*Sanction Hearing*") seeking an order sanctioning the Plan pursuant to the CCAA (the "*Sanction Order*"), without further notice. A copy of the motion for the Sanction Order will be filed on the Monitor's website, at http://cfcanada.fticonsulting.com/clp as soon as it is filed with the Court. Any Person intending to object to the motion seeking the Sanction Order must file with the Court, before 4:30 p.m. (Toronto time) no later than three days before the Sanction Hearing, a written notice containing a description of its proposed grounds of contestation and shall effect service of Same, without delay, to counsel to the Agent, the LP Entities and the Monitor, and to those persons listed on the LP Entities' service list posted on the Monitor's website at http://cfcanada.fticonsulting.com/clp

DATED at Toronto, Ontario, this • day of January, 2010.

FTI Consulting Canada Inc.

Monitor appointed by the Court in the matter of the proposed plan of compromise and arrangement of Canwest Publishing Inc. / Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

Footnotes

1 *Any Syndicate Claims denominated in a foreign currency shall be converted into Canadian dollars at the Bank of Canada United States/Canadian Dollar noon exchange rate in effect on the date of the Initial Order*

2 All capitalized terms used herein that are not otherwise defined shall have the meanings set out in the Initial Order dated January [8], 2010.

3 *Any Senior Secured Claims denominated in a foreign currency shall be converted into Canadian dollars at the Bank of Canada United States/Canadian Dollar noon exchange rate in effect on the date of the Initial Order*.

4 All capitalized terms used herein that are not otherwise defined shall have fee meanings set out in the Initial Order dated January [8], 2010.

TAB 8

CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

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 CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A", Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants**

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

HEARD &
ENDORSED: **JUNE 25, 2012**

REASONS: **JUNE 26, 2012**

ENDORSEMENT

[1] Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

[2] Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

[3] The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

[4] Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

[5] Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

(i) to ensure the ongoing operations of the Cinram Group;

(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

[6] Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

[7] The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

[8] Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

[9] Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

[10] The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

[11] Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

[12] Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

[13] Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

[14] Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms

part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

[15] Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

[16] The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

[17] All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

[18] As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

[19] Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

[20] Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

[21] The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their

Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

[27] Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

[28] Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

[29] Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

[30] Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

[31] The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

> Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

[32] Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

[33] The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

[34] Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

[35] The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

[36] In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

[37] As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

[38] The Applicants have also requested that the confidential supplement – which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules – be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

[39] Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

[40] In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally

integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;

(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;

(j) new business development initiatives are centralized and managed from Toronto, Ontario; and

(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

[41] Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

[42] The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court – in this case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

[43] In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

MORAWETZ J.

Date: June 26, 2012

SCHEDULE "A"

ADDITIONAL APPLICANTS

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

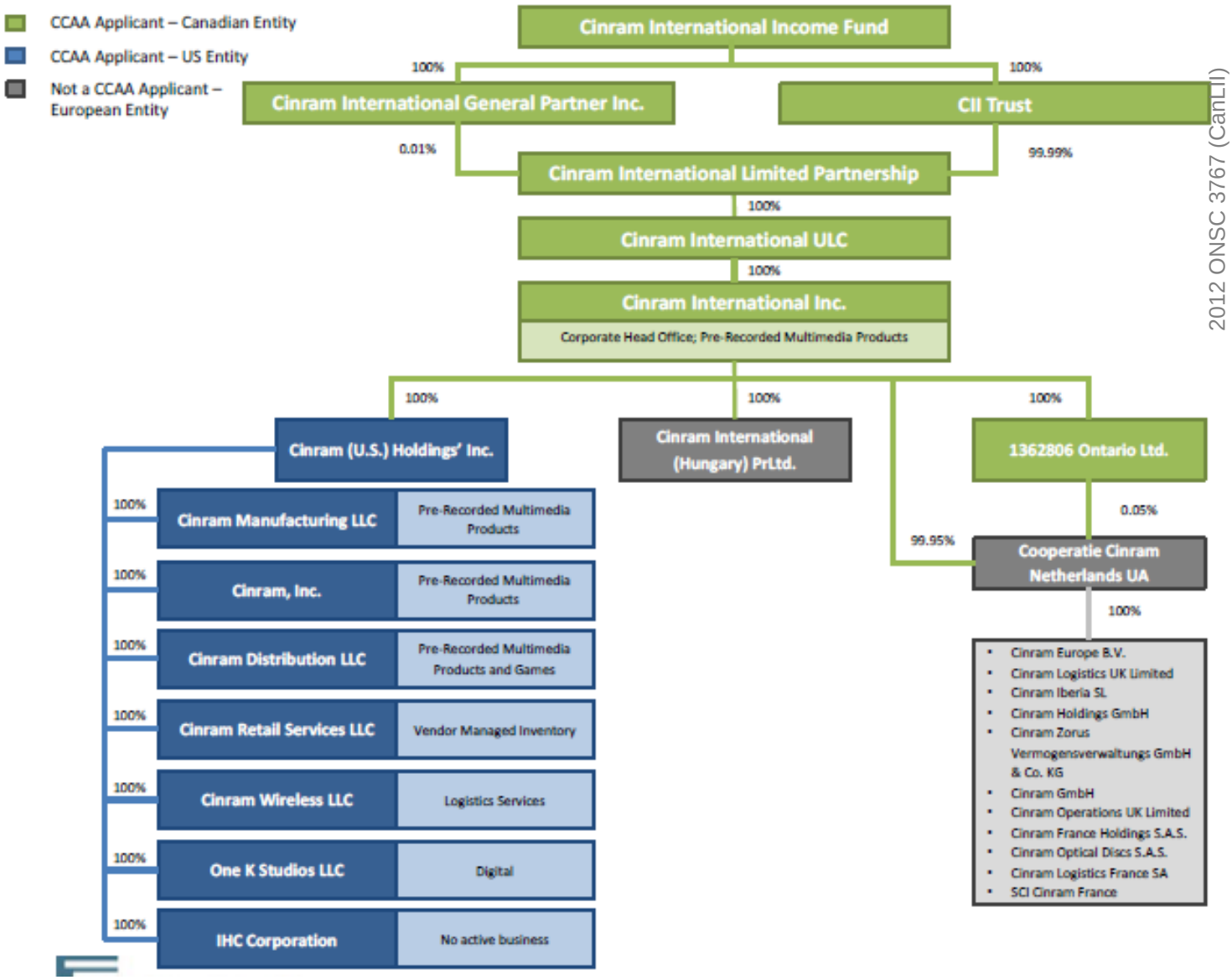
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

SCHEDULE "B"



SCHEDULE "C"

A. THE APPLICANTS ARE "DEBTOR COMPANIES" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

> CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.
>
> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("**Book of Authorities**"), Tab 1.
Re Global Light Telecommunications Ltd. (2004), 2 C.B.R. (5th) 210 (B.C.S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

> *Global Light*, *supra* at para. 17; Book of Authorities, Tab 2.
> *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.
> *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.[Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at para. 4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. THE RELIEF IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corp. v. Comiskey, supra at paras. 22 and 56-60; Book of Authorities, Tab 4.
Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Gen. Div. [Commercial List]); Book of Authorities, Tab 6.
Re Chef Ready Foods Ltd; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall

objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

> *Re Sulphur Corporation of Canada Ltd.* (2002), 35 C.B.R. (4th) 304 (Alta Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

> Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

> In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> *Lehndorff General Partner Ltd., Re, supra* at para. 5; Book of Authorities, Tab 6. *Canwest Global, supra* at para. 27; Book of Authorities, Tab 1.
> CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

> *Lehndorff, supra* at paras. 5 and 16; Book of Authorities, Tab 6.
> *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10.
Lehndorff, supra at para. 21; Book of Authorities, Tab 6.
Canwest Global, supra at paras. 28 and 29; Book of Authorities, Tab 1.
Re Sino-Forest Corp. 2012 ONSC 2063 (Commercial List) at paras. 5, 18, and 31; Book of Authorities, Tab 11.
Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's

practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global supra, at para. 43; Book of Authorities, Tab 1.
Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.
Re Priszm Income Fund (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an

efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

> 11.2(1) *Interim financing* - 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.

> 11.2(2) *Priority* – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> *Re Timminco Ltd*. (2012), 211 A.C.W.S. (3d) 881(Ont. Sup. Ct. J. [Commercial List]) at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) Factors to be considered – 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.
>
> CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

> *Re Canwest Publishing Inc./Publications Canwest Inc.* (2010), 63 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

> *Re Catalyst Paper Corporation*, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.
> *Angiotech, supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18
> *Re Fraser Papers Inc.*, Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent,

the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

> 11.52(1) *Court may order security or charge to cover certain costs*
> 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 -- in an amount that the court considers appropriate – in respect of the fees and expenses of
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco*, *Canwest Global* and *Canwest Publishing*.

> *Canwest Global*, *supra*; Book of Authorities, Tab 1.
> *Canwest Publishing*, *supra*; Book of Authorities, Tab 16.
> *Re Timminco Ltd.*, 2012 ONSC 106 (Commercial List) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is 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.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification*
> On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditors of the company
>
> 11.51(3) *Restriction* -- indemnification insurance
> The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault*
> The court shall make an order declaring that the security or charge

> does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global, supra* at paras 46-48; Book of Authorities, Tab 1.
> *Canwest Publishing, supra* at paras. 56-57; Book of Authorities, Tab 16.
> *Timminco, supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.
Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.
Canwest Global supra, at para. 49; Book of Authorities, Tab 1.
Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora

Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate

in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

> *Sino-Forest, supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

> Bell Affidavit, para. 176; Application Record, Tab 2.

TAB 9

2005 CarswellOnt 6648
Ontario Superior Court of Justice [Commercial List]

Grace Canada Inc., Re

2005 CarswellOnt 6648, [2005] O.J. No. 4868, 17 C.B.R. (5th) 275

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF GRACE CANADA INC.

Farley J.

Heard: November 14, 2005
Judgment: November 14, 2005
Docket: 01-CL-4081

Counsel: D. Tay, O. Pasparakis, J. Stam for Plaintiffs, Grace Canada Inc.
E. Merchant for Merv Nordick, Ernest Spencer
K. Ferbers for Raven Thundersky
Ian Dick for Attorney General of Canada
Michel Bélanger, Jean-Philippe Lincourt, Matt Moloci for Association Des Consommatuers Pour La Qualité Dans La Construction, Jean-Charles Dextras, Viviane Brosseau, Léotine Roberge-Turgeon

Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Quebec plaintiffs in their putative class proceedings worked out arrangement with federal Crown — As result, Quebec plaintiffs were not proceeding with their request to lift stay and other ancillary relief — Saskatchewan plaintiffs were not opposed to Grace relief — Stay was extended to April 1, 2006, and included proceedings against federal Crown related to Grace proceedings in class actions — Modified preliminary injunction granted on January 22, 2002, by US Bankruptcy Court was recognized pending further order of Canadian court — There had been recognition in US Bankruptcy Court that Canadian proceedings would be governed by Canadian substantive law.

***Farley J.*:**

1 This endorsement applies to the 3 motions of Grace, the Quebec class proceeding and the Manitoba class proceeding.

2 The Quebec plaintiffs in their putative class proceedings have worked out an arrangement with the Federal Government. As a result they are not proceeding with their request to lift the stay and other ancillary relief, but without prejudice to it or similar relief being sought if the insolvency/CCAA recognition proceedings get bogged down. The Grace relief was then supported by the Quebec plaintiffs.

3 The "Sask" plaintiffs (represented by the Merchant firm were not opposed to the Grace relief.

4 The Manitoba plaintiffs represented by the Atkins firm took the position that the Grace relief was all right so long as it did not apply to their proceedings except that judgment would not be enforced without leave of this court.

5 It would seem to me that the various class proceedings would benefit from cooperation and coordination — using the 3Cs of the Commercial List (communication, cooperation and common sense). Otherwise they will be faced with the

practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.

6 The stay is extended to April 1, 2006 and includes proceedings against the Federal Crown related to the Grace proceedings in these class actions. As well the Modified Preliminary Injunction granted on January 22, 2002 by the US Bankruptcy Court is recognized pending further order of this Court.

7 The foregoing does not prevent any of the parties entering into consensual resolutions with the Federal Crown.

8 I note that the Grace interests represented before me today indicated that it was their goal to emerge from their insolvency proceedings as soon as reasonably possible but under the guidelines that there be justice for all affected persons.

9 I also note that there has been recognition in the US Bankruptcy Court that Canadian proceedings will be governed by Canadian substantive law.

10 The foregoing relief granted is pursuant to the principles set out in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and is in furtherance of the long standing respect for comity extended by the courts of this country for the courts of the US and vice versa.

11 It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

12 I concur with the views of the US court in *Maryland Casualty* re respect to the necessity/desirability of a stay against the Federal Crown as a "3rd party" given the interrelated aspects of the claims against the Crown and Grace. There would in my mind be a considerable risk of record taint if the action against the Crown were allowed to proceed on its own without direct Grace evidence and counsel. See also *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.); *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 137 D.L.R. (3d) 287 (Ont. H.C.), aff'd (1983), 145 D.L.R. (3d) 266 (Ont. Div. Ct.); *Noma Co., Re*, [2004] O.J. No. 4914(Ont. S.C.J. [Commercial List]); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

13 The stay does not affect the ability of the plaintiffs from coming back to court if they feel that there is foot dragging or other elements of prejudice.

14 I note that the Federal Crown may accept service of the Sask claim without that being an infringement of the stay now imposed (and previously requested). This is without prejudice to the Crown moving for relief on, say, a limitations point.

15 What the Manitoba plaintiffs are in essence requesting is that they obtain a leg up on all other Canadian plaintiffs (and US plaintiffs) and that there be by this court somewhat of a quasi-certification, although indicating that the actual certification would be dealt with by the Manitoba court.

16 This would result in a lack of single control in insolvency proceedings which was cautioned against in *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.). It would also fragment and possibly destabilize the other proceedings by other affected persons (including those claiming for personal injury including serious personal injury). In saying that I in no way wish to or intend to be taken as minimizing the terrible tragedy which has befallen the Thundersky/Bruce family.

17 I look forward to seeing that continued timely progress is being made with respect to this insolvency proceeding including the effective efficient way of dealing with personal injury and property damage claims. The information officer should ensure that this court and affected parties including these class action plaintiffs are kept abreast of proposed material developments and their outcome. That is the report on the regular time period basis should be the minimum.

18 The motion of the Manitoba plaintiffs is dismissed, but without prejudice to similar or other relief being sought in the future based on a change in circumstances.

Order accordingly.

TAB 10

CITATION: Grant Forest Products Inc. (Re), 2013 ONSC 5933
FILE NO.: CV-09-8247-00CL
DATE: 20130920

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

BETWEEN

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP, Applicants

- and -

GE CANADA LEASING SERVICES COMPANY, et al, Defendants

BEFORE: C. CAMPBELL J.

COUNSEL: Craig J. Hill, Roger Jaipargas for West Face Capital

Alex Cobb, for PWC, Pension Administrator

Mark Bailey, for Superintendent of Financial Services

Richard Swan, Jonathan Bell, for Peter Grant Sr.

David Byers, Daniel Murdoch, for Ernst & Young

Jane Dietrich, for the remaining applicants

HEARD: July 23, 2013

REASONS FOR DECISION

[1] This decision deals with issues in respect of two defined benefit pension plans of Grant Forest Products Inc. (GFPI) both now in the process of being wound up.

Procedural Issues

[2] The motion seeking relief was originally made returnable June 25, 2012 and adjourned on several occasions, the latest being to enable counsel to make submissions following the release in February of this year of the decision of the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers [2013] SCJ No.6. (Indalex).*

[3] The several specific issues arise based on certain of the facts of this case which give rise to a priority claim by pension beneficiaries in respect of the remaining funds in the hands of the Monitor following the sale of the assets of GFPI. The priority issue is between the Administrator on behalf of the pension plans of GFPI and a Second Lien creditor of GFPI, namely, West Face Capital.

[4] The Initial Order under the CCAA was made June 25, 2009 and provided for a Stay of proceedings to enable a restructuring (liquidation) of the assets of the various entities which for the purposes of this decision can be referred to as the remaining applicant or GFPI.

[5] As at June 25, 2009 there was an outstanding Petition in Bankruptcy issued March 19, 2009 in respect of GFPI initiated by various senior secured creditors which has not to date been proceeded with.

[6] The Initial Order contained a term (standard model order language) that "entitled but not required" GFPI to make pension contributions among other ongoing expenses.

The Pension Plans

[7] As at the date of the Initial Order there were 4 pension plans of GFPI, two of which were defined benefit plans and are the ones at issue here.

[8] The relevant dates with respect to the windup of the two defined benefit plans are as follows:

> Salaried Plan:
>
> The initiation of windup was as a result of an Order dated February 27, 2012. The effective date of windup was made as of March 31, 2011.
>
> Executive Plan:
>
> The initiation of Plan windup was undertaken by the Superintendent of Financial Services as a result of the Order dated February 27, 2012 with the effective date of wind up being June 30, 2010.

[9] The "effective date" as the term appears in the *Pension Benefit Act* (PBA) Ontario is chosen for actuarial purposes as the last date of contributions to the Plans.

[10] None of the above dates preceded the Initial Order of June 2009. The major sale of assets to Georgia Pacific was by Order dated May 26, 2010 with the last significant sale of assets February 20, 2011.

[11] There were no deemed trusts in existence either at the date of the Initial Order of June 2009 or the last significant sale of assets in February 2011.

[12] The Court granted Orders that were unopposed on the 26th day of August and the 21st day of September 2011 which authorized the following:

i) GFPI to take steps to initiate windup of the Timmins Salaried Plan, the appointment of a replacement administrator of such plan;

ii) GFPI to take steps to initiate a windup of both the Salaried and Executive Plans.

[13] The orders directed the Monitor to hold back from any distribution to creditors of GFPI the amount estimated at that time to be the windup deficit in the plans. The Monitor began holding in escrow an amount of $191,245 with respect to the Salaried Plan and $2,185,000 with respect to the Executive Plan.

[14] The issue of deemed trust arising as a result of the Windup Orders was not sought to be determined by any party at the time of the August and September 2011 Orders.

[15] When motions now before the Court first came on for hearing on August 27, 2012 the Court was advised that the Supreme Court of Canada had under reserve its decision in *Indalex* which among other things was to deal with the existence and priority of deemed trust amounts under the *PBA* in the context of *CCAA* proceeding.

[16] The motion returnable on August 27, 2012 by the applicant was for direction with respect to the payment of amounts held in escrow by the Monitor in respect of pensions.

[17] The position of both the Monitor and GFPI at that time was that there should be no further payments made on behalf of the pension plans or distribution of any further amounts to the Second Lien Lenders until following release of the decision of the Supreme Court of Canada in *Indalex*.

[18] The Monitor reported for the motion of August 2012 that the expectation of a windup deficit of both plans would be in excess of $2.3 million. The position of PWC as Administrator of the Plans was that amounts available by way of windup deficit under both plans should be made pursuant to the provisions of the *PBA*.

[19] The position of the Monitor and GFPI prevailed, and the motion for direction adjourned to November 2012 when both that motion and the companion motion of West Face on behalf of Second Lien Lenders for a lifting of the stay under the *CCAA* to permit the petition in bankruptcy to proceed were heard.

[20] Following submissions in November 2012, decision was reserved and following the decision of the Supreme Court of Canada in *Indalex* in February 2013 the parties to this proceeding were invited to provide further submissions based on that decision together with updated figures on amounts held and sums claimed due under the windup of the Pension Plans.

[21] In addition Counsel and their clients did attempt to see if the issues could be resolved without the necessity of further decision. Not surprisingly, given the complexity of issues that still remain following *Indalex* and despite diligent efforts a determination on the motions is required.

Legal Analysis

[22] In the *Indalex* decision — the members of Supreme Court of Canada were divided and in particular on the issue of deemed trust arising on windup in the context of a *CCAA* proceeding.

[23] Justice Cromwell in the introduction to his reasons in *Indalex* at paragraph 85 of the decision describes the general problem associated with pensions and insolvent corporations.

> [85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.
>
> [86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c.C-36 ("CCAA"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act,* R.S.O. 1990, c. P.8 *("PBA"),* and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[24] Justice Deschamps described in paragraph 44 the importance of the deemed trust under the *PBA:*

> The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against the adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing

> priorities between creditors, the remedial purpose favors an approach that includes all wind up payments in the value of the deemed trust in order to achieve a broad protection.

[25] The majority position as set out above in the reasons of Justice Deschamps prevailed over the reasons of Justice Cromwell (for himself Chief Justice McLachlan and Rothstein J.) which held in essence the deficiency amounts could only "accrue" as that word is used in s.57(4) of the *PBA* when the amount is ascertainable. All of the justices agreed that the deemed trust provision contained in s.57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of *CCAA* proceedings.

[26] The legal analysis in *Indalex* commenced with the 2010 decision of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60.

[27] In addition to providing definitive guidance on the purpose of the *CCAA* and the relationship between the *CCAA* and the *BIA*, more specifically on the facts of *Century Services* the Court held the deemed trust provisions of the *Federal Excise Tax Act* did not give rise to a priority over other creditors in a CCAA proceeding.

[28] It was held in *Century Services* that the *CCAA* and the *BIA* are to be read harmoniously and further that in the absence of express language carving out an exception for GST claims the provisions in both statutes nullify statutory deemed trusts in favour of the Crown.

[29] In summary, the more limited and general provisions of the *CCAA* permit insolvent corporations to restructure or indeed liquidate in a flexible and less formal fashion than would otherwise prevail with respect to priorities under the *BIA*.

[30] Prior to the arrival of *Indalex* in this Court in 2009[1], the governing decision dealing with pension claims of a deemed trust under the *PBA* seeking priority for unpaid pension contributions over secured creditors in a *CCAA* proceeding where the companies were unable to restructure and secured creditors sought to put the company into bankruptcy is *Ivaco (Re)* [2006] OJ No. 4152 (C.A.).

[31] Laskin JA for the Court of Appeal dealt with the argument that the provincial deemed trust takes priority based on a gap that exists between the *CCAA* and the *BIA* in the following passage:

> [61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the *CCAA* and the *BIA* in which the Provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

[1] Decision in this Court at 2010, ONSC 1114 and in Court of Appeal for Ontario, 2011 ONCA 265.

[62] The federal insolvency regime includes the *CCAA* and the *BIA*. The two statutes are related. A debtor company under the *CCAA* is defined in s.2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the *BIA*, and s.11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the *CCAA* period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the *CCAA* period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the *CCAA*. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of *CCAA* proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The *CCAA* and the *BIA* create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil, supra,* at paras, 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the *BIA*. It cannot do so.

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco, supra*. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the *PBA*. However, the facts in *Usarco* differed materially from the facts in this case.

[67] In *Usarco, CCAA* proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

> [68] Recently in *Re General Chemical Canada Ltd.*, [2005] 0.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:
>
> > To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both *CCAA* proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.
>
> I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.
>
> [69] Because the federal legislative regime under the *CCAA* and the *BIA* determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so.

[32] The further argument of unfairness in permitting a petition into bankruptcy to proceed if the companies was rejected (see paragraph 77 in *Ivaco):*

> The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

[33] The issues in *Indalex* involved, as those in this instance do, pension plans, but with a difference. While both the plans faced funding deficiencies when *Indalex* filed for an Initial Order under the CCAA and requested a stay, the financial distress threatened the interests of all plan members. Following the Initial Order the Company was authorized to borrow US$24.4 million from DIP (Debtor in Possession) lenders who were granted priority over all other creditors.

[34] The plan members in *Indalex* sought, at the time of the Sanction and Approval Order a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable by way of priority over secured creditors with respect to the proceeds of assets sold. The parties reached agreement on an amount to be held by the Monitor subject to the Courts' determination as to whether or not the funds held were being held subject to a deemed trust.

[35] This Court's decision in *Indalex*[2] held that the deemed trust did not prevail over the priority of DIP financers was appealed. On appeal to the Court of Appeal of Ontario the claims

[2] 2010 ONSC 114, 2011 ONCA 265.

of deemed trust, of breach of fiduciary duty against the company and the requested remedy of constructive trust were successful.

[36] At the time of the Initial Order in *Indalex* the *Indalex* salary plan was in windup with a windup deficiency order. As at the date of the *Indalex* Initial Order the executive plan had not been wound up.

[37] The Supreme Court of Canada in *Indalex* was divided on the issues before it. Four of the judges being Deschamps, Moldaver JJ joined by Lebel J. and Abella J. on the issue held that the deemed trust provision of s.57 (4) of the *PBA* did provide a statutory scheme to provide a deemed trust in respect of the plan which had been wound up, which trust extended to the windup deficiency payments required by s.75(1)(b) of the Act which had "accrued" but were not yet due at the time of the sale of assets.[3]

[38] The three judges of the minority on the issue, being Chief Justice McLachlin, Justices Rothstein and Cromwell JJ., concluded that given the legislative history and evolution of the provisions the legislature never intended to include windup deficiency in a statutory deemed trust — rather the legislative intent is to exclude from the deemed trust liabilities that arise only on the date of wind up.

[39] Five of the judges, which excluded Lebel and Abella JJ., concluded that given the doctrine of federal paramountcy the DIP charges superseded the provincial statutory deemed trust which Abella J., Lebel J., Deschamps J. and Moldaver J. had found.

[40] Those same five judges concluded that the circumstances for the application of a constructive trust were not met notwithstanding a breach of duty by the applicant to give all plan members notice prior to the return of the motion seeking an Initial Order.

[41] The context of *Indalex's* distress was set out in the following paragraph from the reasons of Deschamps J.:

> 8. Indalex's financial distress threatened the interests of all the Plan members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act,* R.S.C, 1985, c.B-3 *("BIA"),* they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Lid v. Minister of National Revenue,*

[3] Pension Benefit Act RSO 1990, c. P.8 57 Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into a pension fund. R,S.O. 1990, c. P.8, s. 57 (3).

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c.P.9,s.57 (4).

> [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA* the Plan Members' position was uncertain.

[42] As was noted by the Supreme Court of Canada in *Century Services*[4] the *CCAA* and the *BIA* are two statutory regimes for re-organization and or liquidation. Of the two federal statutes the *CCAA* provides the opportunity for orderly restructuring and or liquidation with supervision by the Court.

[43] The *BIA* deals with priority distribution when there is no further purpose for the application of the *CCAA*. In the ordinary case under the *CCAA* an applicant company, following the Initial Order, seeks out agreement with its creditors and the formulation of a proposed Plan to be voted on by the creditors which when approved by the Court in effect creates a contract between the company and its creditors. (see Red Cross (2002) 35 CBR (4^{th}) 43 (SCJ).

[44] What has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating *CCAA* of which both *Indalex* and GFPI are leading examples.

The Factual Distinction between *Indalex* and GFPI

[45] In this case the 29th Report of the Monitor dated February 21, 2013 describes the nature of the business of GFPI and its subsidiaries which manufactured Strand Board from facilities located in Canada and the United States.

[46] The Report goes on at paragraphs 29 to 32 to detail the deficiencies in the special payments required to be paid under the PBA to fund the windup deficiencies in the plans. Unlike the situation in *Indalex* neither of the pension plans of GFPI were in windup process at the time of the Initial Order or for some time after. Unlike *Indalex* there was no request made for DIP prior to a sale of assets following the Initial Order.

[47] Unlike *Indalex*, the Initial Order re GFPI contemplated in this case that the business of the company would continue for the purpose of the orderly disposition of various assets being various types of mills in Canada and the United States. The most significant of which were sold to Georgia Pacific, which has continued the operation of some of the mills.

[48] The summary of the position of the Plans as of the date of July 2013 is as follows:

> The Salaried Plan Wind Up Report disclosed an estimated windup deficit of $726,481. The Required Salaried Plan Payment as of August 24, 2012 was $328,298 plus interest from March 31, 2012, which amount was due to be paid by GFPI into the Salaried Plan.
>
> The required Salaried Plan Payment as at November 27, 2012 was $339,923. This amount includes interest in the amount of $11,625 (determined using the same

[4] 2010 SCC60 at para. 77.

rate used in determining the amount of the annual special payments needed to liquidate the windup deficiency). It is contested that interest should be included.

The Required Salaried Plan Payment as at March 31, 2013 was $485,715, including interest in the amount of $15,883. It is contested that interest should be included.

The Executive Plan Wind-Up Report disclosed an estimated wind-up deficit of $2,384,688.

The required Executive Plan Payment as of August 24, 2012 was $1,263,186 plus interest from February 29, 2012, which amount was due to be paid by GFPI into the Executive Plan.

The required Executive Plan Payment as at November 27, 2012 was $1,281,639, including interest in the amount of $18,453. It is contested that interest should be included.

The required Executive Plan Payment as at March 31, 2013 was $1,764,275, including interest in the amount of $20,803. GFPI does not accept that interest should be included.

[49] Submissions with respect to the Pension Motion were heard on November 27, 2012. During the same hearing, submissions were also heard on a motion by West Face Capital Inc. for an order lifting the stay of proceedings herein to facilitate a bankruptcy order against GFPI (the Bankruptcy Motion). Following that hearing, further written submissions were provided by the parties concerning the impact of the decision of the Supreme Court of Canada in *Re Indalex* on the issues in the two motions.

[50] The GFPI situation is a prime example of the flexible operation of the *CCAA*. The assets of the liquidating company were sold in a manner to provide the maximum benefit possible to the widest group of stakeholders.

[51] In this case the sale of certain of the assets on a going concern basis permitted the continuation of employment and benefits for many in the locality of the plants that they had previously worked in. The alternative in bankruptcy under the *BIA* might well have resulted in loss of employment for many and less recovery for all the secured creditors.

[52] The liquidation of the applicant under the *CCAA* did not proceed under an explicit Plan voted on by the creditors and approved by the Court.

[53] What did proceed was an Initial Order that in addition to a stay of proceedings (which has continued), permitted, but did not require the Applicant to pay ordinary operating expenses in the course of liquidating assets under the *CCAA* for the benefit of all stakeholders.

[54] The Initial Order specifically provides in paragraph 5 as follows:

> [5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;
>
> (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and

[55] No creditors including those representing the members of the pension plans opposed the granting of the Initial Order; the representatives of pension plans did not oppose the sale of assets on the occasions in which approval was sought and did not raise the issue of deemed trust until the windup orders made in August 2012.

[56] There was no objection on the part of any party to the payment which the Applicant made to the pension plans being the regular and ordinary contributions under the plans from 2009 until the wind up date.

[57] Up to August 2012 there was no request made on the part of the pension plans to set aside the Initial Order and provide for what might have been expected to be a deemed trust under wind up.

THE FIRST ISSUE.

Are any funds held by the Monitor and/or GFPI deemed to be held in trust pursuant to subsections 57(3) or 57(4) of the PBA for the beneficiaries of each of the Pension Plans as a result of the wind-up of the Pension Plans, and if so, what amounts of the funds held by the Monitor and/or GFPI are deemed to be held in trust?

[58] As noted above one of the two defined benefit pension plans at issue in *Indalex* was wound up prior to the commencement of the *CCAA* proceeding, and the other pension plan was wound up after the filing and the sale of *Indalex's* assets. The Supreme Court of Canada in *Indalex* did not find a deemed trust in respect of the latter pension plan. In considering this first issue, therefore, it is necessary to address the threshold issue of whether a deemed trust can be created during the pendency of a stay of proceedings.

[59] The majority in the Supreme Court of Canada in *Indalex* concluded that prior to an Initial Order a deemed trust did indeed arise when a pension plan was wound up in respect of windup deficits notwithstanding the difficulty in ascertaining the precise amount of the trust.

[60] One of the arguments made before the Supreme Court of Canada in *Indalex* and was rejected was that the priorities under the CCAA should parallel those under the *BIA* with the result that at the time of the Initial Order under the *CCAA* the *BIA* priorities by which pension claims would be unsecured would prevail. The following passage in the decision of Deschamps J. for herself and the majority that dealt with that issue rejected the proposition:

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the CCAA and the BIA relates to priorities. Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements, Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (Crystalline Investments Ltd. v. Domgroup Ltd,, 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the *BIA*.

[56] A party relying on paramountcy must "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" *(Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation *(Husky Oil)*.

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected

> a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):
>
> > When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[61] In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating *CCAA*, it is important for the Court to consider the appropriate time for the *CCAA* proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the *CCAA* process to the *BIA*. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The response of GFPI was to seek protection under the *CCAA* and carry out an orderly liquidation of its assets. The Court permitted the orderly liquidation of the assets in the context of the *CCAA* to maximize recovery in the assets.

[62] Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

[63] It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. Reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time, the Second Lien Lenders submit is the logical extension of that legitimate purpose. Accordingly, it is said appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

[64] I accept that to impose the same priorities under the *CCAA* as the *BIA* without careful consideration might well undermine the flexibility of the *CCAA*. For example the *CCAA* Court itself may make an order on application on notice declaring a person to be a critical supplier (s.11.4) with the charge in favour of that supplier. This is but one example of the flexibility of the *CCAA* that may not be available under the *BIA* once approved by the Court. The same is the case for DIP financing as was the case in *Indalex*.

(65) Where there is a *CCAA* Plan approved by creditors the effect of the contract created may alter what would otherwise be priorities under the *BIA*.

[66] Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the

sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when there is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

[67] There may be good and solid reasons acceptable to creditors and stakeholders who agree to a process under the *CCAA* either in a formal Plan or during the course of a liquidation to alter the priorities that would come into play should there be an assignment or petition into bankruptcy.

[68] The position of the Pension Administrator, the Superintendent of Financial Services and those parties in support of their position, in this case is that in the circumstances the deemed trust which they say arises under the *PBA* should prevail over other creditor claims notwithstanding the *CCAA* Initial Order.

[69] The arguments in support of a deemed trust arising upon windup of the pension plans within the *CCAA* regime are summarized as follows:

i) GFPI should not be excused from any obligation with respect to the pension plans.

ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.

iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.

iv) The Second Lien Creditor should not be permitted to challenge the deemed trusts at this stage since they did not challenge the windup orders.[5]

[70] From my review of the decisions of the Supreme Court of Canada in *Century Services* and *Indalex* I am of the view that the task of a *CCAA* supervising judge when confronted with seeming conflict between Federal insolvency statute provisions and those of Provincial pension obligations is to make the provisions work without resort to the issue of federal paramountcy except where necessary.

[71] The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order.

[5] submission was made in the factum of PWC that all funds held by the Monitor should be regarded as proceeds of accounts and inventory therefore resulting in priority being directed by the Personal Property Security Act (PPSA) s.30 (7) which would subordinate other security to the deemed trusts. This submission was not seriously pursued and in view of the conclusion I reached on other grounds it is not necessary to deal with the argument.

[72] The *Indalex* decision provides predictability and certainty of entitlement to the stakeholders of an insolvent company. If on the application for an Initial Order any party seeks to challenge that priority for the purpose of providing DIP financing in furtherance of a Plan or work out liquidation they are free to do so at the time of the Initial Order. Secured creditors can then decide whether they are willing to pursue a Plan or immediately apply for a bankruptcy order.[6]

Should GFPI be excused from wind up deficiency payments?

[73] I am of the view that the question advanced by the Pension Administrators should be put another way "Is GFPI obligated in view of the provisions in para. 5 of the Initial Order (see paragraph 54) above to make the special payments that arise by virtue of the provisions of the *PBA*?

[74] I accept the argument of the Pension Administrator and all those urging the deemed trust application that the Approval and Vesting Orders necessarily do not for all purposes freeze priorities at the point of sale. Absent other order of the Court, made at the time however, they do provide the certainty required by creditors who are asked to concur with the sales.

[75] In the situation of GFPI there was a recognition in para. 5 of the Initial Order that there may be a challenge to expenses on an ongoing basis.

[76] Where distribution to creditors is made following a sale of assets on full notice, that distribution in accordance with an Approval and Vesting Order does freeze the priorities with respect to that distribution, absent specific direction otherwise.

[77] In this case, the issue of priority is said to arise in respect of a specific sum of money in the hands of the Monitor in respect of funds from assets sold and not distributed and is said to be determined in accordance with the Court Order made at the time of determination which acknowledged all the pension obligations including wind up.

[78] To suggest that all claims and priorities never sought would apply to the Approval Orders past or future would, in my view, be entirely contrary to the principles and scheme of the *CCAA*. To conclude otherwise would risk that secured creditors to whom distribution had been made would be at risk of disgorgement and unpaid secured creditors to uncertainty of priority in future recovery.

[79] This is why in my view the only consistent and predictable operation of the *CCAA* should give predictability as of the Initial Order to enable an informed decision to be made whether or not to proceed with bankruptcy. This issue is implicitly revisited every time there is a sale and distribution of assets.

[6] It is not entirely clear from the various decisions in *Indalex* as to precisely when the deemed trust which can take priority operates. The date of the Initial Order was given as one possibility the other being the date of sale of the assets. In this case it does not really matter which date applies as the Initial Order and primary asset sale pre-date any deemed trust.

[80] The Supreme Court of Canada decision in *Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

[81] Justice Cromwell at paragraphs 177 and 178 in *Indalex* spoke of the problem of extending the deemed trust. While he was speaking of the entirety of the issue his comments below are equally applicable to a deemed trust said to arise during insolvency:

> 177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.
>
> 178 While I agree that 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. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*.

[82] That consistency prevails if the limitation on deemed trust is limited to those plans already in windup as of the date of the Initial Order.

[83] During the course of the sale of assets the Initial Order continued to operate presumably to the advantage of all stakeholders since the asset sale as here proceeded in an advantageous fashion for maximizing return on assets, for the benefit of those who were able to transfer employment and in an advantageous fashion for the pension plans which received the benefit of ongoing regular payments.

[84] The alternative had the bankruptcy petition proceeded would have seen a significant loss particularly to the pension plans.

[85] I note as have many judges before me that the solution to the problem created by section 67 of the *BIA* which leaves pension obligations unsecured and Provincial statutes which seek to raise the priority lies with the federal and provincial governments not with judicial determination. As Justice Deschamps noted in Indalex:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009- 68; see also Bill C-

501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

[86] I conclude that given the uncertainty in this area of legal decision together with the provisions of paragraph 5 of the Initial Order that GFPI was not under an obligation to make the special windup payments and was correct is seeking direction from this Court.

[87] I can only presume that had GFPI sought to make the special payments that they would have been opposed on much the same grounds as now advanced by the Second Lien Lenders.

THE SECOND ISSUE

Did the Court Order authorize the Deemed Trust?

[88] It is urged in the second ground for priority of the deemed trust that this Court authorized the wind up of the Pension plans which by the operation of the *PBA* imposes the deemed trust.

[89] The Order authorizing the windup in its operative provisions with respect to wind up is as follows:

> **This Court Orders** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

> amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.
>
> **This Court Orders** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

[90] Similar wording was in the order with respect to the Executive Plan.

[91] Nothing in those Orders dealt with the issue of deemed trust. No one appearing raised the issue of deemed trust. The paragraph above dealt with the issue presented and preserved the argument that arises today namely whether in context of a claimed deemed trust the estimated windup deficit was to be held from distribution.

[92] One can understand why the issue was not raised beyond setting aside the amount and leaving the issue for later determination. For their own reasons each side was content to have the *CCAA* process continued. It was to the benefit of all party stakeholders.

[93] When a pension plan is wound up the precise amount of money necessary to fulfill the obligation to each and every pensioner is at that time uncertain. Over time as windup occurs those amounts become more certain and that is why the deemed trust concept comes into play.

[94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a *CCAA* order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments, (See paragraph 45 of the Initial Order above).

[95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA*. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made. The decision of the Supreme Court of Canada in *Indalex* appears to stand for the proposition that once a valid Initial Order is made under the *CCAA* the Federal insolvency regime is paramount, and absent any agreement or other Order where there is conflict, the Initial Order prevails over an applicant's obligation under the provincial statute.

[96] This conclusion provides the predictability and certainty that is necessary for those who are willing to consider financing a distressed entity. It is unlikely that lenders would be willing to support a distressed entity if they had little or no information on the amount or timing of pension obligations.

[97] The Supreme Court of Canada decision in *Indalex* alerts lenders who are aware or are taken to be aware prior to insolvency of the fact of a deemed trust when there is wind up even though the amount may not be known.

[98] Where a pension plan has not been wound up prior to insolvency the potential for a windup deficiency is entirely uncertain. Since a deemed trust does not arise until there is a windup order it would be entirely inconsistent with the insolvency regime of the *CCAA* (absent additional legislation) to expose lending creditors to an uncertain priority both in time and amount.

[99] It is to be noted that on the sale of assets as they occurred there was no issue raised about the priority of claims prior to those sales or distribution of assets as reflected in the fact that payments were made to entirely discharge the security of the First Lien Lenders and a portion of the obligation to the Second Lien lenders.

[100] The Court did not authorize a deemed trust to prevail in insolvency by granting windup orders.

Should the Stay be lifted to permit the petition in bankruptcy to proceed?

[101] If one accepts the above analysis a lifting of the stay to permit bankruptcy is not necessary to defeat a deemed trust said to arise after the Initial Order.

[102] The basis of the motion on behalf of West Face Capital Inc. (the Second Lien Lenders) is set out in paragraph 2 of their factum:

> The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that must be paid immediately. The factual and legal basis for those claims have been advanced during the *CCAA* proceedings, notwithstanding the stay of proceedings.

[103] Those opposed to the motion to lift the stay (which is supported by GFPI and the Monitor) urge that what is being requested is extraordinary relief from the requirements of the *PBA* and GFPI should not be excused from its obligation to make special payments simply at the asking.

[104] While acknowledging that the court does have broad discretion, it is urged there is nothing in the circumstances of this case which would justify relieving GFPI of its obligation to make special payments.

[105] It is further submitted that there is no decision that stands for the proposition that bankruptcy is automatic at the end of a *CCAA* proceeding and no independent reason for granting the bankruptcy order.

[106] It is well settled that bankruptcy may well be an appropriate outcome of a *CCAA* process that has failed or has run its course. In *Century Services* 2010 SCC 60 at paragraph 23, Justice Deschamps noted "because the *CCAA* is silent about what happens if reorganization fails, the

BIA scheme of liquidation distribution necessarily supplies the backdrop for what will happen if a *CCAA* is ultimately unsuccessful".

[107] The issue of terminating a CCAA proceeding by permitting a petition in bankruptcy to proceed is one of discretion on the part of the supervising judge (see *Ivaco* (Re) [2006] 0.J. No. 4152 para. 77 and Nortel Networks Corp. (Re) 2009 ONCA 833 at para 41.)

[108] Those who seek to have a stay lifted or to oppose the stay being lifted to obtain other relief must be acting in good faith. There is no evidence of lack of good faith here beyond the suggestion of delay.

[109] The parties resisting the lifting of the stay urge that it not be granted on several grounds. The first is based on the delay on the part of West Face in bringing the motion. It is asserted that the motion should have been brought when the applicant first made it returnable on its motion for direction.

[110] It is also urged that given the passage of time that the Monitor should be directed to make payments of those amounts which would otherwise have been made to date under the windup orders of the Superintendent.

[111] The argument advanced by the Pension Administrator is that the *CCAA* process has completed what it set out to do, namely, liquidate the assets of GFPI and therefore there is no purpose to be served by lifting the stay and therefore the Order should not be granted to allow bankruptcy.

[112] West Face seeks to lift the stay of proceedings granted by the Initial Order to enable the Petition commenced in March 2010 to proceed.

[113] Like those opposing, West Face takes the position that the *CCAA* process has run its course and there is no likelihood of recovery on any other assets and adds therefore no reason for the applicant to continue to make any pension payments on account of pension plans. Since the security of West Face on behalf of the Second Liens Lenders is valid they are entitled to be paid from the assets on hand and a bankruptcy Order would expedite recovery.

[114] What then is the process that is involved under the CCAA when there is not one but several sales of assets of an insolvent company over a period of time during which no one objects to the continuation of "payments being made in the ordinary course" which include ongoing payments to pension plans.

[115] The *CCAA* continues to be sufficiently flexible to allow for an ongoing sale of assets without the necessity of a formal plan voted on by creditors. As I noted above, a sale of assets following an Initial Order is an implicit plan.

[116] In this case following the sale of the major assets to Georgia Pacific there was a distribution the effect of which was to pay out the First Lien Lenders in entirety and indeed some payments to the Second Lien Lenders.

[117] Following the granting of leave in *Indalex* by the Supreme Court of Canada all of the parties in this case recognized that the issue of priority of deemed trusts would likely be clarified by that Court's decision in that case.

[118] From the time that the motion of GFPI for direction with respect to payments on windup deficiency was first brought before this court, there was agreement by all Counsel that the Supreme Court decision in *Indalex* if not determinative would provide considerable guidance on the issues in this case.

[119] To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

[120] This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the *BIA* process.

[121] I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditor's position may be better advanced under the *BIA*.

[122] The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Court's decision in *Indalex*, I questioned whether it would be fair to permit the stay to be lifted if it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

[123] In this case West Face urges its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would *de facto* be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA*.

[124] I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA*. That has been the case here.

[125] If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.

[126] The Supreme Court of Canada in *Indalex* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.

[127] For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.

[128] While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in *Indalex*.

Conclusion

[129] As noted above in this decision virtually all of the judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments.

[130] The difficulty of dealing with these complex issues is not restricted to Canada. In her book of 2008[7] Prof. Janis Sara has chronicled the way in which various countries around the world have sought to deal with the difficulty of pension priority in the context of business financing and insolvency. The conclusion is there is no easy answer.

[131] I have no doubt that the question of pensions will be an ongoing issue for some time to come. There is an urgency that legislators both Federal and Provincial address the issue.

[132] In this case and for the above reasons the priority of proceeds will be to the Secured Creditors in respect of those amounts that otherwise would be payable in respect of windup deficiencies.

[133] I would not think this is an appropriate matter for costs disposition but if any Counsel disagrees or there is any further issue with respect to an Order following from this decision I may be spoken to.

C. L. CAMPBELL J.

Date: September 20, 2013

[7] Employee & Penson Claims during Company Insolvency – A Comparative Study of 62 Jurisdictions, Thomson & Carswell.

COURT OF APPEAL FOR ONTARIO

CITATION: Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570
DATE: 20150807
DOCKET: C58636

Doherty, Gillese and Lauwers JJ.A.

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 Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

BETWEEN

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Applicants

and

The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security

Respondents

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Heard: February 3, 2015

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

Gillese J.A.:

OVERVIEW

[1] The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

[2] The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

[3] Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

[4] During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on

wind up of each plan (the "**wind up deemed trust**"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

[5] The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("**PPSA**").

[6] Sections 57(3) and (4) of the PBA read as follows:

> 57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[7] The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person

> who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

[8] The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[9] For the reasons that follow, I would dismiss the appeal.

THE CAST OF CHARACTERS

[10] Grant Forest Products Inc. ("**GFPI**") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

[11] GFPI and related companies (the "**Applicants**") brought an application for protection from creditors under the CCAA (the **CCAA Proceeding**"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "**Remaining Applicants**" in the CCAA Proceeding.

[12] Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "**Administrator**"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

[13] Stonecrest Capital Inc. was appointed the chief restructuring organization (the "**CRO**") by court order dated June 25, 2009.

[14] Ernst & Young Inc. was appointed the monitor (the "**Monitor**") by court order dated June 25, 2009.

[15] The "**First Lien Lenders**" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

[16] The "**Second Lien Lenders**" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

[17] The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "**Second Lien Lenders' Agent**").

[18] The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

[19] West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "**West Face**"), are parties to the **Second Lien Credit Agreement** with the Remaining Applicants. The Second Lien Lenders (including

West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

[20] Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("**USSC**") in USSC's unrelated proceedings under the CCAA (the "**Intervener**") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

[21] By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Re Grant Forest Products Inc.*, 2015 ONCA 192. Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

BACKGROUND IN BRIEF

Sale of the Applicants' Assets

[22] On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

[23] The court gave that protection by order dated June 25, 2009 (the "**Initial Order**"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

[24] In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

[25] GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

[26] GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("**Georgia Pacific**"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan, which was the pension plan associated with the assets it had purchased.

[27] Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17,

2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

[28] Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

[29] The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

[30] A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

[31] As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "**Remaining Funds**").

The Pension Plans

[32] GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI – Timmins Plant (the "**Salaried Plan**") and (2) the Pension Plan for Executive Employees of GFPI (the "**Executive Plan**") (together, the "**Plans**").

[33] Both of the Plans are defined benefit pension plans under the PBA.

[34] The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business".

[35] On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

[36] A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

[37] The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "**Superintendent's Wind Up Orders**"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

[38] As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

[39] GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "**Pension Motion**"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

[40] When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "**Reserve Funds**").

[41] The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

[42] On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the

Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans.[1]

[43] It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

[44] On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

[45] On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

[46] By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

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[1] Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

[47] The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

[48] On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

[49] On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

[50] When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

[51] By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

[52] West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

[53] By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada

Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "**Bankruptcy Motion**").

[54] On October 22, 2012, it was submitted[2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "**Motions")**, however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

[55] The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

[56] The Supreme Court released its decision in *Indalex on* February 1, 2013.

[57] On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

[58] A further oral hearing on the Motions took place on July 23, 2013.

[2] The record is unclear as to which party or parties made this submission.

The Transition Order

[59] The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "**Transition Order**"). Among other things, in the Transition Order, the court ordered that:

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

[60] In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

[61] The Superintendent then sought and obtained leave to appeal to this court.

THE DECISION BELOW

[62] In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the

assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

[63] The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

[64] The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

[65] In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

[66] The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

[67] The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts

priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

[68] The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

[69] The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

[70] The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

[71] West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

[72] Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A SUMMARY OF THE PARTIES' POSITIONS ON APPEAL

The Superintendent

[73] The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

[74] The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

[75] The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

[76] The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

[77] First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required

payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

[78] Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

[79] Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

[80] Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

[81] Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

[82] The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

[83] West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts

that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

[84] West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

[85] Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

[86] However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;

2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;

3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and

4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

[87] The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

THE ISSUES

[88] The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

[89] The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

[90] West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

[91] In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

[92] To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions*: Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69, at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

[93] With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining

Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

[94] To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?
2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and
3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

THE STANDARD OF REVIEW

[95] The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, at para. 29.

[96] I would not accept this submission for two reasons.

[97] First, in articulating this standard of review, *Resurgence* purported to follow *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93. However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

[98] Second, the applicable standard of review has been established by two decisions of this court: *Re Air Canada* (2003), 66 O.R. (3d) 257 and *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108. In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco*, at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

[99] The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

[100] Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?

[101] The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

[102] I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

[103] It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The

CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

[104] *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

[105] It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced

because there would have been even fewer funds available to satisfy their claims.

[106] The CCAA judge was also aware that in March 2012 – some three months before the Pension Motion was brought – counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

[107] Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

[108] That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

[109] In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?

[110] In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[111] At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

[112] In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA – that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> … The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow

> the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco,* at paras. 62-63). [Citation excluded.]
>
> …
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

[113] Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

[114] The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and

4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

[115] Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

[116] Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

[117] In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

[118] As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

[119] The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts

are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

[120] I would not accept either submission.

Federal Paramountcy

[121] In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

[122] As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

[123] Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

[124] As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

[125] In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

[126] There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

[127] The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

[128] A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the

application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

[129] Both the facts and the issues in *Indalex* differ from those of the present case.

[130] There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made – the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

[131] Second, the BIA played no part in *Indalex.* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding.[3]

[132] The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP

[3] See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

[133] As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[134] Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

[135] It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

[136] I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an

> insolvent company GFPI was not obliged to make the payments … .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

[137] I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

[138] Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going – the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order

permitted, but did not require, GFPI to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

[139] Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps – such as those suggested by the CCAA judge – to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

[140] I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

[141] In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to

address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A CONCLUDING COMMENT

[142] In my view, this case illustrates the value that a CCAA proceeding – rather than a bankruptcy proceeding – offers for pension plan beneficiaries. Three examples demonstrate this.

[143] First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

[144] Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

[145] Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which

the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

[146] I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

DISPOSITION

[147] Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

[148] If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

Released: August 7, 2015 "DD"

"E.E. Gillese J.A."
"I agree Doherty J.A."
"I agree P. Lauwers J.A."

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

SERVICE

1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. ("SCI") in its capacity as Chief Restructuring Organization (the "CRO"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the "Pension Plans") or their respective trustees or to the Pension Administrator.

6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

TAB 11

CITATION: Imperial Tobacco Canada Limited, et al, Re, 2019 ONSC 1684
COURT FILE NO.: CV-19-616077CL
DATE: 20190315

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 IMPERIAL TOBACCO CANADA LIMITED, AND IMPERIAL TOBACCO COMPANY LIMITED, Applicants

BEFORE: McEwen J.

COUNSEL: *Deborah Glendinning*¸ *Marc Wasserman*, *John A. MacDonald*, and *Michael De Lellis*, for the Applicants

David Byers and *Maria Konyukhova*, for the British American Tobacco p.l.c, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited

Jay Swartz, *Robin Schwill*, and *Natasha MacParland*, for the Proposed Monitor, FTI Consulting Canada Inc.

Jonathan Lisus and *Matthew Gottlieb*, for the Proposed Tobacco Claimant Representative

HEARD: March 12, 2019

ENDORSEMENT

[1] On March 12, 2019 I granted the Initial Order, as amended, with reasons to follow. I am now providing those reasons.

Background

[2] Imperial Tobacco Canada Limited ("ITCAN") and its subsidiary Imperial Tobacco Company Limited ("ITCO") (together, the "Applicants") seek an Initial Order for a stay of all existing and prospective proceedings pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), primarily so that they can effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada. They also seek the same relief on behalf of their related companies.

[3] The timing of this Application stems from the recent judgment of the Quebec Court of Appeal in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (the "Quebec Appeal Judgment"), in which the Applicants and co-defendants were

found liable for damages totalling approximately $13.5 billion. Based on the filed record, enforcement of the Quebec Appeal Judgment would likely spell the end of the Applicants' business because ITCAN does not have sufficient funds to satisfy the judgment. ITCAN's share of the judgment exceeds $9 billion.

[4] Amongst other submissions, the Applicants stress that enforcement of the Quebec Appeal Judgment places in serious jeopardy the continued employment of the Applicants' 466 full-time and 98 contract employees across Canada who receive wages and salaries of approximately $70 million per year. The Applicants also point to the fact that they generate taxes payable to various levels of government across Canada totalling approximately $4 billion per year. They further stress that, based on industry publications, if the Applicants and other legal producers of tobacco products in Canada cease to operate then the illegal tobacco trade could expand to fill the void.

[5] In addition to the Quebec Appeal Judgment, ITCAN (and in some cases related companies) face more than 20 large proceedings across Canada. In Ontario alone there are four actions claiming damages in excess of $330 billion. The actions across the country include government actions to recover healthcare costs incurred in connection with smoking related diseases; smoking and health class actions seeking damages on behalf of individuals; and a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN. Most of these cases are in the preliminary stages.

[6] The Applicants submit that in the above circumstances the proposed Initial Order is necessary and reasonable as it seeks an overall solution with respect to the Quebec Appeal Judgment and other outstanding and potential proceedings.

Analysis

[7] ITCAN and ITCO are incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. ITCO is a privately held subsidiary of ITCAN. Their registered head offices are located in Brampton, Ontario. Their liabilities clearly exceed $5 million as a result of the Quebec Appeal Judgment. According to the affidavit filed by Mr. Eric Thauvette, the vice-president and chief financial officer of ITCAN, the Applicants do not have sufficient funds to pay the Quebec Appeal Judgment that is currently payable.

[8] Based on the above, the Applicants are insolvent companies to which the CCAA applies. I am also of the view that it is appropriate to grant the stay of proceedings requested by the Applicants. This court, pursuant to the provisions of s. 11.02 of the CCAA, may grant a stay of proceedings if it is satisfied that circumstances exist that make such an order appropriate.

[9] It is settled law that the principal purpose of the CCAA is to maintain the *status quo* while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company's operations. In the circumstances of this case, ITCAN cannot pay the amount of the Quebec Appeal Judgment and the Judgment is currently enforceable. Enforcement would cause the Applicants serious harm. As I have outlined above, it would also jeopardize tax revenue and legal trade in tobacco. It is therefore appropriate to grant the stay of proceedings requested by the Applicants as all stakeholders would likely be detrimentally

affected if the Quebec Appeal Judgment was enforced. These stakeholders include employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors. Specifically, a stay creates a level playing field amongst the litigation claimants.

[10] Insofar as the proposed monitor is concerned I am satisfied that FTI Consulting Canada Inc. ("FTI") is a suitable monitor and should be appointed in these proceedings pursuant to s. 11.7 of the CCAA. FTI is an experienced monitor who frequently acts in this capacity in CCAA proceedings. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

[11] I also agree with the Applicants that the CCAA extension should be extended to the non-Applicants British American Tobacco p.l.c. ("BAT") and B.A.T. International Finance p.l.c., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, and entities related to or affiliated with them (the "BAT Affiliates"), Liggett & Myers Tobacco Company of Canada Limited ("Liggett & Myers"), and other non-Applicant subsidiaries noted in the Application Record.

[12] I have jurisdiction to extend the stay: *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461 and *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429. In my view, it is reasonable to do so in circumstances where most of the outstanding proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants. Further, Liggett & Myers and the other non-Applicant subsidiaries are highly integrated with the Applicants and indispensable to the Applicants' business and restructuring. As submitted, certain of them hold trademarks or other assets of ITCAN, provide services to ITCAN, share the cash management system with ITCAN, and /or have guaranteed ITCAN debts from time to time. It is reasonable to extend the stay to these entities. Failure to do so would undermine the intent of the stay. Further, given the stay of proceedings that I have granted with respect to the Applicants, I see no prejudice to claimants in existing and potential proceedings if the stay is extended.

[13] I am further satisfied that the charges requested below by the Applicants are reasonable and should be granted.

[14] The Administration Charge in the amount of $5 million is fair and reasonable. The restructuring will be an extremely extensive and expensive undertaking. It will involve a great deal of effort by the professional advisors who are subject to this charge. I do not see any duplication of the roles. Furthermore, the Administration Charge is supported by the Applicants' parent and other related companies, which are secured creditors. The amount is reasonable given the size of this matter.

[15] I am further satisfied that the Tobacco Claimant Coordinator Charge is reasonable. I pause here to note that the Applicants had proposed that a Tobacco Claimant Coordinator be described as the "Tobacco Claimant Representative". To avoid any confusion that might suggest that the Honourable Warren K. Winkler, Q.C., whom I have appointed, may be seen to displace existing counsel, or to take some sort of role that may be considered binding in nature with

respect to any of the litigants affected by this order, the title was amended to Tobacco Claimant Coordinator.

[16] Given the immense size and complexity of this matter, I am of the view that a charge is reasonable with respect to the Honourable Warren K. Winkler, Q.C. as per the terms of the Interim Order so that he, along with others, can begin a claims process. It is also reasonable to allow him to retain the independent counsel requested and provide for a charge of $1 million.

[17] It is reasonable that the Administration and Tobacco Claimant Coordinator Charges rank as first charges *pari passu* given their importance.

[18] The Directors' and Officers' Charge sought should also be approved to ensure that the Applicants enjoy ongoing stability during these CCAA proceedings.

[19] The directors and officers reasonably insist that a charge be put in place. I agree with their concerns. They also have significant knowledge and experience. The Applicants and related companies require that the directors and officers can continue on with the management of the businesses.

[20] The proposed charge of $16 million, which stands second in priority to the aforementioned Administration and Tobacco Claim Coordinator Charges, is also reasonable.

[21] Last, insofar as the charges are concerned, I am also satisfied that the charge concerning Sales and Excise Taxes in the maximum amount of $580 million is also reasonable as a third charge. It is important that this charge be granted so that the directors and officers do not face personal liability for the taxes. I reviewed the Applicants' record and I am satisfied that the amount is fair and reasonable.

[22] All of the charges are supported by FTI.

[23] In addition to the above specific comments, I am further satisfied that the remaining terms of the proposed Interim Order ought to be granted. The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations. It is in the best interests of all stakeholders to allow for the payment of these obligations.

[24] BAT, the BAT Affiliates, and FTI all support the Applicants' position, including their intention and ability to meet their current payables in the ordinary course of conducting business.

[25] For all of the reasons above, the Application was granted and the Interim Order was signed, as amended.

McEwen J.

Date: March 15, 2019

TAB 12

2006 CarswellOnt 3632
Ontario Superior Court of Justice

Muscletech Research & Development Inc., Re

2006 CarswellOnt 3632

Muscletech Research and Development Inc. - CCAA

Ground J.

Heard: June 8, 2006
Judgment: June 8, 2006
Docket: 06-CL-6241

Counsel: Sara J. Erskine, for Richard Ward and Ward Conceptual Communications
N. MacParland, J. Swartz, for RSM Richter Inc.
Jeff Carhart, David Molton, for Ad Hod Committee of Tort Claimants
Derrick Tay, for Iovate Companies
Stuart Brotman, for GNC Oldco Entities
Sheryl Seigel, for GNC Corporation

Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

***Ground J.*, (Orally):**

1 The motion brought by Richard Ward and Ward Conceptual Communications (collectively "Ward") for the lifting of the stay imposed in the within the CCAA proceeding is, in my view, premature and does not resolve the concern of Ward.

2 It must be kept in mind that the claim which would be filed in the CCAA proceeding and which will be dealt with by the claims resolution officer and which will be dealt with in the Plan submitted to creditors and ultimately to the court for sanction can only be the claim Ward against Muscletech in respect of the infringing activities of Muscletech. It cannot impact on any claim which Ward may have for infringing activities by Mr. Gardiner ("Gardiner") personally or by the Iovate companies (collectively "Iovate"). On the other hand, a determination by the claims officer or by this court that Ward has a valid claim against Muscletech in respect of its infringing activities would, in my view, be either raised *res judicata* or issue estoppel with respect to Ward's claims against Gardiner or Iovate because the activities of all three alleged infringers are the same activities. It, therefore, seems to me that no steps should be taken at this stage with respect to the proposed action against Iovate or the continuance of the action against Gardiner until the determination and final resolution of the claims resolution procedure which will determine whether or not Ward has any claim in respect of the alleged infringing activities against Muscletech and accordingly, whether Ward would have any claim in respect of similar activities against Gardiner or Iovate.

3 In addition, if the "full release" referred to in the factum of the Applicants purported to impose a condition, on the acceptance of Ward's claim, that Ward release Gardiner personally and/or Iovate from any liability they may have with respect to their own infringing activities, I would have thought that would be a basis on which Ward would appeal the decision of the claims officer or would certainly be an issue raised by Ward at the sanction hearing of the Plan.

4 Accordingly, I do not see that Ward's rights are, in any way, affected by delaying any motion to proceed with its action against Gardiner and Iovate until after the determination of its claim in the CCAA proceeding against Muscletech.

5 Accordingly, the motion is dismissed without prejudice to the rights of Ward to bring any motion before this court, subsequent to the completion of the claims resolution process or the approval or non-approval of the Plan, to permit it to continue or bring its action against Gardiner or Iovate with respect to their distinct alleged infringements. Pursuant to paragraph 8 of the Initial Order in this matter, the postponement of the bringing of such motion as a result of the dismissal of today's motion will not result in the limitation period running against Ward with respect to any such proposed action or continued action against Gardiner or Iovate. The dismissal of today's motion is also without prejudice to the rights of Ward or the Applicants to seek costs of today's motion dependent upon the resolution of Ward's claim against Muscletech during the claims resolution process.

TAB 13

2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

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

Morawetz J.

Heard: June 16, 2009
Judgment: August 18, 2009
Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Leanne Williams for Flextronics Inc.
J. Pasquariello for Monitor, Ernst & Young Inc.
B. Wadsworth for CAW-Canada
Thomas McRae for Recently Severed Calgary Employees
A. McKinnon for Former Employees
Mary Arzoymanidis for Bell Canada
Alex MacFarlane for Unsecured Creditors' Committee
Gavin Finlayson for Noteholders
Tina Lie for Superintendent of Financial Services of Ontario
Steven Graff, Ian Aversa for Current and Former Employees

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Removal of stay

Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards

restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

***Morawetz J.*:**

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable

that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;

(b) the bulk of documentary discovery issues have been worked out;

(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and

(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by

extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

TAB 14

1992 CarswellBC 524
British Columbia Court of Appeal

Pacific National Lease Holding Corp., Re

1992 CarswellBC 524, [1992] B.C.W.L.D. 2547, [1992] B.C.J. No. 2309, 15 C.B.R. (3d) 265, 19 B.C.A.C. 134, 34 W.A.C. 134, 36 A.C.W.S. (3d) 389, 72 B.C.L.R. (2d) 368

Re PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION

Macfarlane J.A. [in Chambers]

Heard: October 22, 1992
Judgment: October 28, 1992
Docket: Doc. Vancouver CA016047

Counsel: *H.C. Ritchie Clark* and *D.D. Nugent*, for petitioners (appellants).
W.E.J. Skelly, for Sun Life Trust Company.
M.P. Carroll, for Mutual Life Assurance Company of Canada.
W.C. Kaplan, for Commcorp Financial Services Inc. and National Trust.
H.W. Veenstra, for National Bank of Canada.

Headnote

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

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Court refusing to authorize company to set aside funds to fulfil its obligations under Employment Standards Act — Company applying for leave to appeal from order — Leave being denied as appeal likely to delay or frustrate re-organization efforts — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-46 — Employment Standards Act, R.S.B.C. 1979, c. 10.

The petitioners made an application under the *Companies' Creditors Arrangement Act* ("CCAA") for a stay of all proceedings so that they might attempt a re-organization of their affairs. The stay was granted, but the petitioners subsequently applied to set aside over $1 million in a trust fund to meet their obligations under the *Employment Standards Act* (B.C.). The petitioners' application was dismissed because to allow the petitioners' application would be an unacceptable alteration of the status quo in effect when the order was granted. The petitioners sought leave to appeal.

Held:

The application was dismissed.

In supervising a proceeding under the CCAA, orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems. In that context, appellate proceedings may well upset the balance and delay or frustrate the process under the CCAA. Accordingly, it was not appropriate to grant leave to appeal.

***Macfarlane J.A.*:**

1 This is an application for leave to appeal an order of Mr. Justice Brenner pronounced August 17, 1992 pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A.").

2 The petitioners had become insolvent prior to July 22, 1992 when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the C.C.A.A.

3 Mr. Justice Brenner made an ex parte order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

4 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the *Employment Standards Act*, R.S.B.C. 1979, c. 10, for failing to make the payments mandated by that statute.

5 On July 31, 1992 Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the ex parte stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

6 The merits were argued in August, and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

7 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners to compel payment of statutory severance payments are stayed.

8 The appeal concerns the order made under para. 1 of the order, not against the stay granted in para. 2.

9 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in *Re Westar Mining Ltd.*, unreported reasons for judgment, August 11, 1992 [now reported at 14 C.B.R. (3d) 95 (B.C. S.C.)] (which dealt with a similar issue), and the application of that principle to the facts of this case.

10 The essential facts are that the petitioners are a group of interrelated companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his reasons on August 17, 1992, had been reduced to 60. The provisions of the *Employment Standards Act* had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

11 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000 and for vacation pay in an amount of approximately $150,000 for a total potential liability of $1,000,000. I understand from counsel that once the funders are repaid there may be as much as $61,000,000 available to meet other liabilities.

12 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000 is required.

13 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other respondents, who are 27 other financial institutions, referred to in the material as the "funders." The funders advanced moneys and took security, in part by way of assignment of the lease revenue stream. The moneys advanced by the funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

14 The arrangements with the funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the funders.

15 The petitioners got into financial difficulties, which they revealed to the funders. The funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A.

16 The appellants seek an order of this court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the *Employment Standards Act*) and permitting them to continue to maintain the trust funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

17 The petitioners assert that Mr. Justice Brenner erred:

18 1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the *Employment Standards Act*, requiring the appellants to pay all the statutory payments in full, and thereby ordering the appellants to breach a mandatory statute regarding statutory payments.

19 2. In ruling that he had the inherent jurisdiction under the *Companies' Creditors Arrangement Act* or otherwise to order the appellants to breach the *Employment Standards Act* regarding statutory payments and thereby order the petitioners to commit offences under such statute.

20 3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.

21 4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.

22 5. In suspending the provisions of the July 23, 1992 order authorizing the trust fund.

23 6. In failing to provide any protection to the directors and officers of the appellants by way of the trust fund when ordering the petitioners to breach the *Employment Standards Act*, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

24 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted reorganization of the affairs of a company, and which is intended to prevent a creditor obtaining a preference which it would not have if the attempted reorganization fails and bankruptcy occurs.

25 I think that the answer is given in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.). In that case Mr. Justice Gibbs, at pp. 88-89 [B.C.L.R.], said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

26 In the same case, at p. 92, Mr. Justice Gibbs considered whether security given under the *Bank Act* [R.S.C. 1985, c. B-1] gave preference to the bank over other creditors, despite the provisions of the C.C.A.A. He said:

> It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the *Bank Act* which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

27 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvers for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The court has a broad discretion to apply these principles to the facts of a particular case.

Counsel do not suggest that statement of principles is incorrect.

28 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in *Westar*, supra, and concluded:

> In my view, to allow the petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

29 He said earlier that he did not understand Mr. Justice Macdonald to be saying in *Westar* that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

30 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a reorganization was being attempted under the C.C.A.A.

31 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.

32 So far as the directors and officers are concerned, they were personally liable for potential claims under the *Employment Standards Act* before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

33 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.*, supra. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

34 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

35 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

36 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

37 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

38 In all the circumstances I would refuse leave to appeal.

Application dismissed.

TAB 15

Re Scaffold Connection Corporation, 2000 ABQB 35

Date: 20000121
Action No. 9903 23942

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

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

AND IN THE MATTER OF SCAFFOLD CONNECTION CORPORATION,
P.S.P. ERECTORS INC., SC ERECTORS INC., SCAFFOLD WORKS INC.,
INDUSTRIAL INNOVATIONS 7 SERVICES LIMITED,
SCAFFOLD CONNECTION (USA) INC.

REASONS FOR DECISION
of the
ASSOCIATE CHIEF JUSTICE
ALLAN H. WACHOWICH

APPEARANCES:

Ray C. Rutman
Fraser Milner

Edward R. Feehan & D. A. Readman
Duncan & Craig

Tris Mallett
Osler, Hoskin & Harcourt

N. J. Pollock & D.A. Bodner
Lucas Bowker

Michael J. McCabe
Cruickshank Karvellas

L. Diane Young
Ackroyd, Piasta

Background

[1] This Court granted an order (the "Order"), filed December 23, 1999, respecting Scaffold Connection Corporation and its related companies (the "Scaffold Group") which in part gave the Scaffold Group protection under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c.C-36 ("***CCAA***"). A motion was presented to the Court on January 21, 2000, for an extension of that Order, which extension was granted until February 29, 2000.

[2] At the same time an application was made by two companies, Hi-Lite Systems Inc. ("Hi-Lite") and Estey & Co. Ltd. ("Estey"), who submitted they had a right to file Mechanics' Liens prior to entry and filing of the Order of December 23, 1999. These companies requested leave to register and maintain (including the filing of a Statement of Claim and Certificate of Lis Pendens) their liens, and a declaration that all Liens already registered subsequent to the Order be effective *nunc pro tunc*. It was also requested that Scaffold, KPMG, Fluor Daniel Wright Inc. and Irving Oil Ltd. be directed to provide all information required, and that Scaffold Connection Corporation or the Monitor, KPMG Inc., be directed to maintain all assets received in trust, pursuant to the ***Mechanics' Lien Act***, R.S.N.B. 1973, c.M-6.

[3] J. McIver Estey deposes in his Affidavit that Estey provided materials to Scaffold Connection Corporation which were used in the construction and upgrading of an oil refinery on land owned by Irving Oil Limited in Saint John, N.B. The last of the materials were furnished on or before December 23, 1999, and Estey is owed $95,753.41 in respect of those materials. Estey filed a lien on December 30, 1999, and on the same date served on Irving Oil Limited a Notice of Lien. The lien was filed and the Notice served prior to Estey's knowledge of the Order. Since December 30, 1999, Estey has continued to furnish materials to Scaffold in connection with the Irving Oil refinery construction and is being paid for such materials.

[4] David Jackson, V.P. of Hi-Lite, deposes in his Affidavit that Hi-Lite furnished materials and services including sale and lease of scaffolding equipment to Scaffold for use on the Irving Oil Limited Refinery Project. As of November 25, 1999, the outstanding account in relation to this project was $676,674.35. Since that date, further invoices totalling $6,117.62 had been issued. As a result of the outstanding accounts of Scaffold Connection Corporation, the financial position of Hi-Lite has been negatively affected, and it will likely be required to lay off 12 of its 60 employees. During the course of the Project, Scaffold supplied Hi-Lite with post-dated cheques for a portion of the amount owing to Hi-Lite. Scaffold instructed that the cheques not be cashed until such time as Scaffold indicated. Several cheques were cashed to satisfy a portion of the outstanding accounts. Hi-Lite deposited the last cheque in the amount of $92,328.76 in December of 1999. Payment was stopped, and the cheque returned. Scaffold has made no further payments to Hi-Lite. Hi-Lite has prepared a Claim for Mechanics Lien in New Brunswick, but the same has not been filed.

[5] Hi-Lite and Estey argue that by filing liens, they are not proceeding against the Scaffold Group, but rather against trust funds held and specifically assigned to the project by Irving Oil Limited, or by contractors or sub-contractors, and specifically held for Hi-Lite and Estey.

[6] They further submit that the liens or rights granted pursuant to the ***Mechanics' Lien Act***, *supra,* were in existence prior to the Order, and failure to allow them to register and act upon the liens would unduly prejudice the Applicants because the existing liens would lapse by operation of law. In support of their argument, Hi-Lite and Estey emphasize the purpose of the ***CCAA,*** being to maintain the *status quo* while the insolvent companies attempt to gain the approval of its creditors for a proposed arrangement. They also argue unjust enrichment of Irving Oil Ltd. and the Scaffold companies.

[7] Under s.16 of the ***Mechanics' Lien Act,*** where a lienholder gives the owner notice in writing of its lien, the owner is required to retain from the amount payable to the contractor the amount stated in the Notice in addition to the normal statutory holdback, and the amount thus retained constitutes a fund separate from the normal statutory holdback fund. Furthermore, under the ***Mechanics' Lien Act***, a lien ceases to have effect unless within 90 days of the filing of the lien, the lienholder files and serves a Statement of Claim and registers a Lis Pendens against the property of the owner. Estey states there is a serious question as to whether the stay resulting from the Order operates as a postponement of the time limitations under the ***Mechanics' Lien Act***, and if such is not the case, Estey will have lost any claim it might have under the ***Act*** against the land of Irving Oil Limited.

[8] The Scaffold Group also filed a motion, requesting an order restraining any creditors having a right under statute or agreement from requiring that a third party who owes money to the Scaffold Group pay such creditors, from commencing or continuing a proceeding against the said third party, and from taking any step regarding any lien rights they may have. The Scaffold Group further request that payment by the third party to Scaffold Group be without liability to the said creditors, that payments by Irving effectively release Irving from liability to Hi-Lite, and that Irving be entitled to pay the monies without any right of set-off.

[9] The Scaffold Group submits that if Irving does not pay the full amount owing to it, any plan of reorganizing will ultimately fail. Scaffold employs between 150 and 550 employees at any given time. It submits that payment by Irving under the liens would result in a situation whereby it would be unable to meet its payroll and its ongoing operational expenses, putting an end to the major contracts in progress.

[10] At the time of this motion, I dismissed Hi-Lite and Estey's applications, with reasons to follow.

Analysis

[11] The December 23rd Order stays and suspends any and all "Proceedings" taken by any person against or in respect of Scaffold, or in respect of any present or future property, assets, business and undertakings of Scaffold of any kind or nature whatsoever whether real or personal wherever located (para.3(a)(i)). Paragraph 3(a)(ii) provides, *inter alia*, that Proceedings shall mean and include, without limitation, any act or process of or connected to realization, seizure, repossession and/or any suits, actions, extra-judicial proceedings or remedies, or enforcement processes.

[12] A substantial body of case-law has been established concerning the definition of "proceedings" in s.11 since my decision in ***Meridian Developments* v. *Nu-West*** (1984), 53 A.R. 39 (Q.B.), supporting the approach taken therein. I am satisfied that the filing of a lien in this case falls within the meaning of "proceedings" as used in s.11, and in the Order.

[13] The following provisions contained in the Order are relevant to the present application:

> 3(c). the right of any Person to assert, enforce or exercise any option, remedy or right, including, without limitation, any right of dilution, buy-out, divestiture, repudiation, recission, forced sale, forced purchase, acceleration, termination, suspension, modification, cancellation, or right to revoke any qualifications or registration, howsoever such remedy, option or right arises and whether such remedy, option or right arises under or in respect of any Agreement or by reason of any default under any Agreement, is hereby restrained.
>
> ...
>
> 7. To the extent that any rights, obligations, or time or limitation periods relating to Scaffold or the Property may expire or terminate with the passage of time, the terms of such rights, obligations or periods are deemed to be extended by a period of time equal to the duration of the stay of proceedings effected by this Order and any further Order of this Court...
>
> ...
>
> 19. All liens in favour of the Crown, federal and provincial, and all mortgages, liens, charges or security interests in favour of any Person created or granted before the date of this Order for advances made or obligations incurred prior to the date of this Order shall retain the same priorities as if this Order had not been made.

[14] Section 11 of the ***CCAA*** empowers the Court to make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days, staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the ***Bankruptcy and Insolvency Act*** or the ***Winding-up Act;*** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[15] In ***Meridian,*** *supra,* I described the purpose of the ***CCAA*** (at 42):

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed

> arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

And at 43:

> The intention was to prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed.

Subsequent judicial consideration has confirmed that it is necessary to give s.11 a wide interpretation in order to ensure its effectiveness, and has further clarified the nature of the powers under s.11, as well as those under the inherent jurisdiction of the court.

[16] In ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 20 (Alta.Q.B.), it was argued that the ***CCAA*** was designed to affect creditors only. Forsyth J. noted the "extraordinarily broad" wording of s.11, which could support that argument, as well as the contrary one. However, keeping in mind the purpose of the ***CCAA***, he considered the fact situation in that case (at 14):

> It would be difficult to grant Norcen's application without granting similar orders in the future to other holders of working interests of which Oakwood is the operator *with the result being a marked reduction in the probability of success for Oakwood in its efforts to negotiate an acceptable plan of compromise* with its lenders. [emphasis added]

[17] In a similar vein, it was held in ***Campeau* v. *Olympia & York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont.Gen.Div.), that where an action has been commenced jointly against the debtor and a third party, the court can restrain the proceedings against the third party, if appropriate, under its inherent jurisdiction. In exercising its inherent jurisdiction, the interests of the company which is the subject of the order must be weighed against the interests of the third party (see also ***Re Woodward's Ltd.*** (1993), 17 C.B.R. (3d) 236 B.C.S.C.)).

[18] In ***Re T. Eaton Co.***(1997), 46 C.B.R. (3d) 293 (Ont.Gen.Div.), Dylex sought an amending order to permit it to terminate or otherwise alter the terms of its leases, under the co-tenancy clauses in its leases if Eaton's ceased to operate its store in a shopping centre. The court in that case held that if the court were to grant the order, it would have to grant the same relief to other tenants in similar positions, and that there was evidence that if this took place, Eaton's restructuring plan would be seriously jeopardized. Houlden J.A., citing ***Norcen***, *supra*, and ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 (Ont.Gen.Div. [Commercial List]), held that s.11 of the ***CCAA***, and the inherent jurisdiction of the court were sufficiently wide to permit the making of orders against third parties who were not creditors where their actions would potentially prejudice the success of a plan. He also found that the prejudice to the moving parties did not outweigh the benefits of maintaining the stay.

[19] Based on the foregoing case-law, there is no doubt that in appropriate cases, the court, under its inherent jurisdiction, may order a stay under the ***CCAA*** which has a direct impact on third parties, in order to accomplish the intended goal of that legislation.

[20] Estey and Hi-Lite rely on ***Crane Canada Inc.* v. *McCain Foods Ltd.*** (1992), 14 C.B.R. (3d) 106 (N.B.Q.B.). In that case, Crane provided materials worth over $11,000 to a subcontractor, Bird, working on the construction of a structure on property owned by a third party. The subcontractor became insolvent, and an arrangement was made under the ***CCAA*** which reduced the debt payable to Crane to $2,000. Two weeks after the order was made, Crane filed a claim for lien under the ***Mechanics' Lien Act***. The third party paid $12,000 into court to vacate the lien. The subcontractor argued that Crane was only entitled to $2,000. Crane argued that the ***CCAA*** did not affect its rights to collect the full debt under the ***Mechanics' Lien Act***. Bird argued that since the court did not give leave to Crane to file the claim, the lien was filed in violation of para.7 of the ***CCAA*** order, and was void. Paragraph 7 provided:

> 7. IT IS FURTHER ORDERED THAT ALL CREDITORS OF THE Applicant holding any security including but not limited to, promissory notes, hypothecation and pledge of shares, debentures, trust deeds, mortgages, chattel mortgages, conditional sales, assignment of book debts, security under Section 178 of the Bank Act or letters of credit, be enjoined and restrained from realizing upon or otherwise dealing with such security, including without limitation the crystallization of any floating charge, appointment of receiver, agent, or receiver/manager except with the leave of this Court and subject to such terms as this Court may then impose.

Crane argued the enforcement of a lien against the property of a third party was outside the scope of an order under the ***CCAA***.

[21] McLellan J. reviewed the relationship between the provisions of the ***CCAA*** and those of the ***Bankruptcy Act***, and held (at 111):

> Accordingly, in my view, rights of holders of mechanics' liens under orders made under the ***Companies' Creditors Arrangement Act*** are to be interpreted as the same as the rights of such lienholders under a bankruptcy. A bankruptcy does not prevent a mechanics' lienholder from enforcing (without leave of the court) a mechanics' lien against the lands of a third party for the full value of the goods and work provided. Therefore, in my opinion, orders under the ***CCAA*** also do not prevent a claimant from enforcing a mechanics' lien against the lands of a third party for the full value of the goods and work provided.
>
> If Parliament had intended any other result, then, in my view, Parliament should have said so. Parliament did not.

[22] While the ***CCAA*** clearly is only one piece of the existing body of insolvency legislation, it must be kept in mind that the goal of the ***CCAA*** is to enable insolvent companies

the opportunity to reorganize in order to continue operating, where that appears to be a realistic goal. It may be that in particular circumstances, leave to pursue a lien claim would not jeopardize the company's efforts at reorganization. However, this must be determined on the facts of each case. In cases where such a claim would endanger the survival of the company, the courts' jurisdiction enables it to stay proceedings, even those concerning third parties. It would greatly hamper the usefulness of this legislation if such jurisdiction did not exist, as stays would in some cases (such as the present one) be rendered futile.

[23] The reasoning in ***Crane**, supra,* does not specifically deal with the jurisdiction of the Court, as outlined in the above cited cases which recognize the broad powers of the Court to stay proceedings under the ***CCAA***. It may be that certain stay orders will be drafted in a manner which allows such a conclusion as to the nature of the stay. Indeed, para. 7 of the order in ***Crane*** applied expressly to "all creditors of the Applicant". It must also be noted that McLellan J. was considering the stay order in hindsight. On an application such as the present one, however, where the Court is asked to exercise its jurisdiction to grant a stay, it must not be presumed that third parties cannot be affected by the stay. Paragraph 3(c) of the Order in the present matter is sufficiently broad to cover the liens in question.

[24] The court's primary concerns under the ***CCAA*** must be for the debtor company and all of the creditors. However, where possible, creditors must not be unduly prejudiced.

[25] It is not uncommon for courts to lift stay orders in order to enable filing of claims to avoid limitation problems (for example: ***Re Anvil Range Mining Corp.*** (1998), 3 C.B.R. (4th) 93 (Ont.Gen.Div.) (miner's lien); ***Algoma Steel Corp.* v.** ***Royal Bank*** (1992), 11 C.B.R. (3d) 11 (Ont.C.A.) (insurance claim); order of Powers J. in ***Re Smoky River Coal Ltd.,*** referred to [1999] A.J. No. 930 (Q.B.) (liens)). In some cases leave *nunc pro tunc* to bring an action has been granted (for example: ***Re Campbell* v.** ***Barager Lumber Co. Ltd.***, [1953] O.W.N. 508 (Ont.H.C.J.)). In other cases, the running of a limitation has been suspended (for example: ***Re Woodward's Ltd.*** (1993), 17 B.C.R. (3d) 253 (S.C.)).

[26] At this point, it is uncertain as to whether the liens are valid. The *status quo* at the time of the Order was that Hi-Lite and Estey had the right to file liens. Paragraph 7 of the Order is sufficient to preserve that right by suspending the limitation that would otherwise run against Estey and Hi-Lite with respect to the lien claims. To use the language of Blair J. in ***Campeau**, supra*, their action is not being precluded, but merely postponed.

[27] It is clear that the Scaffold group requires payment by Irving in order to continue its operations. The evidence of Hi-Lite and Estey did not persuade this Court that the prejudice to those companies if the liens were not filed at the present time would compare in magnitude to the prejudice to Scaffold if its cash flow ceases. If the stay were lifted with respect to the liens, Scaffold's ability to negotiate an arrangement would be seriously undermined.

HEARD on the 21st day of January, 2000.

DATED at Edmonton, Alberta this 21st day of January, 2000.

A.C.J.C.Q.B.A.

TAB 16

2008 S. H. No. 305549

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re) 2009 NSSC 162

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 of Arrangement of ScoZinc Limited

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DECISION OF THE CLAIMS OFFICER

Claims Officer: Richard. W. Cregan, Q.C.

Heard : May 7, 2009

Counsel: Michael J. Wood, Q.C. and R. Paul Thorne representing Q-Drilling & Remediation Incorporated,

John Kulik, Q.C. and Owen Thomas representing ScoZinc Limited, and

Gavin D. F. MacDonald, representing Grant Thornton Limited, the Monitor

[1] On December 22, 2008, ScoZinc Limited (the "Company") made an application to the Court under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "CCAA"), at which time the Initial Order was granted.

[2] Paragraph 3 of this order provides a stay of almost every conceivable proceeding which could be brought against the company, including liens under the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended.

[3] The Claims Procedure Order was granted on February 18, 2009. It sets the procedure for creditors to assert their claims against the Company. Specifically paragraphs 13 to 17 provide the method for resolving disputed claims. For this purpose I am appointed, acting in my personal capacity, as the Claims Officer and directed to hear the parties to any unresolved disputed claims and determine their value and character.

[4] Q-Drilling & Remediation Inc. ("Q-Drilling") pursuant to the Claims Procedure Order submitted a Proof of Claim, dated March 5, 2009, in the amount of $54,883.42 in respect of geotechnical drilling at the Company's

premises at Cooks Brook, Halifax County. The Proof of Claim is based on a Claim for Lien for Registration under the *Builders' Lien Act,* dated December 19, 2008, in respect of work provided up to and including October 22, 2008. It was recorded on December 19, 2008, pursuant to the *Land Registration Act,* S.N.S. 2001. C.6, as amended. No action was commenced against the Company nor certificate thereof registered, as is required by Section 26 of the *Builders' Lien Act.* This failure was the basis for the Monitor's Notice of Revision or Disallowance in which it rejected Q-Drilling's claimed status as a secured creditor, but allowed the amount as an unsecured claim.

[5] The Monitor and the Company say that the security of the lien was lost when Q-Drilling failed to commence an action and register a certificate thereof within the time required by that Section. Q-Drilling, in response, says that it can rely on Paragraph 7 of the Initial Order, the material part of which is:

> *To the extent any rights or obligations, or time or limitation periods relating to the Applicant or the Property may expire or terminate with the passage of time, the term of such rights, obligations or periods shall hereby be deemed to be extended by a period of time equal to the duration of the stay of proceedings effected by this Order and any further Order of this Court....*

[6] It says this paragraph has the effect of suspending the requirements of Section 26 during the stay provided in the Initial Order, with the result that

the secured status effected by registering the Claim for Lien stands without the commencement of an action, notwithstanding the running of time. To put the matter more specifically, time stopped running on December 22, 2008, and will not resume until the stay is lifted, whenever that happens. Which position is correct is for me to determine.

[7] I note parenthetically that this problem is usually avoided by a well established practice of holders of builders' liens seeking orders lifting the stay to the extent necessary for the perfection of their liens. This procedure was followed by seven holders of liens against the Company.

[8] I agree with the submission of counsel for Q-Drilling that my authority is limited to that granted in the Claim Procedure Order which simply is to determine the value and character of the disputed claims put before me. It is not for me to question the appropriateness of any provisions of the orders. Thus it is not for me to consider the constitutional issues, particularly those that arise from the interaction between federal and provincial legislation or the paramountcy doctrine. I am to take Paragraph 7 as it is and give meaning and effect to it as best I can.

[9] Counsel for Q-Drilling refers me to a series of Alberta cases which I shall briefly review. First is *Re: Smokey River Coal Limited*, 1999 CarswellAlta 743. The order in that case did not contain a provision similar to Paragraph 7. The time for registering a woodsmen's lien expired after the issuance of a CCAA order. No proceedings had been made to have the stay lifted to enable registration. The holder of the lien was found to have lost its security.

[10] Paragraph 471 of the *Canadian Encyclopedic Digest* refers to this case. I quote the relevant part of it:

> *The right of a claimant to file a claim for lien for services rendered to the debtor company may expire if the lien is not filed within the proper time period unless either an order under the CCAA freezes the running of the limitation period or the lien claimant obtains an order lifting the stay to permit the filing of the lien.*

[11] In *Re: Scaffold Connection Corp.*, 2000 CarswellAlta 60 the order contained a provision equivalent to Paragraph 7. The court refused a motion to lift a stay to enable liens to be filed. It was satisfied that the provisions of the Paragraph 7 equivalent should be sufficient to preserve the lien claims. This position was recently confirmed in *Re: Kerr Interior Systems Limited*, 2008 CarswellAlta 661.

[12] Most of the other cases cited to me to the extent that they address the present issue cover either situations where there is no Paragraph 7 equivalent, or there is such equivalent but the lien holders' problem is solved by lifting the stay. The effect of Paragraph 7 equivalents is not helpfully considered, rather the arguments centre on whether the lifting of the stay would result in prejudice to certain parties.

[13] A good example is *Cansugar Inc, (Re)* (2003), 48 C.B.R. (4th) 225 (N.B.Q.B., Glennie J.). The Initial Order contained a Paragraph 7 equivalent. However, Glennie J. avoided analysis of it. Instead he simply quoted two paragraphs from *Houlden & Morawetz* which simply affirm that the proper procedure to preserve a lien claim is to apply to have the stay lifted to allow perfection of the lien. He ordered such stay be given, having found that it would not prejudice anyone.

[14] Counsel for Q-Drilling says that the Company is estopped from arguing that Paragraph7 does not apply. One cannot approbate and then reprobate; that is, one cannot ask for a remedy and then, when its existence becomes inconvenient, ask that it not be applied. He cites the discussion in paragraph

18 of *Iron v Saskatchewan* (1993),103 D.L.R. (4th) 585 (Sask., C.A.). In effect, he is saying that the Company asked the Court in the *ex parte* application for the Initial Order to include the paragraph and is now asking that its full effect not be recognized. This it should not be allowed to do. Paragraph 7 is in the Initial order and the Company must live with what meaning and effect may properly be given it, whether it likes it or not.

[15] There is little clear guidance in the cases when taken as a whole. *Scaffold* says that the paragraph will by itself preserve a lien. Other cases leave open that this might be possible, but avoid any useful analysis, being able to solve the immediate problem by lifting the stay. Where there is no Paragraph 7 equivalent, the matter in not addressed.

[16] This is an appeal of a disallowance of the Monitor, not an appeal of the Orders by which I am bound. As mentioned earlier, it follows that I am not to look into questions of their constitutional validity or to address conflicts between the CCAA and other legislation, particularly provincial legislation, and especially the *Builders' Lien Act.*

[17] Much of the discussion before me addressed issues quite beyond my authority. It is only for me to give meaning to and apply Paragraph 7. However, it was urged that as a matter of interpretation I should consider that the strict requirements of the *Builders' Lien Act* should limit the meaning I can give. It was suggested that those requirements are so clear that they should override any attempt under another statute to compromise them.

[18] However, paragraph 7 says that *"any rights or obligations, or time or limitation periods"* are deemed to be extended through the duration of the stay. This is very clear language and effect must be given to it in proceedings under these orders.

[19] This paragraph I take to be a proper provision for carrying out the objects of the CCAA . It implies that all parties subject to these proceedings are governed by this paragraph. Each must comply with its restrictions and each is entitled to its benefits. The orders are to be treated as a comprehensive code governing all the parties involved.

[20] The Initial Order tells Q-Drilling and all the other claimants that all legal

proceedings they may have against the Company are stayed. Paragraph 7 then tells them they need not be concerned with such things as time limits for perfecting their claims. Time is standing still until the stay is lifted. This affects everyone who is subject to these proceedings..

[21] Thus during the stay the status of Q-Drilling's lien remains the same as it was December 22, 2008. The lien is not otherwise contested. Therefore, it remains a good lien so long as these CCAA proceedings are in place. Q-Drilling remains a secured creditor. I have found the authorities submitted by Q-Drilling's counsel, to the extent they address the problem, persuasive in coming to this conclusion.

[22] The status of the lien, should the CCAA proceedings fail, may be another matter, but this is not for me to consider. As the law in this regard appears unsettled, it is understandable that the received wisdom has been to seek a stay to enable perfection of liens, but this is only an article of prudent practice.

[23] I therefore find that for the purposes of these present CCAA proceedings Q-

Drilling's claim for $54,883.42 is to be treated throughout as a secured claim.

I shall hear the parties, if they cannot agree to costs.

Richard W. Cregan, Q.C.
Claims Officer

May 19, 2009

TAB 17

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^{o} du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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

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

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

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

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

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

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

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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

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

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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

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

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

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

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

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] La juge Deschamps — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

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

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

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

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

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

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

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

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

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

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

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

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

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

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

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

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

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

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

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

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

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

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

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

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

222. . . .

. . .

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

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

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

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

18.3 . . .

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

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

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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

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

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

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

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

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

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

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

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

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

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

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

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

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

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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

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

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

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

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

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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

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

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

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

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

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

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

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

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

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

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

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

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

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

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

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

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

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

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

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

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

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

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

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

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

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

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

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

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

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

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

. . .

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

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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

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

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

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

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

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(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

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

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

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

TAB 18

CITATION: Re TOYS "R" US (CANADA) LTD., 2017 ONSC 5571
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20170920

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 TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey, Melaney Wagner, Christopher Armstrong, counsel for* the applicant
R. Shayne Kukulowicz, Jane Dietrich, counsel for Grant Thornton Limited, the Proposed Monitor
Tony Reyes, counsel for the pre-filing ABL lenders
Alexander Cobb, counsel for the B4 lenders
Linc Rogers, Chris Burr counsel for JPMorgan Chase Bank, NA, the lead lender on behalf of the proposed DIP lenders

HEARD: September 19, 2017

ENDORSEMENT

[1] At the conclusion of the hearing I granted the relief sought by the applicant with minor revisions for reasons to be delivered shortly. These are my reasons for doing so.

[2] The applicant is Canada's leading retailer of toys and baby products. It operates from 82 stores across all ten provinces and over the internet. It employs nearly 4,000 people. This number increases to more than 6,000 during the peak holiday season. It is an important participant in the Canadian retail economy and a much beloved childhood icon in many Canadians' lives.

[3] The applicant is an indirect, wholly owned subsidiary of TOYS "R" US INC. a US company. On September 18, 2017 the US parent, several affiliates, and the applicant filed for bankruptcy protection in the US Bankruptcy Court for the Eastern District of Virginia. They did so in order to protect against stakeholder action that could adversely impact their businesses while they explore restructuring options. Publicity concerning the problems facing the companies has already led some suppliers to take steps to limit the credit terms that they are willing to extend to the retailer. As a result, the businesses found themselves in need of the stability of bankruptcy protection.

[4] The Canadian applicant's operations are generally autonomous from the parent's US operations. But, the applicant's pre-filing US$200 million secured revolving credit facility and its US$125 million secured term loan facility were both provided under a wider asset-backed lending facility provided by the pre-filing ABL lenders to the US and Canadian companies.

[5] When the applicant and its US affiliates filed for US bankruptcy protection, they committed defaults under their ABL facilities. Therefore, although the applicant is generally cash flow positive and has positive shareholder equity, it found itself without borrowing facilities and within two weeks of being unable to meet its obligations as they come due.

[6] As a result of its looming liquidity crisis, the applicant meets the definition of a "debtor company" to whom the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 applies. *Re Stelco Inc.*, 2004 CanLII 24933 (ON SC). It has liabilities of more than $5 million and otherwise meets the technical requirements of the statute.

[7] The applicant needs the protection of a general stay that is available under the *CCAA*. The stay is a court order that prevents people and companies with claims against the applicant from cancelling their contracts or taking steps to enforce their claims against the applicant during the period of the restructuring. All creditors and claimants are held at bay, together, to maintain a level playing field. At the same time, the stay protects the applicant's business in order to: create conditions under which a lender will advance fresh funds to the applicant to carry it through its restructuring efforts; help prevent suppliers from ceasing or tightening credit terms just prior to the vital holiday selling season; to prevent enforcement efforts by creditors that would deflect the company from its efforts to find a win-win restructuring for the general body of its creditors; and to enable the applicant to continue to operate on a "business as usual" basis to protect the value of its business and brand for all. I am satisfied that this is an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*.

[8] The applicant expresses concern that it might be required to pay some pre-filing claims to critical suppliers and others despite the general goal of a bankruptcy proceeding to freeze all claims at the filing date. For example, employees with wages accrued before today need to be paid in the ordinary course in order to keep the workforce engaged. Customers holding gift cards and similar pre-paid rights need to be able to enforce those pre-filing claims in order to protect the company's public customers. There is good reason to allow these types of claims to protect the goodwill of the business in the interests of all creditors even though most others are being prevented from enforcing their claims while these claims are recognized.

[9] In addition, a small number of critical suppliers of goods and services may have the ability to avoid the stay order under the CCAA and the US automatic stay. Sometimes those suppliers will threaten to refuse to continue to supply a *CCAA* debtor unless they are paid their pre-filing claims in priority to others. In some circumstances this could imperil the applicant's business. Under s. 11.4 of the *CCAA*, the court may declare a person to be a "critical supplier." A critical supplier can be compelled to supply the applicant with goods and, in return, it can be provided with court-ordered security to protect its right to payment. That situation is quite different than the order sought in this case. Here, the applicant is not seeking to compel anyone

to supply on credit against its will. The suppliers of concern in this case may claim to be beyond the reach of the court's orders. Rather, here, the applicant is recognizing that in some specific and limited cases, it may face an inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date. Providing such a payment is a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few. They will be carefully scrutinized by the applicant and the Monitor. The initial order granted by the court in this proceeding empowers the Monitor to exercise discretion to approve a payment to a critical supplier on its pre-filing claims. The Monitor will do so only in truly critical situations. It will be guided by the factors set out in para. 55 of the applicant's factum as drawn from the discussion by Morawetz J. (as he then was) in *Re Cinram International Inc*., 2012 ONSC 3767.

[10] The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the *CCAA* provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in *CCAA* cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.

[11] The DIP terms are lengthy and complex. The court has had limited time to scan and parse the documents and has relied heavily on the Monitor's and the applicant's assessments and submissions. Based on my review and the submissions made, I am satisfied that the DIP terms are generally limited to standard lending terms. With one exception discussed below, I was not drawn to any terms that might be thought to create unusual powers in the DIP lenders to control the applicant or the process. There do not appear to be any terms that provide incentives for the DIP lenders to try to execute loan-to-own or other strategies to somehow extract more value than is made available in fees and interest on the face of the DIP loan documents. Scrutinizing complicated, lengthy DIP terms on an urgent initial hearing is a dangerous pursuit. The court relies on the integrity of the parties to disclose unusual terms and otherwise to protect the stakeholders from terms that may be buried in thick documents that could later create skewed outcomes or incentives that are contrary to the interests of the stakeholders generally. If a DIP lender wants extraordinary rights or powers beyond standard, plain vanilla lending terms, they should be disclosed expressly and subject to transparent scrutiny at minimum.

[12] In this case, the DIP lenders ask for the right to enforce their security in the event that they claim that the applicant has committed a default under the terms of its new borrowing. The

stay provisions that I have approved above generally prevent creditors from enforcing their claims without leave of the court. In some cases the stay may prevent a supplier from unilaterally discontinuing supply. The parties are able to come to court very quickly on the Commercial List. Therefore, a party who has good cause to be released from a stay can usually get to court to ask for an order lifting the stay before it has suffered much, if any, prejudice. But the leave requirement ensures that suppliers or others cannot claim that an applicant is in default and take unilateral, destabilizing steps without scrutiny of the alleged default by stakeholders, the Monitor, and ultimately, the court.

[13] The DIP lender and the applicant agreed that the DIP lender could give five days' notice of default to the applicant and then take a number of unilateral enforcement steps. This reverses the burden and requires the applicant to come to court during the five day period to have the DIP lenders' claims reviewed. But there are terms of the DIP documents that limit the applicant's entitlement to oppose the DIP lenders. This could create a complex and ambiguous situation.

[14] In my view, the stay provisions protect the stakeholders, creditors, and the public interest as much as the applicant. The court process provides assurances of transparency and accountability to which all interested parties are entitled as a *quid pro quo* for the protections offered by the statute. The DIP lenders are well protected without an extraordinary power to enforce their claims without court scrutiny. The DIP lenders in this case are replacing first secured lenders. It is not clear why they need special DIP priority when the DIP lenders are likely entitled to step into the priority position of the pre-filing ABL lenders under the doctrine of equitable subrogation. The applicant is paying the DIP lenders more than $20 million in fees plus enhanced interest for a loan that is protected not only by equitable priority but by court-ordered security. DIP loans have not proven to be that risky in Canada generally. I know of only one case where a DIP lender has not been repaid in full and that was a very specific instance where the DIP lender was the principle purchaser of the CCAA debtor's goods and needed to keep funding the debtor at a loss in order to keep its own business afloat.

[15] In this case, the applicant seems to be solvent on a balance sheet basis. The B4 lenders have advised the court that they expect to realize substantial value from their security against the shares of the applicant. I see no valid reason for the DIP lenders to require any significantly enhanced enforcement rights when their position is protected already. Given the applicant's consent and the importance of the DIP loan to the restructuring process generally, I accept that the DIP lenders will be entitled to take minimal steps to give notice of default and to withhold further advances while the parties come to court. Otherwise, the DIP lenders require leave of the court on notice before they may accelerate their loans or to take any other enforcement steps.

[16] The fees and disbursements of the Monitor, counsel, and the financial advisors to the debtor will be protected by a court ordered charges as well under s. 11.52 of the *CCAA*. The members of the board of directors and officers of the applicant will also be protected against the risk of incurring uninsured, post-filing liabilities. I am satisfied that the applicant and the Monitor have calculated the limits of this charge to reflect realistic, potential statutory D & O liability. I am less sanguine that these liabilities cannot be insured at a reasonable cost under s. 11.51 (3) of the *CCAA*. One can always postulate that an insurer might decline coverage or that

the insurance limits might prove to be insufficient. However, creating a charge can also provide an incentive to structure affairs so that others can access the available insurance precisely because the Ds & Os can access their charge and do not need their insurance. Moreover, the standard, *in terrorem* assertion that the Ds & Os are necessary to the restructuring and may resign unless they are granted a charge is rarely subjected to real scrutiny. However, absent concerns expressed by those being primed, I am satisfied that the applicants have met the statutory test for the purposes of this initial hearing.

[17] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee is a strong performing business facing a liquidity crisis that causes it to suffer technical insolvency. It is fair, reasonable, and wholly appropriate for it to be supported by the protections of the *CCAA* so as to provide it with an opportunity to restructure its affairs to enable it to address its current circumstances.

[18] Order accordingly.

F.L. Myers J.

Date: September 20, 2017

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.*

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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