Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

BRIEF OF AUTHORITIES OF THE CANADIAN CANCER SOCIETY

(Returnable October 2, 2019)

September 24, 2019

FOGLER, RUBINOFF LLP
Suite 3000, P.O. Box 95
Toronto-Dominion Centre
77 King Street West
Toronto, Ontario M5K 1G8

Vern W. DaRe (LSO# 32591E)
Tel: 416-941-8842
Fax: 416-941-8852
Email: vdare@foglers.com

CANADIAN CANCER SOCIETY
116 Albert Street, Suite 500
Ottawa, ON K1P 5G3

Robert Cunningham (LSO# 35179L)
Tel: 613-565-2522 ext. 4981
Fax: 613-565-2278
Email: rcunning@cancer.ca

Lawyers for Canadian Cancer Society

TO: THE COMMON SERVICE LIST

Court File No. 19-CV-615862-00CL
Court File No. 19-CV-616077-00CL
Court File No. 19-CV-616779-00CL

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

COMMON SERVICE LIST
(as at September 5, 2019)

TO:	**THORNTON GROUT FINNIGAN LLP** 100 Wellington Street West Suite 3200 TD West Tower, Toronto-Dominion Centre Toronto, ON M5K 1K7 Fax: 416-304-1313 **Robert I. Thornton** Tel: 416-304-0560 Email: rthornton@tgf.ca **Leanne M. Williams** Tel: 416-304-0060 Email: lwilliams@tgf.ca **Rebecca L. Kennedy** Tel: 416-304-0603 Email: rkennedy@tgf.ca

* For any additions or questions, please contact Nancy Thompson at nancy.thompson@blakes.com

	Rachel A. Bengino Tel: 416-304-1153 Email: rbengino@tgf.ca **Mitchell W. Grossell** Tel: 416-304-7978 Email: mgrossell@tgf.ca **John L. Finnigan** Tel: 416-304-0558 Email: jfinnigan@tgf.ca Lawyers for JTI-Macdonald Corp.
AND TO:	**DELOITTE RESTRUCTURING INC.** Bay Adelaide East 8 Adelaide Street West Suite 200 Toronto, ON M5H 0A9 Fax: 416-601-6690 **Paul Casey** Tel: 416-775-7172 Email: paucasey@deloitte.ca **Warren Leung** Tel: 416-874-4461 Email: waleung@deloitte.ca **Jean-Francois Nadon** Tel: 514-390-0059 Email: jnadon@deloitte.ca **Phil Reynolds** Tel: 416-956-9200 Email: philreynolds@deloitte.ca The Monitor of JTI-Macdonald Corp.
AND TO:	**BLAKE, CASSELS & GRAYDON LLP** 199 Bay Street Suite 4000, Commerce Court West Toronto, ON M5L 1A9 Fax: 416-863-2653

	Pamela Huff Tel: 416-863-2958 Email: pamela.huff@blakes.com **Linc Rogers** Tel: 416-863-4168 Email: linc.rogers@blakes.com **Chris Burr** Tel: 416-863-3261 Email: chris.burr@blakes.com **Aryo Shalviri** Tel: 416-863-2962 Email: aryo.shalviri@blakes.com **Caitlin McIntyre** Tel: 416-863-4174 Email: caitlin.mcintyre@blakes.com **Nancy Thompson**, Law Clerk Tel: 416-863-2437 Email: nancy.thompson@blakes.com Lawyers for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.
AND TO:	**MILLER THOMSON LLP** Scotia Plaza 40 King Street West, Suite 5800 Toronto, ON M5H 3S1 **Craig A. Mills** Tel: 416-595-8596 Email: cmills@millerthomson.com Lawyers for North Atlantic Operating Company, Inc.
AND TO:	**MILLER THOMSON LLP** 1000, rue De La Gauchetière Ouest, bureau 3700 Montreal, QC H3B 4W5 **Hubert Sibre** Tel: 514-879-4088 Email: hsibre@millerthomson.com Lawyers for AIG Insurance Canada

AND TO:	**BLUETREE ADVISORS INC.** First Canada Place 100 King Street West Suite 5600 Toronto, ON M5X 1C9 **William E. Aziz** Tel: 416-640-7122 Email: baziz@bluetreeadvisors.com Chief Restructuring Officer of JTI-Macdonald Corp.
AND TO:	**STIKEMAN ELLIOTT LLP** Commerce Court West 199 Bay Street, Suite 5300 Toronto, ON M5L 1B9 Fax: 416-947-0866 **David R. Byers** Tel: 416-869-5697 Email: dbyers@stikeman.com **Maria Konyukhova** Tel: 416-869-5230 Email: mkonyukhova@stikeman.com **Lesley Mercer** Tel: 416-869-6859 Email: lmercer@stikeman.com **Sanja Sopic** Tel: 416-869-6825 Email: ssopic@stikeman.com Lawyers for British American Tobacco p.l.c., B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited
AND TO:	**OSLER, HOSKIN & HARCOURT LLP** 100 King Street West 1 First Canadian Place Suite 6200, P.O. Box 50 Toronto, ON M5X 1B8 Fax: 416-862-6666 **Deborah Glendinning** Tel: 416-862-4714 Email: dglendinning@osler.com

	Marc Wasserman Tel: 416-862-4908 Email: mwasserman@osler.com **John A. MacDonald** Tel: 416-862-5672 Email: jmacdonald@osler.com **Michael De Lellis** Tel: 416-862-5997 Email: mdelellis@osler.com Lawyers for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
AND TO:	**DAVIES WARD PHILLIPS & VINEBERG LLP** 155 Wellington Street West Toronto, ON M5V 3J7 **Jay Swartz** Tel: 416-863-5520 Email: jswartz@dwpv.com **Robin Schwill** Tel: 416-863-5502 Email: rschwill@dwpv.com **Natasha MacParland** Tel: 416-863-5567 Email: nmacparland@dwpv.com Lawyers for FTI Consulting Canada Inc., in its capacity as Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
AND TO:	**FTI CONSULTING CANADA INC.** 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M4K 1G8 Fax: 416-649-8101 **Greg Watson** Tel: 416-649-8077 Email: greg.watson@fticonsulting.com **Paul Bishop** Tel: 416-649-8053 Email: paul.bishop@fticonsulting.com

	Jeffrey Rosenberg Tel: 416-649-8073 Email: jeffrey.rosenberg@fticonsulting.com **Kamran Hamidi** Tel: 416-649-8068 Email: kamran.hamidi@fticonsulting.com **Daliwar Azhar** Tel: 416-649-8133 Email: dilawar.azhar@fticonsulting.com Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
AND TO:	**MCCARTHY TÉTRAULT LLP** 66 Wellington Street West Suite 5300 TD Bank Tower, Box 48 Toronto, ON M5K 1E6 Fax: 416-868-0673 **James Gage** Tel: 416-601-7539 Email: jgage@mccarthy.ca **Heather Meredith** Tel: 416-601-8342 Email: hmeredith@mccarthy.ca **Paul Steep** Tel: 416-601-7998 Email: psteep@mccarthy.ca **Trevor Courtis** Tel: 416-601-7643 Email: tcourtis@mccarthy.ca **Deborah Templer** Tel: 416-601-8421 Email: dtempler@mccarthy.ca Lawyers for Rothmans, Benson & Hedges, Inc.
AND TO:	**BCF LLP** 1100, René-Lévesque Blvd., Suite 2500 Montreal, QC H3B 5C9

	Me Bertrand Giroux Tel: 514-397-6935 Email: bertrand.giroux@bcf.ca **Me Mireille Fontaine** Tel: 514-397-4561 Email: mireille.fontaine@bcf.ca Lawyers for the Top Tube Company
AND TO:	**TORYS LLP** 79 Wellington St. West, Suite 3000 Box 270, TD Centre Toronto, ON M5K 1N2 Fax: 416-865-7380 **Scott Bomhof** Tel: 416-865-7370 Email: sbomhof@torys.com **Adam Slavens** Tel: 416-865-7333 Email: aslavens@torys.com Lawyers for JT Canada LLC Inc. and PricewaterhouseCoopers Inc., in its capacity as receiver of JTI-Macdonald TM Corp.
AND TO:	**PRICEWATERHOUSECOOPERS** PwC Tower 18 York St., Suite 2600 Toronto, ON M5J 0B2 Fax: 416-814-3210 **Mica Arlette** Tel: 416-814-5834 Email: mica.arlette@pwc.com **Tyler Ray** Email: tyler.ray@pwc.com Receiver and Manager of JTI-Macdonald TM Corp.
AND TO:	**BENNETT JONES** 100 King Street West Suite 3400 Toronto, ON M5X 1A4 Fax: 416-863-1716

	Jeff Leon Tel: 416-777-7472 Email: leonj@bennettjones.com **Mike Eizenga** Tel: 416-777-4879 Email: eizengam@bennettjones.com **Sean Zweig** Tel: 416-777-6254 Email: zweigs@bennettjones.com Lawyers for the Provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, in their capacities as plaintiffs in the HCCR Legislation claims
AND TO:	**MINISTRY OF THE ATTORNEY GENERAL** Legal Services Branch 1001 Douglas Street Victoria, BC V8W 2C5 Fax: 250-356-6730 **Peter R. Lawless** Tel: 250-356-8432 Email: peter.lawless@gov.bc.ca
AND TO:	**KSV ADVISORY INC.** 150 King Street West Suite 2308, Box 42 Toronto, ON M5H 1J9 Fax: 416-932-6266 **Noah Goldstein** Tel: 416-932-6207 Email: ngoldstein@ksvadvisory.com **Bobby Kofman** Email: bkofman@ksvadvisory.com Financial Advisory for the Provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, in their capacities as plaintiffs in the HCCR Legislation claims

AND TO:	**MINISTRY OF THE ATTORNEY GENERAL** Crown Law Office - Civil 720 Bay Street, 8th Floor Toronto, ON M7A 2S9 Fax: 416-326-4181 **Jacqueline Wall** Tel: 416-434-4454 Email: jacqueline.wall@ontario.ca **Edmund Huang** Tel: 416-524-1654 Email: edmund.huang@ontario.ca **Peter Entecott** Tel: 647-467-7768 Email: peter.entecott@ontario.ca Lawyers for Her Majesty the Queen in Right of Ontario
AND TO:	**FISHMAN FLANZ MELAND PAQUIN LLP** 4100 – 1250 René-Lévesque Blvd. West Montreal, QC H3A 3H3 **Avram Fishman** Email: afishman@ffmp.ca **Mark E. Meland** Tel: 514-932-4100 Email: mmeland@ffmp.ca **Margo R. Siminovitch** Email: msiminovitch@ffmp.ca **Jason Dolman** Email: jdolman@ffmp.ca **Nicolas Brochu** Email: nbrochu@ffmp.ca **Tina Silverstein** Email: tsilverstein@ffmp.ca **CHAITONS LLP** 5000 Yonge Street 10th Floor Toronto, ON M2N 7E9

	Harvey Chaiton Tel: 416-218-1129 Email: harvey@chaitons.com **George Benchetrit** Tel: 416-218-1141 Email: george@chaitons.com **TRUDEL JOHNSTON & LESPÉRANCE** 750, Cote de la Place d'Armes, Bureau 90 Montréal, QC H2Y 2X8 Fax: 514-871-8800 **Philippe Trudel** Tel: 514-871-0800 Email: philippe@tjl.quebec **Bruce Johnston** Tel: 514-871-085 Email: bruce@tjl.quebec **André Lespérance** Tel: 514-871-8385 x204 Email: andre@tjl.quebec **Gabrielle Gagné** Tel: 514-871-8385 x207 Email: gabrielle@tjl.quebec Lawyers for Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Quebec Class Action Plaintiffs)
AND TO:	**KLEIN LAWYERS** 100 King Street West, Suite 5600 Toronto, Ontario M5X 1C9 **Douglas Lennox** Tel: 416-506-1944 Email: dlennox@callkleinlawyers.com Lawyers for the representative plaintiff, Kenneth Knight, in the certified British Columbia class action, *Knight v. Imperial Tobacco Canada Ltd.*, Supreme Court of British Columbia, Vancouver Registry No. L031300

AND TO:	**JENSEN SHAWA SOLOMON DUGID HAWKES LLP** 800, 304 – 8 Avenue SW Calgary, AB T2P 1C2 Fax: 403-571-1528 **Carsten Jensen, QC** Tel: 403-571-1526 Email: jensenc@jssbarristers.ca **Sabri Shawa, QC** Tel: 403-571-1527 Email: shawas@jssbarristers.ca **Stacy Petriuk** Tel: 403-571-1523 Email: petriuks@jssbarristers.ca **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP** 155 Wellington Street West, 35th Floor Toronto, ON M5V 3H1 **Kenneth T. Rosenberg** Email: ken.rosenberg@pailareroland.com **Lilly Harmer** Email: lily.harmer@paliareroland.com **Massimo (Max) Starnino** Email: max.starnino@paliareroland.com **Danielle Glatt** Email: Danielle.glatt@paliareroland.com **Elizabeth Rathbone** Tel: 416-646-4300 Email: elizabeth.rathbone@paliareroland.com Lawyers for Her Majesty the Queen in Right of Alberta
AND TO:	**STEWART MCKELVEY** 1959 Upper Water Street, Suite 900 PO Box 997 Halifax, NS B3J 2X2 Fax: 902-420-1417

	Robert G. MacKeigan, Q.C. Tel: 902-444-1771 Email: robbie@stewartmckelvey.com Lawyers for Sobeys Capital Incorporated
AND TO:	**CASSELS BROCK & BLACKWELL LLP** 2100 Scotia Plaza 40 King Street West Toronto, ON M5H 3C2 **Shayne Kukulowicz** Tel: 416-860-6463 Fax: 416-640-3176 Email: skukulowicz@casselsbrock.com **Jane Dietrich** Tel: 416-860-5223 Fax: 416-640-3144 Email: jdietrich@casselsbrock.com **Joseph Bellissimo** Tel: 416-860-6572 Fax: 416-642-7150 Email: jbellissimo@casselsbrock.com **Monique Sassi** Tel: 416-860-6886 Fax: 416-640-3005 Email: msassi@casselsbrock.com Lawyers for Ernst & Young Inc, in its capacity as court-appointed monitor of Rothmans, Benson & Hedges, Inc.
AND TO:	**ERNST & YOUNG INC.** Ernst & Young Tower 100 Adelaide Street West P.O. Box 1 Toronto, ON M5H 0B3 **Murray A. McDonald** Tel: 416-943-3016 Email: murray.a.mcdonald@ca.ey.com **Brent Beekenkamp** Tel: 416-943-2652 Email: brent.r.beekenkamp@ca.ey.com

	Edmund Yau Tel: 416-943-2177 Email: edmund.yau@ca.ey.com **Matt Kaplan** Tel: 416-932-6155 Email: matt.kaplan@ca.ey.com Monitor of Rothmans, Benson & Hedges, Inc.
AND TO:	**GOWLING WLG (CANADA) LLP** 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, ON M5X 1G5 Fax: 416-862-7661 **Derrick Tay** Tel: 416-369-7330 Email: derrick.tay@gowlingwlg.com **Clifton Prophet** Tel: 416-862-3509 Email: clifton.prophet@gowlingwlg.com **Steven Sofer** Tel: 416-369-7240 Email: steven.sofer@gowlingwlg.com Lawyers for Philip Morris International Inc.
AND TO:	**PALIARE ROLAD ROSENBERG ROTHSTEIN LLP** 155 Wellington Street West, 35th Floor Toronto, ON M5V 3H1 **Kenneth T. Rosenberg** Email: ken.rosenberg@pailareroland.com **Lilly Harmer** Email: lily.harmer@paliareroland.com **Massimo (Max) Starnino** Email: max.starnino@paliareroland.com **Danielle Glatt** Email: Danielle.glatt@paliareroland.com

	Elizabeth Rathbone Tel: 416-646-4300 Email: elizabeth.rathbone@paliareroland.com **ROEBOTHAN MCKAY MARSHALL** Paramount Building 34 Harvey Road, 5th Floor St. John's NL A1C 3Y7 Fax: 709-753-5221 **Glenda Best** Tel: 705-576-2255 Email: gbest@wrmmlaw.com Lawyers for Her Majesty the Queen in Right of Newfoundland
AND TO:	**WESTROCK COMPANY OF CANADA CORP.** 15400 Sherbrooke Street East Montreal, QC H1A 3S2 **Dean Jones** Tel: 514-642-9251 Email: dean.jones@westrock.com
AND TO	**MINISTRY OF THE ATTORNEY GENERAL** Civil Law Division, FSCO Branch 5160 Yonge Street, 17th Floor Toronto, ON M2N 6L9 Fax: 416-590-7556 **Michael Scott** Tel: 416-226-7834 Email: michael.scott@fsco.gov.on.ca Lawyers for the Superintendent of Financial Services
AND TO:	**KAPLAN LAW** 393 University Avenue, Suite 2000 Toronto, ON M5G 1E6 **Ari Kaplan** Tel: 416-565-4656 Email: ari@kaplanlaw.ca Counsel to the Former Genstar U.S. Retiree Group Committee

AND TO:	**McMILLAN LLP** Brookfield Place 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 **Wael Rostom** Tel: 416-865-7790 Email: wael.rostom@mcmillan.ca **Michael J. Hanlon** Tel: 416-987-5061 Email: michael.hanlon@mcmillan.ca Lawyers for The Bank of Nova Scotia
AND TO	**MERCHANT LAW GROUP LLP** c/o #400 – 333 Adelaide St. West Toronto, ON M5V 1R5 Fax: 613-366-2793 **Evatt Merchant,** QC Tel: 613-366-2795 Email: emerchant@merchantlaw.com **Chris Simoes** Email: csimoes@merchantlaw.com Lawyers for the Class Action Plaintiffs (MLG)
AND TO:	**LABSTAT INTERNATIONAL INC.** 262 Manitou Drive Kitchener, ON N2C 1L3 **Kimberly Stevenson Chow (CFO)** Tel: 519-748-5409 Email: kstevens@labstat.com
AND TO:	**CHERNOS FLAHERTY SVONKIN LLP** 220 Bay Street, Suite 700 Toronto, ON M5J 2W4 Fax: 647-725-5440 **Patrick Flaherty** Tel: 416-855-0403 Email: pflaherty@cfscounsel.com

	Bryan D. McLeese Tel: 416-855-0414 Email: bmcleese@cfscounsel.com **STOCKWOODS LLP** 77 King Street West, Suite 4130 TD North Tower, P.O. Box 140, TD Centre Toronto, ON M5K 1H1 Fax: 416-593-9345 **Brian Gover** Tel: 416-593-2489 Email: briang@stockwoods.ca **Justin Safayeni** Tel: 416-593-3494 Email: justins@stockwoods.ca Lawyers for R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.
AND TO:	**BRAUTI THORNING LLP** 161 Bay Street, Suite 2900 Toronto, ON M5J 2S1 **Steven Weisz** Tel: 416-304-6522 Email: sweisz@btlegal.ca **INCH HAMMOND PROFESSIONAL CORPORATION** 1 King Street West, Suite 500 Hamilton, ON L8P 4X8 **Amanda McInnis** Tel: 905-525-0031 Email: amcinnis@inchlaw.com Lawyer for Grand River Enterprises Six Nations Ltd.
AND TO:	**STROSBERG SASSO SUTTS LLP** 1561 Ouellette Avenue Windsor, ON M8X 1K5 Fax: 866-316-5308 **William V. Sasso** Tel: 519-561-6222 Email: wvs@strosbergco.com

	David Robins Tel: 519-561-6215 Email: drobins@strosbergco.com Lawyers for The Ontario Flue-Cured Tobacco Growers' Marketing Board, plaintiffs in Ontario Superior Court of Justice Court File No. 1056/10CP (Class Proceedings)
AND TO:	**ATTORNEY GENERAL OF CANADA** Department of Justice Canada Ontario Regional Office, Tax Law Section 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1 Fax: 416-973-0810 **Diane Winters, General Counsel** Tel: 647-256-7459 Email: diane.winters@justice.gc.ca Lawyers for the Minister of National Revenue
AND TO:	**LAX O'SULLIVAN LISUS GOTTLIEB LLP** Suite 2750, 145 King Street West Toronto, ON M5H 1J8 **Jonathan Lisus** Tel: 416-598-7873 Email: jlisus@lolg.ca **Matthew Gottlieb** Tel: 416-644-5353 Email: mgottlieb@lolg.ca **Nadia Campion** Tel: 416-642-3134 Email: ncampion@lolg.ca **Andrew Winton** Tel: 416-644-5342 Email: awinton@lolg.ca Lawyers for the Court-Appointed Mediator

AND TO:	**FOGLER, RUBINOFF LLP** Suite 3000, P.O. Box 95 Toronto-Dominion Centre 77 King Street West Toronto, ON M5K 1G8 Fax: 416-941-8852 **Vern W. DaRe** Tel: 416-941-8842 Email: vdare@foglers.com **CANADIAN CANCER SOCIETY** 116 Albert Street, Suite 500 Ottawa, ON K1P 5G3 Fax: 613-565-2278 **Robert Cunningham** Tel: 613-565-2522 ext. 4981 Email: rcunning@cancer.ca Lawyers for Canadian Cancer Society
AND TO:	**BLANEY MCMURTRY LLP** 2 Queen Street East, Suite 1500 Toronto, ON M5C 3G5 **David Ullmann** Tel: 416-596-4289 Email: dullmann@blaney.com **Dominic T. Clarke** Tel: 416-593-3968 Email: dclarke@blaney.com **Alexandra Teodorescu** Tel: 416-596-4279 Email: ateodorescu@blaney.com Lawyers for La Nordique Compagnie D'Assurance du Canada
AND TO:	**VAILLANCOURT & CLOCCHIATTI** 2600, boul. Laurier, bur. 760 Quebec, QC G1V 4T3 Fax: 416-643-050-

	Marc-André Maltais Tel: 418-657-8702, ext. 3018 Email: marc-andre.maltais@retraitequebec.gouv.qc.ca Lawyers for Retraite Québec
AND TO:	**LECKER & ASSOCIATES** 4789 Yonge Street, Suite 514 Toronto, ON M2N 0G3 **Kimberley Sebag** Tel: 416-223-5391 x339 Email: ksebag@leckerslaw.com Lawyer for Imperial Tobacco claimant
AND TO:	**McMILLAN LLP** 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 Fax: 416-865-7048 **Brett Harrison** Tel: 416-865-7932 Email: brett.harrison@mcmillan.ca Lawyers for the Province of Quebec
AND TO:	**ATTORNEY GENERAL OF CANADA** Department of Justice Canada Ontario Regional Office, L.E.A.D. 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1 **John C. Spencer** Tel: 647-256-0557 Email: john.spencer@justice.gc.ca **Victor Paolone** Tel: 647-256-7548 Email: victor.paolone@justice.gc.ca

AND TO:	**McMILLAN LLP** Brookfield Place 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 Fax: 416-865-7048 **Stephen Brown-Okruhlik** Tel: 416-865-7043 Email: stephen.brown-okruhlik@mcmillan.ca Lawyers for Citibank Canada
AND TO:	**BORDEN LADNER GERVAIS LLP** Bay Adelaide Centre, East Tower 22 Adelaide Street West, Suite 3400 Toronto, ON M5H 4E3 Fax: 416-367-6749 **Alex MacFarlane** Tel: 416-367-6305 Email: amacfarlane@blg.com **James W. MacLellan** Tel: 416-367-6592 Email: jmaclellan@blg.com **Judith Manger** Tel: 416-367-6428 Email: jmanger@blg.com Lawyers for Chubb Insurance Company of Canada

Email Service List

rthornton@tgf.ca; lwilliams@tgf.ca; rkennedy@tgf.ca; rbengino@tgf.ca; mgrossell@tgf.ca; jfinnigan@tgf.ca; rmanea@tgf.ca; paucasey@deloitte.ca; waleung@deloitte.ca; jnadon@deloitte.ca; philreynolds@deloitte.ca; pamela.huff@blakes.com; linc.rogers@blakes.com; chris.burr@blakes.com; aryo.shalviri@blakes.com; caitlin.mcintyre@blakes.com; emily.hazlett@blakes.com; nancy.thompson@blakes.com; cmills@millerthomson.com; hsibre@millerthomson.com; baziz@bluetreeadvisors.com; dbyers@stikeman.com; mkonyukhova@stikeman.com; lmercer@stikeman.com; ssopic@stikeman.com; dglendinning@osler.com; mwasserman@osler.com; jmacdonald@osler.com; mdelellis@osler.com; wmalik@osler.com; jswartz@dwpv.com; rschwill@dwpv.com; nmacparland@dwpv.com; szaifman@dwpv.com; nrenner@dwpv.com; tbarbiero@dwpv.com; greg.watson@fticonsulting.com; paul.bishop@fticonsulting.com; jeffrey.rosenberg@fticonsulting.com; kamran.hamidi@fticonsulting.com; dilawar.azhar@fticonsulting.com; jgage@mccarthy.ca; hmeredith@mccarthy.ca; psteep@mccarthy.ca; tcourtis@mccarthy.ca; dtempler@mccarthy.ca; kfick@mccarthy.ca; bertrand.giroux@bcf.ca; mireille.fontaine@bcf.ca; sbomhof@torys.com; aslavens@torys.com; mica.arlette@pwc.com; tyler.ray@pwc.com; leonj@bennettjones.com; eizengam@bennettjones.com; zweigs@bennettjones.com; peter.lawless@gov.bc.ca; ngoldstein@ksvadvisory.com; bkofman@ksvadvisory.com; jacqueline.wall@ontario.ca; shahana.kar@ontario.ca; edmund.huang@ontario.ca; peter.entecott@ontario.ca; afishman@ffmp.ca; mmeland@ffmp.ca; msiminovitch@ffmp.ca; jdolman@ffmp.ca; nbrochu@ffmp.ca; tsilverstein@ffmp.ca; harvey@chaitons.com; george@chaitons.com; philippe@tjl.quebec; bruce@tjl.quebec; andre@tjl.quebec; gabrielle@tjl.quebec; dlennox@callkleinlawyers.com; jensenc@jssbarristers.ca; shawas@jssbarristers.ca; petriuks@jssbarristers.ca; ken.rosenberg@paliareroland.com; lily.harmer@paliareroland.com; max.starnino@paliareroland.com; danielle.glatt@paliareroland.com; elizabeth.rathbone@paliareroland.com; karen.lam@paliareroland.com; sarita.sanasie@paliareroland.com; natalia.botelho@paliareroland.com; michelle.jackson@paliareroland.com; robbie@stewartmckelvey.com; skukulowicz@casselsbrock.com; jdietrich@casselsbrock.com; jbellissimo@casselsbrock.com; msassi@casselsbrock.com; murray.a.mcdonald@ca.ey.com; brent.r.beekenkamp@ca.ey.com; edmund.yau@ca.ey.com; matt.kaplan@ca.ey.com; derrick.tay@gowlingwlg.com; clifton.prophet@gowlingwlg.com; steven.sofer@gowlingwlg.com; gbest@wrmmlaw.com; dean.jones@westrock.com; michael.scott@fsco.gov.on.ca; ari@kaplanlaw.ca; wael.rostom@mcmillan.ca; michael.hanlon@mcmillan.ca; emerchant@merchantlaw.com; csimoes@merchantlaw.com; jtim.ccaa@merchantlaw.com; rothmans.ccaa@merchantlaw.com; kstevens@labstat.com; pflaherty@cfscounsel.com; bmcleese@cfscounsel.com; briang@stockwoods.ca; justins@stockwoods.ca; sweisz@btlegal.ca; amcinnis@inchlaw.com; wvs@strosbergco.com; drobins@strosbergco.com; diane.winters@justice.gc.ca; jlisus@lolg.ca; mgottlieb@lolg.ca; ncampion@lolg.ca; awinton@lolg.ca; vdare@foglers.com; rcunning@cancer.ca; dullmann@blaney.com; dclarke@blaney.com; ateodorescu@blaney.com; marc-andre.maltais@retraitequebec.gouv.qc.ca; ksebag@leckerslaw.com; john.bringardner@acuris.com; brett.harrison@mcmillan.ca; john.spencer@justice.gc.ca; victor.paolone@justice.gc.ca; stephen.brown-okruhlik@mcmillan.ca; amacfarlane@blg.com; jmaclellan@blg.com; jmanger@blg.com;

* For any additions or questions, please contact Nancy Thompson at nancy.thompson@blakes.com

index

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

BRIEF OF AUTHORITIES OF THE CANADIAN CANCER SOCIETY
(Returnable October 2, 2019)

INDEX

TAB	DOCUMENT
1	*WHO Framework Convention on Tobacco Control*, 21 May 2003, 2302 UNTS 229 including Guidelines for implementation of Article 5.3
2	*Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, 1989 CarswellNat 594 (FCTD)
3	*Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* [1990] 1 FC 90 (CA)
4	*RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120 (SCC) (headnote)
5	*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 3 CarswellQue 119 (SCC) (headnote)
6	*Rosen v. Ontario (Attorney General)*, 1995 CarswellOnt 4306 (Ont Ct Gen Div)
7	*Rosen v. Ontario (Attorney General)*, 1996 CarswellOnt 89 (CA) (headnote)
8	*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 CarswellSask 162 (SCC) (headnote)
9	*Rothmans, Benson & Hedges inc. v. Canada (Attorney General)*, 1997 CarswellQue 1521 (QCCS)

10	*J.T.I. Macdonald Corp. v. Attorney General of Canada,* 2002 CarswellQue 3403 (QCSC) (conclusions only)
11	*JTI-MacDonald Corporation v Canada (Attorney General)*, [2005] J.Q. no 10915 (QCCA) (case summary)
12	*JTI-Macdonald Corp.* v. *Canada (Attorney General),* 2007 CarswellQue 5573 (SCC) (headnote)
13	*Rothman's, Benson & Hedges inc. v. Canada (Attorney General),* 2000 CarswellQue 1931 (QCSC)
14	Mary I A Buttery, H Lance Williams and Tijana Garvic, "TLC The Land Conservancy of Canada: The Evolution of the Role of 'Other' Interests in *Companies' Creditors Arrangement Act* Proceedings", in Janis P Sarra and Justice Barbara Romaine, eds, *Annual Review of Insolvency Law 2015* (Toronto: Carswell, 2016) 513
15	V W DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) 355
16	*Re Canwest Global Communications Corp,* 2010 CarswellOnt 5510 (Ont SCJ [Commercial List])
17	*Century Services Inc. v. Canada (A.G.); Ted Leroy Trucking Ltd., Re,* 2010 CarswellBC 3419 (SCC)
18	*Re Canadian Airlines Corp,* 2000 CarswellAlta 662 (ABQB)
19	*Re Anvil Range Mining Corp.,* 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List])
20	*Re Canadian Red Cross Society/Societe Canadienne de la Croix-Rouge,* 1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List])
21	Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2013)
22	*Re TLC The Land Conservancy of British Columbia,* 2015 CarswellBC 1089 (BCSC)
23	*Re Bloom Lake, g.p.l.,* 2015 CarswellQue 4072 (QSC)

tab 1

Preamble

The Parties to this Convention,

Determined to give priority to their right to protect public health,

Recognizing that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response,

Reflecting the concern of the international community about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke,

Seriously concerned about the increase in the worldwide consumption and production of cigarettes and other tobacco products, particularly in developing countries, as well as about the burden this places on families, on the poor, and on national health systems,

Recognizing that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases,

Recognizing also that cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases,

Acknowledging that there is clear scientific evidence that prenatal exposure to tobacco smoke causes adverse health and developmental conditions for children,

Deeply concerned about the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages,

Alarmed by the increase in smoking and other forms of tobacco consumption by women and young girls worldwide and keeping in mind the need for full participation of women at all levels of policy-making and implementation and the need for gender-specific tobacco control strategies,

Deeply concerned about the high levels of smoking and other forms of tobacco consumption by indigenous peoples,

Seriously concerned about the impact of all forms of advertising, promotion and sponsorship aimed at encouraging the use of tobacco products,

Recognizing that cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including smuggling, illicit manufacturing and counterfeiting,

Acknowledging that tobacco control at all levels and particularly in developing countries and in countries with economies in transition requires sufficient financial and technical resources commensurate with the current and projected need for tobacco control activities,

Recognizing the need to develop appropriate mechanisms to address the long-term social and economic implications of successful tobacco demand reduction strategies,

Mindful of the social and economic difficulties that tobacco control programmes may engender in the medium and long term in some developing countries and countries with economies in transition, and recognizing their need for technical and financial assistance in the context of nationally developed strategies for sustainable development,

Conscious of the valuable work being conducted by many States on tobacco control and commending the leadership of the World Health Organization as well as the efforts of other organizations and bodies of the United Nations system and other international and regional intergovernmental organizations in developing measures on tobacco control,

Emphasizing the special contribution of nongovernmental organizations and other members of civil society not affiliated with the tobacco industry, including health professional bodies, women's, youth, environmental and consumer groups, and academic and health care institutions, to tobacco control efforts nationally and internationally and the vital importance of their participation in national and international tobacco control efforts,

Recognizing the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts,

Recalling Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, which states that it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,

Recalling also the preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition,

Determined to promote measures of tobacco control based on current and relevant scientific, technical and economic considerations,

Recalling that the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979, provides that States Parties to that Convention shall take appropriate measures to eliminate discrimination against women in the field of health care,

Recalling further that the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, provides that States Parties to that Convention recognize the right of the child to the enjoyment of the highest attainable standard of health,

Have agreed, as follows:

PART I: INTRODUCTION

Article 1
Use of terms

For the purposes of this Convention:

(a) "illicit trade" means any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity;

(b) "regional economic integration organization" means an organization that is composed of several sovereign states, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters;[1]

(c) "tobacco advertising and promotion" means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly;

(d) "tobacco control" means a range of supply, demand and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke;

(e) "tobacco industry" means tobacco manufacturers, wholesale distributors and importers of tobacco products;

(f) "tobacco products" means products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing;

(g) "tobacco sponsorship" means any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly;

[1] Where appropriate, national will refer equally to regional economic integration organizations.

Article 2
Relationship between this Convention and other agreements and legal instruments

1. In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.

2. The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the Convention and its protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat.

PART II: OBJECTIVE, GUIDING PRINCIPLES AND GENERAL OBLIGATIONS

Article 3
Objective

The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

Article 4
Guiding principles

To achieve the objective of this Convention and its protocols and to implement its provisions, the Parties shall be guided, *inter alia*, by the principles set out below:

1. Every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke.

2. Strong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration:

(a) the need to take measures to protect all persons from exposure to tobacco smoke;

(b) the need to take measures to prevent the initiation, to promote and support cessation, and to decrease the consumption of tobacco products in any form;

(c) the need to take measures to promote the participation of indigenous individuals and communities in the development, implementation and evaluation of tobacco control programmes that are socially and culturally appropriate to their needs and perspectives; and

(d) the need to take measures to address gender-specific risks when developing tobacco control strategies.

3. International cooperation, particularly transfer of technology, knowledge and financial assistance and provision of related expertise, to establish and implement effective tobacco control programmes, taking into consideration local culture, as well as social, economic, political and legal factors, is an important part of the Convention.

4. Comprehensive multisectoral measures and responses to reduce consumption of all tobacco products at the national, regional and international levels are essential so as to prevent, in accordance with public health principles, the incidence of diseases, premature disability and mortality due to tobacco consumption and exposure to tobacco smoke.

5. Issues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control.

6. The importance of technical and financial assistance to aid the economic transition of tobacco growers and workers whose livelihoods are seriously affected as a consequence of tobacco control programmes in developing country Parties, as well as Parties with economies in transition, should be recognized and addressed in the context of nationally developed strategies for sustainable development.

7. The participation of civil society is essential in achieving the objective of the Convention and its protocols.

Article 5
General obligations

1. Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.

2. Towards this end, each Party shall, in accordance with its capabilities:

(a) establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control; and

(b) adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

3. In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.

4. The Parties shall cooperate in the formulation of proposed measures, procedures and guidelines for the implementation of the Convention and the protocols to which they are Parties.

5. The Parties shall cooperate, as appropriate, with competent international and regional intergovernmental organizations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties.

6. The Parties shall, within means and resources at their disposal, cooperate to raise financial resources for effective implementation of the Convention through bilateral and multilateral funding mechanisms.

PART III: MEASURES RELATING TO THE REDUCTION OF DEMAND FOR TOBACCO

Article 6
Price and tax measures to reduce the demand for tobacco

1. The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.

2. Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:

(a) implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and

(b) prohibiting or restricting, as appropriate, sales to and/or importations by international travellers of tax- and duty-free tobacco products.

3. The Parties shall provide rates of taxation for tobacco products and trends in tobacco consumption in their periodic reports to the Conference of the Parties, in accordance with Article 21.

Article 7
Non-price measures to reduce the demand for tobacco

The Parties recognize that comprehensive non-price measures are an effective and important means of reducing tobacco consumption. Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.

Article 8
Protection from exposure to tobacco smoke

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.

2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

Article 9
Regulation of the contents of tobacco products

The Conference of the Parties, in consultation with competent international bodies, shall propose guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. Each Party shall, where approved by competent national authorities, adopt and implement effective legislative, executive and administrative or other measures for such testing and measuring, and for such regulation.

Article 10
Regulation of tobacco product disclosures

Each Party shall, in accordance with its national law, adopt and implement effective legislative, executive, administrative or other measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products. Each Party shall further adopt and implement effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce.

Article 11
Packaging and labelling of tobacco products

1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"; and

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

(iii)shall be large, clear, visible and legible,

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,

(v) may be in the form of or include pictures or pictograms.

2. Each unit packet and package of tobacco products and any outside packaging and labelling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.

3. Each Party shall require that the warnings and other textual information specified in paragraphs 1(b) and paragraph 2 of this Article will appear on each unit packet and package of tobacco products and any outside packaging and labelling of such products in its principal language or languages.

4. For the purposes of this Article, the term "outside packaging and labelling" in relation to tobacco products applies to any packaging and labelling used in the retail sale of the product.

Article 12
Education, communication, training and public awareness

Each Party shall promote and strengthen public awareness of tobacco control issues, using all available communication tools, as appropriate. Towards this end, each Party shall adopt and implement effective legislative, executive, administrative or other measures to promote:

(a) broad access to effective and comprehensive educational and public awareness programmes on the health risks including the addictive characteristics of tobacco consumption and exposure to tobacco smoke;

(b) public awareness about the health risks of tobacco consumption and exposure to tobacco smoke, and about the benefits of the cessation of tobacco use and tobacco-free lifestyles as specified in Article 14.2;

(c) public access, in accordance with national law, to a wide range of information on the tobacco industry as relevant to the objective of this Convention;

(d) effective and appropriate training or sensitization and awareness programmes on tobacco control addressed to persons such as health workers, community workers, social workers, media professionals, educators, decision-makers, administrators and other concerned persons;

(e) awareness and participation of public and private agencies and nongovernmental organizations not affiliated with the tobacco industry in developing and implementing intersectoral programmes and strategies for tobacco control; and

(f) public awareness of and access to information regarding the adverse health, economic, and environmental consequences of tobacco production and consumption.

Article 13
Tobacco advertising, promotion and sponsorship

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.

4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

(a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or

likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;

(b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;

(c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;

(d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;

(e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and

(f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.

5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.

6. Parties shall cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising.

7. Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law. This paragraph does not endorse or approve of any particular penalty.

8. Parties shall consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship.

Article 14
Demand reduction measures concerning tobacco dependence and cessation

1. Each Party shall develop and disseminate appropriate, comprehensive and integrated guidelines based on scientific evidence and best practices, taking into account national circumstances and priorities, and shall take effective measures to promote cessation of tobacco use and adequate treatment for tobacco dependence.

2. Towards this end, each Party shall endeavour to:

(a) design and implement effective programmes aimed at promoting the cessation of tobacco use, in such locations as educational institutions, health care facilities, workplaces and sporting environments;

(b) include diagnosis and treatment of tobacco dependence and counselling services on cessation of tobacco use in national health and education programmes, plans and strategies, with the participation of health workers, community workers and social workers as appropriate;

(c) establish in health care facilities and rehabilitation centres programmes for diagnosing, counselling, preventing and treating tobacco dependence; and

(d) collaborate with other Parties to facilitate accessibility and affordability for treatment of tobacco dependence including pharmaceutical products pursuant to Article 22. Such products and their constituents may include medicines, products used to administer medicines and diagnostics when appropriate.

PART IV: MEASURES RELATING TO THE REDUCTION OF THE SUPPLY OF TOBACCO

Article 15
Illicit trade in tobacco products

1. The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.

2. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any

outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status. In addition, each Party shall:

(a) require that unit packets and packages of tobacco products for retail and wholesale use that are sold on its domestic market carry the statement: *"Sales only allowed in (insert name of the country, subnational, regional or federal unit)"* or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market; and

(b) consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.

3. Each Party shall require that the packaging information or marking specified in paragraph 2 of this Article shall be presented in legible form and/or appear in its principal language or languages.

4. With a view to eliminating illicit trade in tobacco products, each Party shall:

(a) monitor and collect data on cross-border trade in tobacco products, including illicit trade, and exchange information among customs, tax and other authorities, as appropriate, and in accordance with national law and relevant applicable bilateral or multilateral agreements;

(b) enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes;

(c) take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally-friendly methods where feasible, or disposed of in accordance with national law;

(d) adopt and implement measures to monitor, document and control the storage and distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction; and

(e) adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products.

5. Information collected pursuant to subparagraphs 4(a) and 4(d) of this Article shall, as appropriate, be provided in aggregate form by the Parties in their periodic reports to the Conference of the Parties, in accordance with Article 21.

6. The Parties shall, as appropriate and in accordance with national law, promote cooperation between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products. Special emphasis shall be placed on cooperation at regional and subregional levels to combat illicit trade of tobacco products.

7. Each Party shall endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.

Article 16
Sales to and by minors

1. Each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen. These measures may include:

(a) requiring that all sellers of tobacco products place a clear and prominent indicator inside their point of sale about the prohibition of tobacco sales to minors and, in case of doubt, request that each tobacco purchaser provide appropriate evidence of having reached full legal age;

(b) banning the sale of tobacco products in any manner by which they are directly accessible, such as store shelves;

(c) prohibiting the manufacture and sale of sweets, snacks, toys or any other objects in the form of tobacco products which appeal to minors; and

(d) ensuring that tobacco vending machines under its jurisdiction are not accessible to minors and do not promote the sale of tobacco products to minors.

2. Each Party shall prohibit or promote the prohibition of the distribution of free tobacco products to the public and especially minors.

3. Each Party shall endeavour to prohibit the sale of cigarettes individually or in small packets which increase the affordability of such products to minors.

4. The Parties recognize that in order to increase their effectiveness, measures to prevent tobacco product sales to minors should, where appropriate, be implemented in conjunction with other provisions contained in this Convention.

5. When signing, ratifying, accepting, approving or acceding to the Convention or at any time thereafter, a Party may, by means of a binding written declaration, indicate its commitment to prohibit the introduction of tobacco vending machines within its jurisdiction or, as appropriate, to a total ban on tobacco vending machines. The declaration made pursuant to this Article shall be circulated by the Depositary to all Parties to the Convention.

6. Each Party shall adopt and implement effective legislative, executive, administrative or other measures, including penalties against sellers and distributors, in order to ensure compliance with the obligations contained in paragraphs 1-5 of this Article.

7. Each Party should, as appropriate, adopt and implement effective legislative, executive, administrative or other measures to prohibit the sales of tobacco products by persons under the age set by domestic law, national law or eighteen.

Article 17
Provision of support for economically viable alternative activities

Parties shall, in cooperation with each other and with competent international and regional intergovernmental organizations, promote, as appropriate, economically viable alternatives for tobacco workers, growers and, as the case may be, individual sellers.

PART V: PROTECTION OF THE ENVIRONMENT

Article 18
Protection of the environment and the health of persons

In carrying out their obligations under this Convention, the Parties agree to have due regard to the protection of the environment and the health of persons in relation to the environment in respect of tobacco cultivation and manufacture within their respective territories.

PART VI: QUESTIONS RELATED TO LIABILITY

Article 19
Liability

1. For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.

2. Parties shall cooperate with each other in exchanging information through the Conference of the Parties in accordance with Article 21 including:

(a) information on the health effects of the consumption of tobacco products and exposure to tobacco smoke in accordance with Article 20.3(a); and

(b) information on legislation and regulations in force as well as pertinent jurisprudence.

3. The Parties shall, as appropriate and mutually agreed, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements, afford one another assistance in legal proceedings relating to civil and criminal liability consistent with this Convention.

4. The Convention shall in no way affect or limit any rights of access of the Parties to each other's courts where such rights exist.

5. The Conference of the Parties may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international approaches to these issues and appropriate means to support, upon request, the Parties in their legislative and other activities in accordance with this Article.

PART VII: SCIENTIFIC AND TECHNICAL COOPERATION AND COMMUNICATION OF INFORMATION

Article 20
Research, surveillance and exchange of information

1. The Parties undertake to develop and promote national research and to coordinate research programmes at the regional and international levels in the field of tobacco control. Towards this end, each Party shall:

(a) initiate and cooperate in, directly or through competent international and regional intergovernmental organizations and other bodies, the conduct of research and scientific assessments, and in so doing promote and encourage research that addresses the determinants and consequences of tobacco consumption and exposure to tobacco smoke as well as research for identification of alternative crops; and

(b) promote and strengthen, with the support of competent international and regional intergovernmental organizations and other bodies, training and support for all those engaged in tobacco control activities, including research, implementation and evaluation.

2. The Parties shall establish, as appropriate, programmes for national, regional and global surveillance of the magnitude, patterns, determinants and consequences of tobacco consumption and exposure to tobacco smoke. Towards this end, the Parties should integrate tobacco surveillance programmes into national, regional and global health surveillance programmes so that data are comparable and can be analysed at the regional and international levels, as appropriate.

3. Parties recognize the importance of financial and technical assistance from international and regional intergovernmental organizations and other bodies. Each Party shall endeavour to:

(a) establish progressively a national system for the epidemiological surveillance of tobacco consumption and related social, economic and health indicators;

(b) cooperate with competent international and regional intergovernmental organizations and other bodies, including governmental and nongovernmental agencies, in regional and global tobacco surveillance and exchange of information on the indicators specified in paragraph 3(a) of this Article; and

(c) cooperate with the World Health Organization in the development of general guidelines or procedures for defining the collection, analysis and dissemination of tobacco-related surveillance data.

4. The Parties shall, subject to national law, promote and facilitate the exchange of publicly available scientific, technical, socioeconomic, commercial and legal information, as well as information regarding practices of the tobacco industry and the cultivation of tobacco, which is relevant to this Convention, and in so doing shall take into account and address the special needs of developing country Parties and Parties with economies in transition. Each Party shall endeavour to:

(a) progressively establish and maintain an updated database of laws and regulations on tobacco control and, as appropriate, information about their

enforcement, as well as pertinent jurisprudence, and cooperate in the development of programmes for regional and global tobacco control;

(b) progressively establish and maintain updated data from national surveillance programmes in accordance with paragraph 3(a) of this Article; and

(c) cooperate with competent international organizations to progressively establish and maintain a global system to regularly collect and disseminate information on tobacco production, manufacture and the activities of the tobacco industry which have an impact on the Convention or national tobacco control activities.

5. Parties should cooperate in regional and international intergovernmental organizations and financial and development institutions of which they are members, to promote and encourage provision of technical and financial resources to the Secretariat to assist developing country Parties and Parties with economies in transition to meet their commitments on research, surveillance and exchange of information.

Article 21
Reporting and exchange of information

1. Each Party shall submit to the Conference of the Parties, through the Secretariat, periodic reports on its implementation of this Convention, which should include the following:

(a) information on legislative, executive, administrative or other measures taken to implement the Convention;

(b) information, as appropriate, on any constraints or barriers encountered in its implementation of the Convention, and on the measures taken to overcome these barriers;

(c) information, as appropriate, on financial and technical assistance provided or received for tobacco control activities;

(d) information on surveillance and research as specified in Article 20; and

(e) information specified in Articles 6.3, 13.2, 13.3, 13.4(d), 15.5 and 19.2.

2. The frequency and format of such reports by all Parties shall be determined by the Conference of the Parties. Each Party shall make its initial report within two years of the entry into force of the Convention for that Party.

3. The Conference of the Parties, pursuant to Articles 22 and 26, shall consider arrangements to assist developing country Parties and Parties with economies in transition, at their request, in meeting their obligations under this Article.

4. The reporting and exchange of information under the Convention shall be subject to national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is exchanged.

Article 22
Cooperation in the scientific, technical, and legal fields and provision of related expertise

1. The Parties shall cooperate directly or through competent international bodies to strengthen their capacity to fulfill the obligations arising from this Convention, taking into account the needs of developing country Parties and Parties with economies in transition. Such cooperation shall promote the transfer of technical, scientific and legal expertise and technology, as mutually agreed, to establish and strengthen national tobacco control strategies, plans and programmes aiming at, *inter alia*:

(a) facilitation of the development, transfer and acquisition of technology, knowledge, skills, capacity and expertise related to tobacco control;

(b) provision of technical, scientific, legal and other expertise to establish and strengthen national tobacco control strategies, plans and programmes, aiming at implementation of the Convention through, *inter alia*:

(i) assisting, upon request, in the development of a strong legislative foundation as well as technical programmes, including those on prevention of initiation, promotion of cessation and protection from exposure to tobacco smoke;

(ii) assisting, as appropriate, tobacco workers in the development of appropriate economically and legally viable alternative livelihoods in an economically viable manner; and

(iii)assisting, as appropriate, tobacco growers in shifting agricultural production to alternative crops in an economically viable manner;

(c) support for appropriate training or sensitization programmes for appropriate personnel in accordance with Article 12;

(d) provision, as appropriate, of the necessary material, equipment and supplies, as well as logistical support, for tobacco control strategies, plans and programmes;

(e) identification of methods for tobacco control, including comprehensive treatment of nicotine addiction; and

(f) promotion, as appropriate, of research to increase the affordability of comprehensive treatment of nicotine addiction.

2. The Conference of the Parties shall promote and facilitate transfer of technical, scientific and legal expertise and technology with the financial support secured in accordance with Article 26.

PART VIII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES

Article 23
Conference of the Parties

1. A Conference of the Parties is hereby established. The first session of the Conference shall be convened by the World Health Organization not later than one year after the entry into force of this Convention. The Conference will determine the venue and timing of subsequent regular sessions at its first session.

2. Extraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Secretariat of the Convention, it is supported by at least one-third of the Parties.

3. The Conference of the Parties shall adopt by consensus its Rules of Procedure at its first session.

4. The Conference of the Parties shall by consensus adopt financial rules for itself as well as governing the funding of any subsidiary bodies it may establish as well as financial provisions governing the functioning of the Secretariat. At each ordinary session, it shall adopt a budget for the financial period until the next ordinary session.

5. The Conference of the Parties shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation and may adopt protocols, annexes and amendments to the Convention, in accordance with Articles 28, 29 and 33. Towards this end, it shall:

(a) promote and facilitate the exchange of information pursuant to Articles 20 and 21;

(b) promote and guide the development and periodic refinement of comparable methodologies for research and the collection of data, in addition to those provided for in Article 20, relevant to the implementation of the Convention;

(c) promote, as appropriate, the development, implementation and evaluation of strategies, plans, and programmes, as well as policies, legislation and other measures;

(d) consider reports submitted by the Parties in accordance with Article 21 and adopt regular reports on the implementation of the Convention;

(e) promote and facilitate the mobilization of financial resources for the implementation of the Convention in accordance with Article 26;

(f) establish such subsidiary bodies as are necessary to achieve the objective of the Convention;

(g) request, where appropriate, the services and cooperation of, and information provided by, competent and relevant organizations and bodies of the United Nations system and other international and regional intergovernmental organizations and nongovernmental organizations and bodies as a means of strengthening the implementation of the Convention; and

(h) consider other action, as appropriate, for the achievement of the objective of the Convention in the light of experience gained in its implementation.

6. The Conference of the Parties shall establish the criteria for the participation of observers at its proceedings.

Article 24
Secretariat

1. The Conference of the Parties shall designate a permanent secretariat and make arrangements for its functioning. The Conference of the Parties shall endeavour to do so at its first session.

2. Until such time as a permanent secretariat is designated and established, secretariat functions under this Convention shall be provided by the World Health Organization.

3. Secretariat functions shall be:

(a) to make arrangements for sessions of the Conference of the Parties and any subsidiary bodies and to provide them with services as required;

(b) to transmit reports received by it pursuant to the Convention;

(c) to provide support to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the compilation and communication of information required in accordance with the provisions of the Convention;

(d) to prepare reports on its activities under the Convention under the guidance of the Conference of the Parties and submit them to the Conference of the Parties;

(e) to ensure, under the guidance of the Conference of the Parties, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies;

(f) to enter, under the guidance of the Conference of the Parties, into such administrative or contractual arrangements as may be required for the effective discharge of its functions; and

(g) to perform other secretariat functions specified by the Convention and by any of its protocols and such other functions as may be determined by the Conference of the Parties.

Article 25
Relations between the Conference of the Parties and intergovernmental organizations

In order to provide technical and financial cooperation for achieving the objective of this Convention, the Conference of the Parties may request the cooperation of competent international and regional intergovernmental organizations including financial and development institutions.

Article 26
Financial resources

1. The Parties recognize the important role that financial resources play in achieving the objective of this Convention.

2. Each Party shall provide financial support in respect of its national activities intended to achieve the objective of the Convention, in accordance with its national plans, priorities and programmes.

3. Parties shall promote, as appropriate, the utilization of bilateral, regional, subregional and other multilateral channels to provide funding for the development and strengthening of multisectoral comprehensive tobacco control programmes of developing country Parties and Parties with economies in transition. Accordingly, economically viable alternatives to tobacco production, including crop diversification should be addressed and supported in the context of nationally developed strategies of sustainable development.

4. Parties represented in relevant regional and international intergovernmental organizations, and financial and development institutions shall encourage these entities to provide financial assistance for developing country Parties and for Parties with economies in transition to assist them in meeting their obligations under the Convention, without limiting the rights of participation within these organizations.

5. The Parties agree that:

(a) to assist Parties in meeting their obligations under the Convention, all relevant potential and existing resources, financial, technical, or otherwise, both public and private that are available for tobacco control activities, should be mobilized and utilized for the benefit of all Parties, especially developing countries and countries with economies in transition;

(b) the Secretariat shall advise developing country Parties and Parties with economies in transition, upon request, on available sources of funding to facilitate the implementation of their obligations under the Convention;

(c) the Conference of the Parties in its first session shall review existing and potential sources and mechanisms of assistance based on a study conducted by the Secretariat and other relevant information, and consider their adequacy; and

(d) the results of this review shall be taken into account by the Conference of the Parties in determining the necessity to enhance existing mechanisms or to establish a voluntary global fund or other appropriate financial mechanisms to channel additional financial resources, as needed, to developing country Parties and Parties with economies in transition to assist them in meeting the objectives of the Convention.

PART IX: SETTLEMENT OF DISPUTES

Article 27
Settlement of disputes

1. In the event of a dispute between two or more Parties concerning the interpretation or application of this Convention, the Parties concerned shall seek through diplomatic

channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. Failure to reach agreement by good offices, mediation or conciliation shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it.

2. When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.

3. The provisions of this Article shall apply with respect to any protocol as between the parties to the protocol, unless otherwise provided therein.

PART X: DEVELOPMENT OF THE CONVENTION

Article 28
Amendments to this Convention

1. Any Party may propose amendments to this Convention. Such amendments will be considered by the Conference of the Parties.

2. Amendments to the Convention shall be adopted by the Conference of the Parties. The text of any proposed amendment to the Convention shall be communicated to the Parties by the Secretariat at least six months before the session at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories of the Convention and, for information, to the Depositary.

3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to the Convention. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Secretariat to the Depositary, who shall circulate it to all Parties for acceptance.

4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least two-thirds of the Parties to the Convention.

5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

Article 29
Adoption and amendment of annexes to this Convention

1. Annexes to this Convention and amendments thereto shall be proposed, adopted and shall enter into force in accordance with the procedure set forth in Article 28.

2. Annexes to the Convention shall form an integral part thereof and, unless otherwise expressly provided, a reference to the Convention constitutes at the same time a reference to any annexes thereto.

3. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.

PART XI: FINAL PROVISIONS

Article 30
Reservations

No reservations may be made to this Convention.

Article 31
Withdrawal

1. At any time after two years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.

2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party.

Article 32
Right to vote

1. Each Party to this Convention shall have one vote, except as provided for in paragraph 2 of this Article.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are Parties to the Convention. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa.

Article 33
Protocols

1. Any Party may propose protocols. Such proposals will be considered by the Conference of the Parties.

2. The Conference of the Parties may adopt protocols to this Convention. In adopting these protocols every effort shall be made to reach consensus. If all efforts at consensus have been exhausted, and no agreement reached, the protocol shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For the purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote.

3. The text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before the session at which it is proposed for adoption.

4. Only Parties to the Convention may be parties to a protocol.

5. Any protocol to the Convention shall be binding only on the parties to the protocol in question. Only Parties to a protocol may take decisions on matters exclusively relating to the protocol in question.

6. The requirements for entry into force of any protocol shall be established by that instrument.

Article 34
Signature

This Convention shall be open for signature by all Members of the World Health Organization and by any States that are not Members of the World Health Organization but are members of the United Nations and by regional economic integration

organizations at the World Health Organization headquarters in Geneva from 16 June 2003 to 22 June 2003, and thereafter at United Nations Headquarters in New York, from 30 June 2003 to 29 June 2004.

Article 35
Ratification, acceptance, approval, formal confirmation or accession

1. This Convention shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations. It shall be open for accession from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary.

2. Any regional economic integration organization which becomes a Party to the Convention without any of its Member States being a Party shall be bound by all the obligations under the Convention. In the case of those organizations, one or more of whose Member States is a Party to the Convention, the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the Member States shall not be entitled to exercise rights under the Convention concurrently.

3. Regional economic integration organizations shall, in their instruments relating to formal confirmation or in their instruments of accession, declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Article 36
Entry into force

1. This Convention shall enter into force on the ninetieth day following the date of deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

2. For each State that ratifies, accepts or approves the Convention or accedes thereto after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled, the Convention shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.

3. For each regional economic integration organization depositing an instrument of formal confirmation or an instrument of accession after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled, the Convention shall enter into

force on the ninetieth day following the date of its depositing of the instrument of formal confirmation or of accession.

4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of the organization.

Article 37
Depositary

The Secretary-General of the United Nations shall be the Depositary of this Convention and amendments thereto and of protocols and annexes adopted in accordance with Articles 28, 29 and 33.

Article 38
Authentic texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

DONE at GENEVA this twenty-first day of May two thousand and three.

WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

Guidelines for implementation of Article 5.3

Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry

Adopted by the Conference of the Parties at its third session (decision FCTC/COP3(7))

Online version available at http://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/

Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control

on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry

INTRODUCTION

1. World Health Assembly resolution WHA54.18 on transparency in tobacco control process, citing the findings of the Committee of Experts on Tobacco Industry Documents, states that "the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic".

2. The Preamble of the WHO Framework Convention on Tobacco Control recognized the Parties'[1] "need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts".

3. Further, Article 5.3 of the Convention requires that "in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law".

4. The Conference of the Parties, in decision FCTC/COP2(14), established a working group to elaborate guidelines for implementation of Article 5.3 of the Convention.

5. Without prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement these guidelines to the extent possible in accordance with their national law.

Purpose, scope and applicability

6. Use of the guidelines for implementation of Article 5.3 of the Convention will have an overarching impact on countries' tobacco control policies and on implementation of the Convention, because the guidelines recognize that tobacco industry interference, including that from the State-owned tobacco industry, cuts across a number of tobacco control policy areas, as stated in the Preamble of the Convention, articles referring to specific tobacco control policies and the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

---

[1] "The term 'Parties' refers to States and other entities with treaty-making capacity which have expressed their consent to be bound by a treaty and where the treaty is in force for such States and entities." (Source: United Nations Treaty Collections: http://untreaty.un.org/English/guide.asp#signatories).

7. The purpose of these guidelines is to ensure that efforts to protect tobacco control from commercial and other vested interests of the tobacco industry are comprehensive and effective. Parties should implement measures in all branches of government that may have an interest in, or the capacity to, affect public health policies with respect to tobacco control.

8. The aim of these guidelines is to assist Parties[2] in meeting their legal obligations under Article 5.3 of the Convention. The guidelines draw on the best available scientific evidence and the experience of Parties in addressing tobacco industry interference.

9. The guidelines apply to setting and implementing Parties' public health policies with respect to tobacco control. They also apply to persons, bodies or entities that contribute to, or could contribute to, the formulation, implementation, administration or enforcement of those policies.

10. The guidelines are applicable to government officials, representatives and employees of any national, state, provincial, municipal, local or other public or semi/quasi-public institution or body within the jurisdiction of a Party, and to any person acting on their behalf. Any government branch (executive, legislative and judiciary) responsible for setting and implementing tobacco control policies and for protecting those policies against tobacco industry interests should be accountable.

11. The broad array of strategies and tactics used by the tobacco industry to interfere with the setting and implementing of tobacco control measures, such as those that Parties to the Convention are required to implement, is documented by a vast body of evidence. The measures recommended in these guidelines aim at protecting against interference not only by the tobacco industry but also, as appropriate, by organizations and individuals that work to further the interests of the tobacco industry.

12. While the measures recommended in these guidelines should be applied by Parties as broadly as necessary, in order best to achieve the objectives of Article 5.3 of the Convention, Parties are strongly urged to implement measures beyond those recommended in these guidelines when adapting them to their specific circumstances.

GUIDING PRINCIPLES

Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests.

13. The tobacco industry produces and promotes a product that has been proven scientifically to be addictive, to cause disease and death and to give rise to a variety of social ills, including increased poverty. Therefore, Parties should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the greatest extent possible.

[2] Where appropriate, these guidelines also refer to regional economic integration organizations.

Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.

14. Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.

Principle 3: Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent.

15. The tobacco industry should be required to provide Parties with information for effective implementation of these guidelines.

Principle 4: Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses.

16. Any preferential treatment of the tobacco industry would be in conflict with tobacco control policy.

RECOMMENDATIONS

17. The following important activities are recommended for addressing tobacco industry interference in public health policies:

(1) Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties' tobacco control policies.

(2) Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.

(3) Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.

(4) Avoid conflicts of interest for government officials and employees.

(5) Require that information provided by the tobacco industry be transparent and accurate.

(6) Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility".

(7) Do not give preferential treatment to the tobacco industry.

(8) Treat State-owned tobacco industry in the same way as any other tobacco industry.

18. Agreed measures for protecting public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry are listed below. Parties are encouraged to implement measures beyond those provided for by these guidelines, and nothing in these guidelines shall prevent a Party from imposing stricter requirements that are consistent with these recommendations.

(1) Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties' tobacco control policies.

19. All branches of government and the public need knowledge and awareness about past and present interference by the tobacco industry in setting and implementing public health policies with respect to tobacco control. Such interference requires specific action for successful implementation of the whole Framework Convention.

Recommendations

1.1 Parties should, in consideration of Article 12 of the Convention, inform and educate all branches of government and the public about the addictive and harmful nature of tobacco products, the need to protect public health policies for tobacco control from commercial and other vested interests of the tobacco industry and the strategies and tactics used by the tobacco industry to interfere with the setting and implementation of public health policies with respect to tobacco control.

1.2 Parties should, in addition, raise awareness about the tobacco industry's practice of using individuals, front groups and affiliated organizations to act, openly or covertly, on their behalf or to take action to further the interests of the tobacco industry.

(2) Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.

20. In setting and implementing public health policies with respect to tobacco control, any necessary interaction with the tobacco industry should be carried out by Parties in such a way as to avoid the creation of any perception of a real or potential partnership or cooperation resulting from or on account of such interaction. In the event the tobacco industry engages in any conduct that may create such a perception, Parties should act to prevent or correct this perception.

Recommendations

2.1 Parties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products.

2.2 Where interactions with the tobacco industry are necessary, Parties should ensure that such interactions are conducted transparently. Whenever possible, interactions should be conducted in public, for example through public hearings, public notice of interactions, disclosure of records of such interactions to the public.

(3) Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.

21. The tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies, given that its interests are in direct conflict with the goals of public health.

Recommendations

3.1 Parties should not accept, support or endorse partnerships and non-binding or non-enforceable agreements as well as any voluntary arrangement with the tobacco industry or any entity or person working to further its interests.

3.2 Parties should not accept, support or endorse the tobacco industry organizing, promoting, participating in, or performing, youth, public education or any initiatives that are directly or indirectly related to tobacco control.

3.3 Parties should not accept, support or endorse any voluntary code of conduct or instrument drafted by the tobacco industry that is offered as a substitute for legally enforceable tobacco control measures.

3.4 Parties should not accept, support or endorse any offer for assistance or proposed tobacco control legislation or policy drafted by or in collaboration with the tobacco industry.

(4) Avoid conflicts of interest for government officials and employees.

22. The involvement of organizations or individuals with commercial or vested interests in the tobacco industry in public health policies with respect to tobacco control is most likely to have a negative effect. Clear rules regarding conflicts of interest for government officials and employees working in tobacco control are important means for protecting such policies from interference by the tobacco industry.

23. Payments, gifts and services, monetary or in-kind, and research funding offered by the tobacco industry to government institutions, officials or employees can create conflicts of interest. Conflicting interests are created even if a promise of favourable consideration is not given in exchange, as the potential exists for personal interest to influence official responsibilities as recognized in the International Code of Conduct for Public Officials adopted by the United Nations General Assembly and by several governmental and regional economic integration organizations.

Recommendations

4.1 Parties should mandate a policy on the disclosure and management of conflicts of interest that applies to all persons involved in setting and implementing public health policies with respect to tobacco control, including government officials, employees, consultants and contractors.

4.2 Parties should formulate, adopt and implement a code of conduct for public officials, prescribing the standards with which they should comply in their dealings with the tobacco industry.

4.3 Parties should not award contracts for carrying out any work related to setting and implementing public health policies with respect to tobacco control to candidates or tenderers who have conflicts of interest with established tobacco control policies.

4.4 Parties should develop clear policies that require public office holders who have or have had a role in setting and implementing public health policies with respect to tobacco control to inform their institutions about any intention to engage in an

occupational activity within the tobacco industry, whether gainful or not, within a specified period of time after leaving service.

4.5 Parties should develop clear policies that require applicants for public office positions which have a role in setting and implementing public health policies with respect to tobacco control to declare any current or previous occupational activity with any tobacco industry whether gainful or not.

4.6 Parties should require government officials to declare and divest themselves of direct interests in the tobacco industry.

4.7 Government institutions and their bodies should not have any financial interest in the tobacco industry, unless they are responsible for managing a Party's ownership interest in a State-owned tobacco industry.

4.8 Parties should not allow any person employed by the tobacco industry or any entity working to further its interests to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy.

4.9 Parties should not nominate any person employed by the tobacco industry or any entity working to further its interests to serve on delegations to meetings of the Conference of the Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties.

4.10 Parties should not allow any official or employee of government or of any semi/quasi-governmental body to accept payments, gifts or services, monetary or in-kind, from the tobacco industry.

4.11 Taking into account national law and constitutional principles, Parties should have effective measures to prohibit contributions from the tobacco industry or any entity working to further its interests to political parties, candidates or campaigns, or to require full disclosure of such contributions.

(5) Require that information provided by the tobacco industry be transparent and accurate.

24. To take effective measures preventing interference of the tobacco industry with public health policies, Parties need information about its activities and practices, thus ensuring that the industry operates in a transparent manner. Article 12 of the Convention requires Parties to promote public access to such information in accordance with national law.

25. Article 20.4 of the Convention requires, inter alia, Parties to promote and facilitate exchanges of information about tobacco industry practices and the cultivation of tobacco. In accordance with Article 20.4(c) of the Convention, each Party should endeavour to cooperate with competent international organizations to establish progressively and maintain a global system to regularly collect and disseminate information on tobacco production and manufacture and activities of the tobacco industry which have an impact on the Convention or national tobacco control activities.

Recommendations

5.1 Parties should introduce and apply measures to ensure that all operations and activities of the tobacco industry are transparent.[3]

5.2 Parties should require the tobacco industry and those working to further its interests to periodically submit information on tobacco production, manufacture, market share, marketing expenditures, revenues and any other activity, including lobbying, philanthropy, political contributions and all other activities not prohibited or not yet prohibited under Article 13 of the Convention.[1]

5.3 Parties should require rules for the disclosure or registration of the tobacco industry entities, affiliated organizations and individuals acting on their behalf, including lobbyists.

5.4 Parties should impose mandatory penalties on the tobacco industry in case of the provision of false or misleading information in accordance with national law.

5.5 Parties should adopt and implement effective legislative, executive, administrative and other measures to ensure public access, in accordance with Article 12(c) of the Convention, to a wide range of information on tobacco industry activities as relevant to the objectives of the Convention, such as in a public repository.

(6) Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility".

26. The tobacco industry conducts activities described as socially responsible to distance its image from the lethal nature of the product it produces and sells or to interfere with the setting and implementation of public health policies. Activities that are described as "socially responsible" by the tobacco industry, aiming at the promotion of tobacco consumption, is a marketing as well as a public relations strategy that falls within the Convention's definition of advertising, promotion and sponsorship.

27. The corporate social responsibility of the tobacco industry is, according to WHO,[4] an inherent contradiction, as industry's core functions are in conflict with the goals of public health policies with respect to tobacco control.

Recommendations

6.1 Parties should ensure that all branches of government and the public are informed and made aware of the true purpose and scope of activities described as socially responsible performed by the tobacco industry.

6.2 Parties should not endorse, support, form partnerships with or participate in activities of the tobacco industry described as socially responsible.

---

[3] Without prejudice to trade secrets or confidential information protected by law.

[4] WHO. *Tobacco industry and corporate social responsibility – an inherent contradiction*. Geneva, World Health Organization, 2004.

6.3 Parties should not allow public disclosure by the tobacco industry or any other person acting on its behalf of activities described as socially responsible or of the expenditures made for these activities, except when legally required to report on such expenditures, such as in an annual report.[5]

6.4 Parties should not allow acceptance by any branch of government or the public sector of political, social, financial, educational, community or other contributions from the tobacco industry or from those working to further its interests, except for compensations due to legal settlements or mandated by law or legally binding and enforceable agreements.

(7) Do not give preferential treatment to the tobacco industry.

28. Some governments encourage investments by the tobacco industry, even to the extent of subsidizing them with financial incentives, such as providing partial or complete exemption from taxes otherwise mandated by law.

29. Without prejudice to their sovereign right to determine and establish their economic, financial and taxation policies, Parties should respect their commitments for tobacco control.

Recommendations

7.1 Parties should not grant incentives, privileges or benefits to the tobacco industry to establish or run their businesses.

7.2 Parties that do not have a State-owned tobacco industry should not invest in the tobacco industry and related ventures. Parties with a State-owned tobacco industry should ensure that any investment in the tobacco industry does not prevent them from fully implementing the WHO Framework Convention on Tobacco Control.

7.3 Parties should not provide any preferential tax exemption to the tobacco industry.

(8) Treat State-owned tobacco industry in the same way as any other tobacco industry.

30. Tobacco industry can be government-owned, non-government-owned or a combination thereof. These guidelines apply to all tobacco industry, regardless of its ownership.

Recommendations

8.1 Parties should ensure that State-owned tobacco industry is treated in the same way as any other member of the tobacco industry in respect of setting and implementing tobacco control policy.

8.2 Parties should ensure that the setting and implementing of tobacco control policy are separated from overseeing or managing tobacco industry.

---

[5] The guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control address this subject from the perspective of tobacco advertising, promotion and sponsorship.

8.3 Parties should ensure that representatives of State-owned tobacco industry does not form part of delegations to any meetings of the Conference of the Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties.

Enforcement and monitoring

Enforcement

31. Parties should put in place enforcement mechanisms or, to the extent possible, use existing enforcement mechanisms to meet their obligations under Article 5.3 of the Convention and these guidelines.

Monitoring implementation of Article 5.3 of the Convention and of these guidelines

32. Monitoring implementation of Article 5.3 of the Convention and of these guidelines is essential for ensuring the introduction and implementation of efficient tobacco control policies. This should also involve monitoring the tobacco industry, for which existing models and resources should be used, such as the database on tobacco industry monitoring of the WHO Tobacco Free Initiative.

33. Nongovernmental organizations and other members of civil society not affiliated with the tobacco industry could play an essential role in monitoring the activities of the tobacco industry.

34. Codes of conduct or staff regulations for all branches of governments should include a "whistleblower function", with adequate protection of whistleblowers. In addition, Parties should be encouraged to use and enforce mechanisms to ensure compliance with these guidelines, such as the possibility of bringing an action to court, and to use complaint procedures such as an ombudsman system.

INTERNATIONAL COLLABORATION AND UPDATING AND REVISION OF THE GUIDELINES

35. International cooperation is essential for making progress in preventing interference by the tobacco industry with the formulation of public health policies on tobacco control. Article 20.4 of the Convention provides the basis for collecting and exchanging knowledge and experience with respect to tobacco industry practices, taking into account and addressing the special needs of developing country Parties and Parties with economies in transition.

36. Efforts have already been made to coordinate the collection and dissemination of national and international experience with regard to the strategies and tactics used by the tobacco industry and to the monitoring of tobacco industry activities. Parties would benefit from sharing legal and strategic expertise for countering tobacco industry strategies. Article 21.4 of the Convention provides that information exchange should be subject to national laws regarding confidentiality and privacy.

Recommendations

37. As the strategies and tactics used by the tobacco industry evolve constantly, these guidelines should be reviewed and revised periodically to ensure that they continue to provide

effective guidance to Parties on protecting their public health policies on tobacco control from tobacco industry interference.

38. Parties reporting via the existing reporting instrument of the Framework Convention should provide information on tobacco production and manufacture and the activities of the tobacco industry that affect the Convention or national tobacco control activities. To facilitate this exchange, the Convention Secretariat should ensure that the principal provisions of these guidelines are reflected in the next phases of the reporting instrument, which the Conference of the Parties will gradually adopt for use by Parties.

39. In view of the paramount importance of preventing tobacco industry interference in any public health policy with respect to tobacco control, the Conference of the Parties may, in the light of experience with implementing these guidelines, consider whether there is a need to elaborate a protocol in relation to Article 5.3 of the Convention.

tab 2

1989 CarswellNat 594
Federal Court of Canada — Trial Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 594, 1989 CarswellNat 663, [1989] F.C.J. No. 446,
[1990] 1 F.C. 74, 15 A.C.W.S. (3d) 323, 29 F.T.R. 267, 41 Admin. L.R. 102

ROTHMANS, BENSON & HEDGES INC. v. ATTORNEY GENERAL OF CANADA

Rouleau J.

Heard: April 7, 1989
Judgment: May 19, 1989
Docket: No. T-1416-88

Counsel: *E. Belobaba*, for plaintiff.
P. Evraire, for defendant.
C.R. Thomson, for proposed intervenor.
R. Staley, for Institute of Canadian Advertising.
D. McDuff, agent for the Canadian Cancer Society.

Subject: Public; Constitutional; Civil Practice and Procedure

Headnote

Constitutional Law --- Procedure in constitutional challenges — Standing

Practice — Intervention — Constitutional validity of legislation — Intervention allowed to public interest group despite lack of direct interest where good chance that expertise would add different dimension to arguments being advanced in defence of legislation by Attorney General — Potential extra length of proceedings worth it.

R, B & H Inc. commenced an action in the Federal Court, Trial Division seeking a declaration that the *Tobacco Products Control Act*, was constitutionally invalid. The Canadian Cancer Society (the "Society") applied for leave to be added as an intervenor. The Society was the largest charitable organization devoted to public health in Canada with approximately 350,000 active members and was involved in fundraising of $50,000,000 annually. Among its activities were research into the links between cigarette smoking and cancer and the dissemination of information with respect to that research.

Held:

The application was granted.

As the *Federal Court Rules* did not make specific provision with respect to intervention, the appropriate principles to be applied were those of r. 13.01 of the *Ontario Rules of Civil Procedure*, since r. 5 of the *Federal Court Rules* allowed the Court to determine its practice in relation to matters on which the Rules were silent by reference to the Rules of Court of "that province to which the subject matter of the proceedings most particularly relates."

To the extent that r. 13.01 required that the Society have an "interest" in the subject matter of the proceedings, that interest did not have to be a direct interest. Particularly with respect to public interest litigation in which *Canadian Charter of Rights and Freedoms* issues were raised for the first time, it was sufficient that the applicant for intervenor status have, as here, a genuine interest in the issues and special knowledge and expertise in relation to those issues.

Even though the Attorney General of Canada would support the same interests as those represented by Society, it was sufficient in litigation such as this that the Society appeared to be in a position to put certain aspects of the action into a different or new perspective. Not only did the Attorney General not have a monopoly on all aspects of the public interest but according intervenor status to the Society would offset any concern that lobbying by the tobacco industry might be having an effect on the government.

Allowing the Society to intervene would not, in terms of r. 13.01, "unduly delay or prejudice the determination of the rights of the parties." While the intervention might lead to more evidence and a lengthier trial, that new evidence could be of invaluable assistance.

Table of Authorities

Cases considered:

R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.) — *applied*

Schofield and Minister of Consumer & Commercial Relations, Re (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.) — *applied*

Service de limousine Murray Hill Ltée c. Québec (P.G.), 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146 — *applied*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 7

s. 11(d)

Criminal Code, R.S.C. 1970, c. C-34 —

s. 246.6 [now R.S.C. 1985, c. C-46, s. 276]

s. 246.7 [now R.S.C. 1985, c. C-46, s. 277]

Tobacco Products Control Act, S.C. 1988, c. 20 [now R.S.C. 1985 (4th Supp.), c. 14].

Rules considered:

Federal Court Rules —

r. 5

Ontario, Rules of Civil Procedure —

r. 13.01

r. 13.02

APPLICATION for leave to be added as an intervenor in an action for a declaration.

***Rouleau J.*:**

1 This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987, it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some $50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence

has been the vehicle that generated public awareness to the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect, comment and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the *Tobacco Products Control Act* the Legislative Committee of the House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the *Tobacco Products Control Act* by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, r. 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings on the Courts of "that province to which the subject matter of the proceedings most particularly relates."

9 Rule 13.01 of the *Ontario Rules of Civil Procedure* permits a person not a party to the proceedings who claims "an interest in the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings." Rule 13.02 permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the Court by way of argument."

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in *Charter* issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the Courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the *Charter*. The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

(1) Is the proposed intervenor directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In *Service de limousine Murray Hill Ltée c. Québec (P.G.)*, 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146, the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding Judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that subss. 246.6 and 246.7 of the *Criminal Code*, R.S.C. 1970, c. C-34 were inoperative because they infringed s. 7 and para. 11(d) of the *Charter*. LEAF is a federally incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the *Charter* through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows at 397-398:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time *Charter* arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In *Re Schofield and Minister of Consumer & Commercial Relations* (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.), Thorson J.A. made the following comments in this regard at 141 [D.L.R.]:

> It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sens', within the meaning of that expression as used by Le Dain, J., in *Rothmans of Pall Mall et al. v. Minister of National Revenue et al.* (1976) 67 D.L.R. (3d) 505, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the *Solosky* case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.
>
> The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervenor to certain defined issues so as to avoid getting into the merits of the lis inter partes, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the 'direct sense' earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the Court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Application granted.

tab 3

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (C.A.), [1990] 1 F.C. 90

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Hugessen, MacGuigan and Desjardins JJ.A.

Ottawa, August 17, 1989.

Court File Nos. A-277-89, A-301-89

[1990] 1 F.C. 90 *[1989] F.C.J. No. 707*

Rothmans, Benson & Hedges Inc. (Plaintiff) (Appellant) v. Attorney General of Canada (Defendant) (Respondent) and Canadian Cancer Society (Intervenor) Rothmans, Benson & Hedges Inc. (Plaintiff) v. Attorney General of Canada (Defendant)

Case Summary

Practice — Parties — Intervention — Appeals from orders granting Canadian Cancer Society (CCS), and denying Institute of Canadian Advertising (ICA), leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not to be unduly restricted where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene in public interest litigation recognized by courts in organization genuinely interested in, and possessing special knowledge and expertise related to, issues — No error in finding CCS meeting test, but intervention should be restricted to s. 1 issues — ICA's application granted — Position extending beyond question of advertising of tobacco products to more general questions relating to commercial free speech — May contribute to balancing process in s. 1 assessment of justification of limits imposed upon Charter-guaranteed freedom.

Constitutional law — Charter of Rights — Limitation clause — Appeals from orders granting one organization and denying another leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not subject to traditional restrictions where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene recognized in organization genuinely [page91] interested in, and possessing special knowledge and expertise related to, issues.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), ss. 1, 2(b).
Tobacco Products Control Act, S.C. 1988, c. 20.

Cases Judicially Considered

Referred to:
Re Canadian Labour Congress and Bhindi et al. *(1985), 17 D.L.R. (4th) 193* (B.C.C.A.).

Counsel

Edward P. Belobaba and Barbara L. Rutherford, for the appellant. Gerry N. Sparrow, for the respondent. Karl Delwaide and Andre T. Mecs, for the intervenor. Claude R. Thomson, Q.C., for the Institute of Canadian Advertising.

Solicitors

Gowling, Strathy & Henderson, Toronto, for the appellant. Deputy Attorney General of Canada, for the respondent. Martineau, Walker, Montréal, for the intervenor. Campbell, Godfrey & Lewtas, Toronto, for the Institute of Canadian Advertising.

The following are the reasons for judgment of the Court delivered orally in English by

HUGESSEN J.A.

1 These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS) [*[1990] 1 F.C. 74*], and denying, in the case of the Institute of Canadian Advertising (ICA) [*[1990] 1 F.C. 84*], leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the Tobacco Products Control Act (TPCA) (S.C. 1988, c. 20).

[page92]

2 It is common ground that the plaintiff's attack is primarily Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)] based, invoking the guarantee of freedom of expression in paragraph 2(b). There can also be no doubt, given the prohibitions contained in the TPCA, that such attack is best met by a section 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

3 We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a section 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A section 1 question normally requires evidence for the Court to make a proper determination and such evidence should be adduced at trial (see Re Canadian Labour Congress and Bhindi et al. *(1985), 17 D.L.R. (4th) 193* (B.C.C.A.)). Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said [at page 79] "the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised".

4 As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to section 1 issues, that it be required to deliver a pleading or statement of intervention within ten days and permitted to call evidence and [page93] to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by

agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the order as aforesaid.

5 As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a section 1 assessment of the justification and reasonableness of limits imposed upon a Charter-guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

6 In our view this is not a case for costs in either Division.

---

tab 4

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.e Stay pending appeal
Remedies
II Injunctions
II.1 Principles relating to availability of injunctions
II.1.e Public interest
Remedies
II Injunctions

II.7 Injunctions in specific contexts
II.7.k Injunctions involving Crown or government entities
Remedies
II Injunctions
II.9 Form and operation of order
II.9.f Stay of injunction
II.9.f.i Pending appeal

Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions
Injunctions --- Availability of injunctions — Public interest
Injunctions --- Availability of injunctions — Need to show irreparable injury
Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts
Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal
Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law. Where the government was the unsuccessful party in a constitutional claim, a plaintiff faced a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations required would therefore impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the

balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

tab 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Dans l'affaire du: Renvoi relatif à la Loi sur la non-discrimination génétique édictée par les articles 1 à 7 de la Loi visant à interdire et à prévenir la discrimination génétique | 2018 QCCA 2193, 2018 CarswellQue 11522, 2018 CarswellQue 11830, EYB 2018-305486, 2019 C.L.L.C. 230-020, 305 A.C.W.S. (3d) 72 | (C.A. Que, Dec 21, 2018)

1995 CarswellQue 119
Supreme Court of Canada

RJR-MacDonald Inc. v. Canada

1995 CarswellQue 119F, 1995 CarswellQue 119, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68, 100 C.C.C. (3d) 449, 127 D.L.R. (4th) 1, 187 N.R. 1, 28 W.C.B. (2d) 216, 31 C.R.R. (2d) 189, 57 A.C.W.S. (3d) 578, 62 C.P.R. (3d) 417, J.E. 95-1766, EYB 1995-67815

RJR-MacDonald Inc., Appellant v. The Attorney General of Canada, Respondent

Imperial Tobacco Ltd., Appellant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Attorney General for Ontario, the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, and the Canadian Lung Association, Interveners

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: November 29, 1994
Judgment: November 30, 1994
Judgment: September 21, 1995
Docket: 23460; 23490

Proceedings: On Appeal from the Court of Appeal for Quebec

Counsel: *Colin K. Irving, Georges R. Thibaudeau* and *Douglas Mitchell*, for the appellant RJR-MacDonald Inc.
L. Yves Fortier, Q.C., Simon V. Potter, Lyndon A.J. Barnes and *Gregory Bordan*, for the appellant Imperial Tobacco Ltd.
Alain Gingras, for the mis-en-cause the Attorney General of Quebec.
Claude Joyal, James Mabbutt, Q.C., Paul Évraire, Q.C., Yves Leboeuf and *Johanne Poirier*, for the respondent.
Tanya Lee, for the intervener the Attorney General for Ontario.
Robert W. Cosman, Karl Delwaide and *Richard B. Swan*, for the interveners the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, and the Canadian Lung Association.

Subject: Intellectual Property; Constitutional; Criminal; Property
Related Abridgment Classifications
Constitutional law
VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.d Property and civil rights within province
VII.3.d.i General principles
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.a Commercial regulation

VII.4.a.iv Consumer protection
VII.4.a.iv.D Advertising
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.v Advertising
Criminal law
II Constitutional authority
II.1 Federal criminal law powers
II.1.a Criminal power

Headnote

Constitutional Law --- Distribution of legislative powers — Areas of legislation — Commercial regulation — Consumer protection — Advertising

Constitutional Law --- Distribution of legislative powers — Nature of general provincial powers — Property and civil rights within province

Constitutional Law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Advertising

Criminal Law --- Constitutional issues in criminal law — Constitutional responsibility for criminal law — Federal powers — Nature and extent of federal criminal power

Federal legislation prohibiting advertising of tobacco products in Canada and requiring health warnings on tobacco products — Tobacco Products Control Act, S.C. 1988, c. 20.

The Act prohibited the advertising of tobacco products offered for sale in Canada as well as the free distribution of tobacco products and the offering of gifts or bonuses. It also restricted the sponsoring activities associated with a tobacco product in connection with any other products, and required the display of health warnings on tobacco products. Tobacco companies brought motions for a declaration that the Act was ultra vires Parliament. Tobacco companies argued that the Act was an attempt to regulate advertising throughout Canada, an activity which was exclusively within provincial jurisdiction. The trial Judge declared the Act ultra vires Parliament, rejecting arguments that it was valid under the criminal law power or the peace, order, and good government clause. On appeal, the Court of Appeal upheld the trial Judge's ruling with respect to the criminal law power, but it held that the Act was intra vires Parliament under the peace, order, and good government clause. On appeal to the Supreme Court of Canada, held, the Act was valid under the criminal law power. The criminal law power was plenary in nature and its scope was broadly defined. The penal sanctions attached to the activities prohibited by the Act created a prima facie indication that it was criminal law. The stated purpose of the Act was the protection of public health, which was one of the ordinary ends served by criminal law. The Act was not colourable as an attempt to intrude upon the provincial power to regulate advertising. The decision to ban tobacco advertising rather than the manufacturing and consumption of tobacco was a policy decision based upon practical considerations that did not affect the criminal law nature and purpose of the Act. The creation of broad exemptions to the Act did not detract from its criminal law nature. It was unnecessary to consider the arguments with respect to peace, order, and good government.

The Act prohibited the advertising of tobacco products offered for sale in Canada as well as the free distribution of tobacco products and the offering of gifts or bonuses. It also restricted the sponsoring activities associated with a tobacco product in connection with any other products, and required the display of health warnings on tobacco products. Tobacco companies brought motions for a declaration that the Act was ultra vires Parliament. Tobacco companies argued that the Act was an attempt to regulate advertising throughout Canada, an activity which was exclusively within provincial jurisdiction. The trial Judge declared the Act ultra vires Parliament, rejecting arguments that it was valid under the criminal law power or the peace, order, and good government clause. On appeal, the Court of Appeal upheld the trial Judge's ruling with respect to the criminal law power, but it held that the Act was intra vires Parliament under the peace, order, and good government clause. On appeal to the Supreme Court of Canada, held, the Act was a valid under the criminal law power. The criminal law power was plenary in nature and its scope was broadly defined. The penal sanctions attached to the activities prohibited by the Act created a prima facie indication that it was criminal law. The stated purpose of the Act was the protection of public health, which was one of the

ordinary ends served by criminal law. The Act was not colourable as an attempt to intrude upon the provincial power to regulate advertising. The decision to ban tobacco advertising rather than the manufacturing and consumption of tobacco was a policy decision based upon practical considerations that did not affect the criminal law nature and purpose of the Act. The creation of broad exemptions to the Act did not detract from its criminal law nature. It was unnecessary to consider the arguments with respect to peace, order, and good government.

Federal legislation prohibiting advertising of tobacco products in Canada and requiring health warnings on tobacco products — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Tobacco Products Control Act, S.C. 1988, c. 20.

The Act prohibited the advertising of tobacco products offered for sale in Canada as well as the free distribution of tobacco products and the offering of gifts or bonuses. It also restricted the sponsoring activities associated with a tobacco product in connection with any other products, and required the display of health warnings on tobacco products. Tobacco companies contended that the Act deprived them of a means of commercial communication with users of the product and, therefore, infringed s. 2(b) of the Charter. The trial Judge declared the Act unconstitutional. On appeal, the Court of Appeal found that the right to freedom of expression was infringed by the Act. However, the struggle against the harmfulness of tobacco constituted a sufficiently important objective in a free and democratic society to justify restrictions on a freedom guaranteed by the Charter. On appeal to the Supreme Court of Canada, held, the appeal was allowed and the offending provisions of the Act were struck down. The protection of s. 2(b) extended to commercial expression such as advertising. The prohibition on the advertising and promotion of tobacco products, and the requirement for unattributed health warnings, infringed the right of free expression. The objective of reducing health risks by reducing advertising-related consumption of tobacco was of sufficient importance to justify overriding the right of free expression. The provisions of the Act were rationally connected to the objective of reduced tobacco consumption. However, Minister failed to demonstrate that a total ban on advertising and a requirement for an unattributed health warning were minimal impairments on the freedom of expression that were necessary to achieve the objectives of the Act. The offending provisions were not justified under s. 1 of the Charter.

The Act prohibited the advertising of tobacco products offered for sale in Canada as well as free distribution of tobacco products and the offering of gifts or bonuses. It also restricted the sponsoring of activities associated with a tobacco product in connection with any other products, and required the display of health warnings on tobacco products. Tobacco companies brought motions for a declaration that the Act was ultra vires Parliament. Tobacco companies argued that the Act was an attempt to regulate advertising throughout Canada, an activity which was exclusively within provincial jurisdiction. The trial Judge declared the Act ultra vires Parliament, rejecting arguments that it was valid under the criminal law power or the peace, order, and good government clause. On appeal, the Court of Appeal upheld the trial Judge's ruling with respect to the criminal law power, but it held that the Act was intra vires Parliament under the peace, order, and good government clause. On appeal to the Supreme Court of Canada, held, the Act was valid under the criminal law power. The criminal law power was plenary in nature and its scope was broadly defined. The penal sanctions attached to the activities prohibited by the Act created a prima facie indication that it was criminal law. The stated purpose of the Act was the protection of public health, which was one of the ordinary ends served by criminal law. The Act was not colourable as an attempt to intrude upon the provincial power to regulate advertising. The decision to ban tobacco advertising rather than the manufacturing and consumption of tobacco was a policy decision based upon practical considerations that did not affect the criminal law nature and purpose of the Act. The creation of broad exemptions to the Act did not detract from its criminal law nature.

The following are the reasons delivered by *Lamer C.J.*:

1 I have had the benefit of reading the reasons of my colleagues. I am in agreement with the reasons of my colleague, Justice Iacobucci, but agree with my colleague, Justice McLachlin, as to the disposition.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by *La Forest J.* (dissenting):

2 The issues in these appeals are whether the *Tobacco Products Control Act*, S.C. 1988, c. 20 (the "Act"), falls within the legislative competence of the Parliament of Canada under s. 91 of the *Constitution Act, 1867*, either as criminal law or under the peace, order and good government clause, and if so whether it constitutes an infringement of freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* which is not justified under s. 1 of the *Charter*. In broad terms, the Act prohibits, subject to specified exceptions, all advertising and promotion of tobacco products, and prohibits the sale of a tobacco

tab 6

1995 CarswellOnt 4306
Ontario Court of Justice (General Division)

Rosen v. Ontario (Attorney General)

1995 CarswellOnt 4306, [1995] O.J. No. 413, 27 C.R.R. (2d) 162, 53 A.C.W.S. (3d) 741

Larry Rosen and Sav-On Drugs Limited, Applicants and The Attorney General of Ontario, Respondent and The Canadian Cancer Society (Ontario Division), Heart and Stroke Foundation of Ontario, the Ontario Lung Association, the Ontario Chiropractic Association, the Canadian Oncology Society, Council for a Tobacco-Free Ontario, Physicians for a Smoke-Free Canada, Non-Smokers Rights Association, the Ontario Medical Association, the Ontario Federation of Home and School Associations, the Ontario Naturopathic Association, Canadian Council on Smoking and Health, Concerns Canada, Sudbury & District Council on Tobacco and Health, Council for a Tobacco Free Wellington-Dufferin, Elgin-St. Thomas Health Unit, the Lung Association, Elgin Region, the Lung Association, Wellington County, the Lung Association, London & Middlesesex, the Ontario Public Health Association and Elgin Council on Smoking and Health, Intervenors

Boland J.

Judgment: February 20, 1995
Docket: RE 4712/94

Proceedings: Affirmed, 131 D.L.R. (4th) 708, 87 O.A.C. 280, 34 C.R.R. (2d) 84, 1996 CarswellOnt 89 (Ont. C.A.); Leave to appeal refused, 137 D.L.R. (4th) vii, 38 C.R.R. (2d) 188 (note), 205 N.R. 395 (note), 100 O.A.C. 399 (note), [1996] S.C.C.A. No. 127 (S.C.C.)

Counsel: Alan J. Lenczner, Q.C., Anne E. Posno, for Applicants
Robert E. Charney, for Respondent
Peter Downard, Richard B. Swan, for Intervenors

Subject: Constitutional; Corporate and Commercial
Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.6 Marketing controls
VI.6.b Effect of Charter of Rights and Freedoms
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.i Nature and scope of expression
Headnote
Constitutional law
Trade and commerce

Boland J.:

1 The applicants, Larry Rosen and Sav-On Drugs Limited, seek a declaration that s. 4(2) 8 and 9 of the *Tobacco Control Act, 1994*, S.O. 1994, c. 10, are unconstitutional in that they restrict the fundamental freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The application was strongly contested by the Attorney General of Ontario and the 21 Intervenors who were granted status in the matter.

2 Larry Rosen is a licensed pharmacist who owns shares in Sav-On Drugs Limited as well as a number of drug stores. He represents an organization of 579 pharmacy owners or operators across Ontario who protest the mandatory removal of tobacco products from premises containing pharmacies. Mr. Rosen contends that a community pharmacy is highly dependent upon its general retail sales to remain economically viable. Tobacco products have been part of the retail mix for more than 60 years and generates the necessary cash flow. The removal of tobacco products from pharmacies will result in loss of both jobs and substantial profits.

3 It is the position of the applicants that the removal of tobacco from pharmacies is intended to create a symbolic effect by reducing the social acceptability of smoking. They contend the government wishes to force pharmacists to give a message to the public that smoking is expressly disapproved of by the pharmacists. On the other hand, the government argues this is not the purpose of s.4 of the *Tobacco Control Act*. The purpose is to ensure that pharmacists, as health care professionals, provide proper health care to the public who are their patients.

4 Pharmacies in Ontario are regulated under a number of other statutes, including the *Drug and Pharmacies Regulation Act*, R.S.O. 1990, c. H.4, the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 and the *Pharmacy Act, 1991*, S.O. 1991, c.36. Pursuant to this legislation, only a pharmacist or a corporation in which the majority of the directors are pharmacists can own or operate a pharmacy. The pharmacy must be under the supervision of a pharmacist who is physically present. A pharmacy is defined as a "premises in or in part of which prescriptions are compounded and dispensed for the public or drugs are sold by retail". Drugs may only be sold to the public in accredited pharmacies and the entire premises is accredited as a pharmacy.

5 The *Tobacco Control Act* came into force on November 30, 1994. Prior to enactment, it was supported by the Ontario College of Pharmacists which is the licensing and regulatory body for pharmacists in Ontario. It is of interest that the World Health Organization reports that Canada and the United States are two of only a very few countries in which cigarettes are sold in pharmacies.

6 Section 4 of the Act is part of a comprehensive tobacco control scheme that prohibits the sale of tobacco to a person under 19 years of age. The section prohibits the sale of tobacco in health care facilities in Ontario, including hospitals, psychiatric facilities, nursing homes, homes for the aged, rest homes and pharmacies. It prohibits tobacco vending machines. It controls smoking tobacco in specific places and regulates the posting of warnings on packaging and signs.

7 The following portions of s.4 are under attack:

> 4. (1) No person shall sell tobacco in a designated place.
>
> (2) The following are designated places:
>
> . . .
>
> 8. A pharmacy as defined in the Drug and Pharmacies Regulation Act.
>
> 9. An establishment where goods or services are sold or offered for sale to the public, if,
>
> i. a pharmacy as defined in the Drug and Pharmacies Regulation Act is located within the establishment, or
>
> ii. customers of such a pharmacy can pass into the establishment directly or by the use of a corridor or area used exclusively to connect the pharmacy with the establishment.

8 It is the applicants position that these subsections violate their fundamental right to freedom of expression under s.2(b) of the Charter which provides:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

9 The applicants contend that the government has identified their activities in selling tobacco products in pharmacies as expressing a message that tobacco is socially acceptable and has the tacit approval of an important group of health professionals. They argue that by enacting s.4(2), 8 and 9 of the *Tobacco Control Act*, the government intends to send a message to the public that cigarettes and smokers are expressly disapproved of by pharmacists. The applicants further argue that this legislation infringes their freedom of expression by compelling them to be the vehicle the government uses to express its disapproval of smoking. They are effectively forced to speak out in the government's voice, regardless of their own views and regardless of whether they would otherwise choose to speak publicly on this subject.

10 Having considered the materials filed by counsel and their excellent submissions, I am satisfied that the prohibition of tobacco sales in pharmacies and other health care facilities does not infringe s.2(b) of the *Charter*.

11 It is well recognized that freedom of expression is a necessary and important feature of our modern democracy. It guarantees our right to express disagreement with government regulation. It does not guarantee our right to be free from government regulation with which we disagree.

12 Our Court of Appeal has decided that "the display of goods and wares for sale" is not a form of expression contemplated by s.2(b) of the *Charter*. *R. v. Greenbaum* (1991), 77 D.L.R. (4th) 334. As well, the material strongly suggests that Mr. Rosen's real concern is economic loss and not any message he may or may not give to the public whom he acknowledges are his patients. The applicants are still free to express whatever opinions they may have with regard to the consumption or sale of tobacco. It is also abundantly clear that it was the legislature's intent in drafting s.4, that pharmacists, as health care professionals, must provide proper health care to their patients. It has been established that tobacco products are a health hazard to those who smoke and to those who inhale environmental tobacco smoke. It follows that the sale of tobacco in pharmacies is totally incompatible with the role of the pharmacist providing professional health care to the public. It is reasonable that latitude be given to legislatures that act to protect such vulnerable groups.

13 The respondent submits as an alternative argument that s.4 of the *Tobacco Control Act* represents a reasonable limit on freedom of expression and is therefore justified under s.1 of the Charter. He contends the limitation at issue does not touch upon the core values underlying freedom of expression and the purpose of the legislation is to ensure that pharmacists, health care professionals, provide proper health care to their patients. The applicant remains free to speak his mind and express whatever opinions he may have with regard to the consumption or sale of tobacco. In my view these alternative submissions have considerable weight. However, having determined this application on the basis of s.2(b), it is not necessary to consider s.1 of the Charter.

14 For these reasons, the application is dismissed. If counsel are unable to agree on costs, they may speak to me at their convenience.

tab 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Mader's Tobacco Store Ltd. | 2010 NSPC 52, 2010 CarswellNS 552, 933 A.P.R. 180, 294 N.S.R. (2d) 180, 89 W.C.B. (2d) 550 | (N.S. Prov. Ct., Aug 18, 2010)

1996 CarswellOnt 89
Ontario Court of Appeal

Rosen v. Ontario (Attorney General)

1996 CarswellOnt 89, [1996] O.J. No. 100, 131 D.L.R. (4th) 708, 34 C.R.R. (2d) 84, 60 A.C.W.S. (3d) 723, 87 O.A.C. 280

Larry Rosen and Sav-On Drugs Limited, Applicants (Appellants) v. The Attorney General of Ontario, Respondent (Respondent); The Canadian Cancer Society (Ontario Division), Heart and Stroke Foundation of Ontario, The Ontario Lung Association, The Ontario Chiropractic Association, The Canadian Oncology Society, Council for a Tobacco-Free Ontario, Physicians for a Smoke-Free Canada, Non-Smokers Rights Association, The Ontario Medical Association, The Ontario Federation of Home and School Associations, The Ontario Naturopathic Association, Canadian Council on Smoking and Health, Concerns Canada, Sudbury & District Council on Tobacco and Health, Council for a Tobacco Free Wellington-Dufferin, Elgin-St. Thomas Health Unit, The Lung Association, Elgin Region, The Lung Association, Wellington County, The Lung Association, London & Middlesex, The Ontario Public Health Association and Elgin Council on Smoking and Health, Intervenors

Finlayson, Doherty, Austin, JJ.A.

Judgment: January 17, 1996
Docket: Doc. CA C21206

Proceedings: affirming, (1995), 27 C.R.R. (2d) 162 (Ont. Gen. Div.)

Counsel: *Edward M. Morgan* and *Lawrence E. Thacker*, for the appellants.
Robert E. Charney, for the respondent.
Peter A. Downard and *Richard B. Swan*, for the intervenors.

Subject: Constitutional; Corporate and Commercial
Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.6 Marketing controls
VI.6.b Effect of Charter of Rights and Freedoms
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.i Nature and scope of expression

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Nature and scope of expression

Trade and Commerce --- Marketing controls — Effect of Charter of Rights and Freedoms

Legislative prohibition on sale of a tobacco products at pharmacies not violating freedom of expression — Bare sale of tobacco products not constituting "expression" within meaning of s. 2(b) — Freedom of expression not guaranteeing right to be free from disliked government regulation — Canadian Charter of Rights and Freedoms, s. 2(b) — Tobacco Control Act, 1994, S.O. 1994, c. 10, ss. 4, 4(2) paras. 8, 9.

Section 4 of the Act prohibited the sale of tobacco products in designated places, including pharmacies and premises on which accredited pharmacies were located. The individual applicant was a licenced pharmacist and a shareholder in the corporate applicant. The applicants stressed the importance of the sale of tobacco products to the economic well-being of the pharmacies. They brought an application on their own behalf and on behalf of the members of a committee of independent pharmacists for a declaration that s. 4(2) paras. 8 and 9 of the Tobacco Control Act, 1994 infringed upon the fundamental freedom of expression guaranteed under s. 2(b) of the Canadian Charter of Rights and Freedoms. They relied on the contention of some government representatives that there was a mixed message in the sale of tobacco products by health care facilities such as pharmacies. They also argued that the legislation compelled pharmacists to become a vehicle for the expression of the government's disapproval of the consumption of tobacco products. The application was dismissed. The applicants appealed. Held, the appeal was dismissed. Firstly, the bare sale of tobacco products in a pharmacy did not convey any meaning and therefore, did not constitute a form of expression as contemplated by s. 2(b). Nor could the applicant have gained s. 2(b) protection for his sale of tobacco products by relying on the mixed message others choose to read into his activity in their efforts to promote the legislation. Secondly, freedom of expression guaranteed the right to express disagreement with government regulation. However, it did not guarantee the right to be free from disliked government regulation. The Act neither compelled the applicants to communicate any message, nor constrained them from expressing whatever opinion they may have had with regard to the consumption or sale of tobacco. Accordingly, the applicants had failed to show that the action in which they wished to engage constituted an "expression" within the meaning of s. 2(b) of the Charter. The constitutional protection of the Charter was not engaged.

Legislative prohibition on sale of tobacco products at pharmacies not violating freedom of expression — Bare sale of tobacco products not constituting "expression" within meaning of s. 2(b) — Freedom of expression not guaranteeing right to be free from disliked government regulation — Canadian Charter of Rights and Freedoms, s. 2(b) — Tobacco Control Act, 1994, S.O. 1994, c. 10, ss. 4, 4(2), 8, 9.

Section 4 of the Act prohibited the sale of tobacco products in designated places, including pharmacies and premises on which accredited pharmacies were located. The individual applicant was a licenced pharmacist and a shareholder in the corporate applicant. The applicants stressed the importance of the sale of tobacco products to the economic well-being of the pharmacies. They brought an application on their own behalf and on behalf of the members of a committee of independent pharmacists for a declaration that s. 4(2)8 and 9 of the Tobacco Control Act, 1994 infringed upon the fundamental freedom of expression guaranteed under s. 2(b) of the Canadian Charter of Rights and Freedoms. They relied on the contention of some government representatives that there was a mixed message in the sale of tobacco products by health care facilities such as pharmacies. They also argued that the legislation compelled pharmacists to become a vehicle for the expression of the government's disapproval of the consumption of tobacco products. The application was dismissed. The applicants appealed. Held, the appeal was dismissed. Firstly, the bare sale of tobacco products in a pharmacy did not convey any meaning and therefore, did not constitute a form of expression as contemplated by s. 2(b). Nor could the applicant have gained s. 2(b) protection for his sale of tobacco products by relying on the mixed message others choose to read into his activity in their efforts to promote the legislation. Secondly, freedom of expression guaranteed the right to express disagreement with government regulation. However, it did not guarantee the right to be free from disliked government regulation. The Act neither compelled the applicants to communicate any message, nor constrained them from expressing whatever opinion they may have had with regard to the consumption or sale of tobacco. Accordingly, the applicants had failed to show that the action in which they wished to engage constituted an "expression" within the meaning of s. 2(b) of the Charter. The constitutional protection of the Charter was not engaged.

Finlayson J.A.:

tab 8

Most Negative Treatment: Check subsequent history and related treatments.

2005 SCC 13
Supreme Court of Canada

Rothmans, Benson & Hedges Inc. v. Saskatchewan

2005 CarswellSask 162, 2005 CarswellSask 163, 2005 SCC 13, [2005] 1 S.C.R. 188, [2005] 9 W.W.R. 403, [2005] S.C.J. No. 1, 250 D.L.R. (4th) 411, J.E. 2005-572, EYB 2005-86468

Government of Saskatchewan (Appellant) v. Rothmans, Benson & Hedges Inc. (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Prince Edward Island, Canadian Cancer Society, Canadian Lung Association, Canadian Medical Association, Heart and Stroke Foundation of Canada and Western Convenience Stores Association (Interveners)

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: January 19, 2005
Judgment: March 18, 2005
Docket: 29973

Proceedings: additional reasons to *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005), 2005 CarswellSask 29, 2005 CarswellSask 30 (S.C.C.); reversing *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2003), 232 D.L.R. (4th) 495, 238 Sask. R. 250, 305 W.A.C. 250, 2003 SKCA 93, 2003 CarswellSask 628, [2004] 3 W.W.R. 589 (Sask. C.A.); reversing *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2002), 2002 SKQB 382, 2002 CarswellSask 577, [2002] 10 W.W.R. 733, 224 Sask. R. 208 (Sask. Q.B.)

Counsel: Thomson Irvine, Richard Hischebett, for Appellant
Steven Sofer, Neil G. Gabrielson, Q.C., Michelle Ouellette, Marshall Reinhart, for Respondent
S. David Frankel, Q.C., David Schermbrucker, for Intervener, Attorney General of Canada
Robin K. Basu, Mark Crow, Edward Burrow, for Intervener, Attorney General of Ontario
Brigitte Bussières, Hugo Jean, for Intervener, Attorney General of Quebec
Edward A. Gores, for Intervener, Attorney General of Nova Scotia
Cynthia Devine, for Intervener, Attorney General of Manitoba
R. Richard M. Butler, for Intervener, Attorney General of British Columbia
Ruth M. DeMone (written) for Intervener, Attorney General of Prince Edward Island
Julie Desrosiers (written), Robert Cunningham (written) for interveners, Canadian Cancer Society, Canadian Lung Association, Canadian Medical Association, Heart and Stroke Foundation of Canada
Ron A. Skolrood (written), Clifford G. Proudfoot (written) for Intervener, Western Convenience Stores Association

Subject: Constitutional; Civil Practice and Procedure
Related Abridgment Classifications
Constitutional law
VII Distribution of legislative powers
VII.5 Relation between federal and provincial powers
VII.5.c Paramountcy of federal legislation
VII.5.c.i General principles

Headnote

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — General principles

Tobacco legislation — Section 6 of Tobacco Control Act ("TCA") prevented advertising, display, and promotion of cigarettes in retail premises in Saskatchewan where young persons were present — Federal Tobacco Act ("TA") also regulated cigarette promotion in Canada, and was less restrictive than TCA — Cigarette manufacturer's application under R. 188 of Queen's Bench Rules for declaration that s. 6 of TCA was invalid was dismissed — Chambers judge held that no operational conflict existed between s. 6 of TCA and s. 30 of TA and that retailer could comply simultaneously with restrictions imposed by both governments — Court of Appeal reversed decision, holding that practical inconsistency existed between two provisions in that authorization to display afforded by s. 30 of TA was negated by s. 6 of TCA — Government of Saskatchewan appealed — Appeal allowed — In determining whether s. 6 of TCA was sufficiently inconsistent with s. 30 of TA as to be rendered inoperative through paramountcy doctrine, question of impossibility of dual compliance and frustration of Parliament's purpose in enacting s. 30 of TA needed to be answered — Retailer could comply with both statutes by admitting no one under 18 years of age onto premises or by not displaying tobacco products — Section 6 of TCA did not frustrate legislative purpose underlying s. 30 of TA — Both general purpose of TA, namely to address national public health problem, and specific purpose of s. 30, namely to circumscribe TA's general prohibition on promotion of tobacco products set out in s. 19, remained fulfilled — No inconsistency existed between s. 6 of TCA and s. 30 of TA that would render former inoperative pursuant to doctrine of federal legislative paramountcy.

Droit constitutionnel --- Partage des compétences législatives — Rapports entre les compétences fédérales et provinciales — Prépondérance de la loi fédérale — Principes généraux

Lois sur le tabac — Article 6 de la Tobacco Control Act (« TCA ») interdisait la publicité, l'étalage et la promotion de cigarettes dans les lieux de détail, en Saskatchewan, où l'on retrouvait des adolescents — Loi sur le tabac fédérale (« LT ») réglementait aussi la promotion de la cigarette au Canada, mais était moins stricte que ne l'était la TCA — Fabricant de cigarettes a présenté une demande en vertu de la r. 188 des Queen's Bench Rules afin que l'art. 6 TCA soit déclaré invalide; sa demande a été rejetée — Juge en chambre a statué qu'il n'existait aucun conflit d'application entre les art. 6 TCA et 30 TA, et qu'un détaillant serait capable de se conformer simultanément aux restrictions imposées par les deux gouvernements — Cour d'appel a infirmé cette décision, statuant qu'il existait une incompatibilité pratique entre les deux dispositions, c'est-à-dire que l'autorisation de faire l'étalage prévue à l'art. 30 LT était de ce fait niée par l'art. 6 TCA — Gouvernement de la Saskatchewan a interjeté appel — Pourvoi accueilli — Afin de déterminer si l'art. 6 TCA était incompatible avec l'art. 30 LT au point de rendre le premier inopérant du fait de la doctrine de la prépondérance de la loi fédérale, il fallait d'abord répondre à la question de savoir s'il était impossible de se conformer simultanément aux deux dispositions et si cela entraverait le but visé par le Parlement lorsqu'il a adopté l'art. 30 LT — Détaillant serait capable de se conformer aux deux lois en interdisant l'accès à son magasin à toute personne âgée de moins de 18 ans ou en ne faisant l'étalage d'aucun produit du tabac — Article 6 TCA n'entravait pas l'objectif législatif qui était sous-jacent à l'art. 30 LT — Tant le but général visé par la LT, soit d'aborder un problème de santé publique national, que le but précis de l'art. 30, soit de circonscrire l'interdiction générale de faire la promotion de produits du tabac énoncée à l'art. 19, étaient toujours respectés — Il n'existait aucune incompatibilité entre les art. 6 TCA et 30 LT qui ait pu rendre le premier inopérant conformément à la doctrine de la prépondérance de la loi fédérale.

Section 6 of The Tobacco Control Act ("TCA") prevented advertising, display, and promotion of cigarettes in retail premises in Saskatchewan where persons under 18 years of age were present. The federal Tobacco Act ("TA") also regulated cigarette promotion in Canada and was less restrictive than the TCA. The plaintiff cigarette manufacturer brought an application under R. 188 of the Queen's Bench Rules for a declaration that s. 6 of the TCA was invalid. The chambers judge dismissed the application, holding that there was no operational conflict between s. 6 of the TCA and s. 30 of the TA. The chambers judge held that a retailer could comply simultaneously with the restrictions imposed by both governments. The Court of Appeal reversed the decision of the chambers judge, holding that there was a practical inconsistency between the two provisions in that the authorization to display afforded by s. 30 of the TA was negated by s. 6 of the TCA. The Court of Appeal held that the inconsistency was sufficient to engage the doctrine of federal legislative paramountcy and declared s. 6 of the TCA inoperative. The Government of Saskatchewan appealed.

Held: The appeal was allowed.

The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency. In determining whether s. 6 of the TCA was sufficiently inconsistent with s. 30 of the TA as to be rendered inoperative through the paramountcy doctrine, two questions were required to be answered. First, could a person simultaneously comply with s. 6 of the TCA and s. 30 of the TA? Second, did s. 6 of the TCA frustrate Parliament's purpose in enacting s. 30 of the TA? It was plain that dual compliance was possible in this case. A retailer could easily comply with both s. 30 of the TA and s. 6 of the TCA by admitting no one under 18 years of age onto the premises or by not displaying tobacco or tobacco-related products. Section 6 of the TCA did not frustrate the legislative purpose underlying s. 30 of the TA. Both the general purpose of the TA, namely to address a national public health problem, and the specific purpose of s. 30, namely to circumscribe the TA's general prohibition on promotion of tobacco products set out in s. 19, remained fulfilled. Section 6 of the TCA appeared to further at least two of the stated purposes of the TA, namely "to protect young persons and others from inducements to use tobacco products" and "to protect the health of young persons by restricting access to tobacco products". There was no inconsistency between s. 6 of the TCA and s. 30 of the TA that would render the former inoperative pursuant to the doctrine of federal legislative paramountcy.

L'article 6 de la Tobacco Control Act (« TCA") interdisait la publicité, l'étalage et la promotion de cigarettes dans les lieux de détail, en Saskatchewan, où l'on retrouvait des personnes âgées de moins de 18 ans. La Loi sur le tabac fédérale (« LT ») réglementait également la promotion de la cigarette au Canada, mais était moins stricte que ne l'est la TCA. Le demandeur, un fabricant de cigarettes, a présenté une demande en vertu de la r. 8 des Queen's Bench Rules afin que l'art. 6 TCA soit déclaré invalide. Le juge en chambre a rejeté la demande, statuant qu'il n'existait aucun conflit d'application entre les art. 6 TCA et 30 LT. Il a de plus statué qu'un détaillant serait capable de se conformer simultanément aux restrictions imposées par les deux gouvernements. La décision du juge en chambre a été infirmée par la Cour d'appel, qui a conclu à l'existence d'une incompatibilité pratique entre les deux dispositions, c'est-à-dire que l'autorisation par l'art. 30 LT de faire de l'étalage était de ce fait niée par l'art. 6 TCA. La Cour d'appel a statué que cette incompatibilité suffisait pour déclencher l'application de la doctrine de la prépondérance de la loi fédérale et a déclaré l'art. 6 TCA inopérant. Le gouvernement de la Saskatchewan a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Selon la doctrine de la prépondérance de la loi fédérale, lorsqu'il existe une incompatibilité entre des lois provinciale et fédérale adoptées validement mais se chevauchant, la loi provinciale est de ce fait inopérante dans la mesure de son incompatibilité. Afin de déterminer si l'art. 6 TCA était incompatible avec l'art. 30 LT au point de rendre inopérant le premier par l'effet de la doctrine de la prépondérance, il fallait d'abord répondre à deux questions. Premièrement, une personne pouvait-elle se conformer simultanément aux art. 6 TCA et 30 LT? Deuxièmement, l'art. 6 TCA entravait-il l'objectif visé par le Parlement lorsque ce dernier a adopté l'art. 30 LT? Il apparaissait clair, dans ce cas-ci, que l'on pouvait se conformer aux deux articles. Un détaillant pouvait, sans difficulté, se conformer aux art. 30 LT et 6 TCA, en interdisant l'accès à son magasin à toute personne âgée de moins de 18 ans ou en ne faisant pas l'étalage de tabac ou de produits du tabac. L'article 6 TCA n'entravait pas l'objectif législatif sous-jacent à l'art. 30 LT. Tant l'objectif général de la LT, soit aborder un problème de santé publique national, que l'objectif spécifique de l'art. 30, soit circonscrire l'interdiction générale prévue à l'art. 19 de la LT à l'égard de la promotion de produits du tabac, étaient toujours respectés. L'article 6 TCA semblait favoriser au moins deux des objectifs énoncés dans la LT, soit « préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter » et « protéger la santé des jeunes par la limitation de l'accès au tabac ». Il n'existait entre les art. 6 TCA et 30 LT aucune incompatibilité qui ait pu rendre le premier inopérant en vertu de la doctrine de la prépondérance de la loi fédérale.

Table of Authorities

Cases considered by *Major J.*:

Bank of Montreal v. Hall (1990), 9 P.P.S.A.C. 177, 46 B.L.R. 161, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, 104 N.R. 110, [1990] 2 W.W.R. 193, 82 Sask. R. 120, 1990 CarswellSask 25, 1990 CarswellSask 405 (S.C.C.) — considered

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture) (2002), 2002 SCC 31, 2002 CarswellBC 617, 2002 CarswellBC 618, 210 D.L.R. (4th) 577, [2002] 2 C.N.L.R. 143, (sub nom. *Kitkatla Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture))* 286 N.R. 131, [2002] 6 W.W.R. 1, 1 B.C.L.R. (4th) 1, 165 B.C.A.C. 1, 270 W.A.C. 1, [2002] 2 S.C.R. 146 (S.C.C.) — referred to

Law Society (British Columbia) v. Mangat (2001), 2001 SCC 67, 2001 CarswellBC 2168, 2001 CarswellBC 2169, 16 Imm. L.R. (3d) 1, 205 D.L.R. (4th) 577, 157 B.C.A.C. 161, 256 W.A.C. 161, 96 B.C.L.R. (3d) 1, 276 N.R. 339, [2002] 2 W.W.R. 201, [2001] 3 S.C.R. 113 (S.C.C.) — referred to

M & D Farm Ltd. v. Manitoba Agricultural Credit Corp. (1999), 1999 CarswellMan 368, 1999 CarswellMan 369, [1999] 9 W.W.R. 356, 176 D.L.R. (4th) 585, 245 N.R. 165, [1999] 2 S.C.R. 961, 35 C.P.C. (4th) 1, 138 Man. R. (2d) 161, 202 W.A.C. 161 (S.C.C.) — referred to

Multiple Access Ltd. v. McCutcheon (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — considered

O'Grady v. Sparling (1960), [1960] S.C.R. 804, 25 D.L.R. (2d) 145, 33 W.W.R. 360, 128 C.C.C. 1, 33 C.R. 293, 1960 CarswellMan 41 (S.C.C.) — considered

Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board) (1987), 77 N.R. 104, 58 C.R. (3d) 378, 28 Admin. L.R. 1, [1987] 2 S.C.R. 59, 44 D.L.R. (4th) 663, 81 N.B.R. (2d) 328, (sub nom. *Rio Hotel Ltd. v. Liquor Licensing Board (N.B.)*) 205 A.P.R. 328, 1987 CarswellNB 24, 1987 CarswellNB 314 (S.C.C.) — referred to

RJR-Macdonald Inc. c. Canada (Procureur général) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) [1995] 3 S.C.R. 199, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 187 N.R. 1, 1995 CarswellQue 119, 1995 CarswellQue 119F (S.C.C.) — followed

Ross v. Ontario (Registrar of Motor Vehicles) (1973), [1975] 1 S.C.R. 5, (sub nom. *Bell v. Prince Edward Island (Attorney General)*) 23 C.R.N.S. 319, 14 C.C.C. (2d) 322, 1 N.R. 9, 42 D.L.R. (3d) 68, 1973 CarswellOnt 41, 1973 CarswellOnt 243F (S.C.C.) — referred to

114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville) (2001), 2001 SCC 40, 2001 CarswellQue 1268, 2001 CarswellQue 1269, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*) 200 D.L.R. (4th) 419, 19 M.P.L.R. (3d) 1, 271 N.R. 201, 40 C.E.L.R. (N.S.) 1, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*) [2001] 2 S.C.R. 241 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 27 — referred to

Tobacco Act, S.C. 1997, c. 13

Generally — referred to

s. 4 — considered

s. 4(b) — referred to

s. 4(c) — referred to

s. 18(1) "promotion" — considered

s. 19 — considered

s. 22(2) — referred to

s. 26(1) — referred to

s. 28(1) — referred to

s. 30 — considered

s. 30(1) — referred to

s. 30(2) — referred to
Tobacco Control Act, S.S. 2001, c. T-14.1
Generally — referred to

s. 6 — considered

s. 7 — referred to
Tobacco Products Control Act, S.C. 1988, c. 20
Generally — referred to
Rules considered:
Queen's Bench Rules, Sask. Q.B. Rules
R. 188 — referred to

ADDITIONAL REASONS to judgment reported at *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005), 2005 CarswellSask 29, 2005 CarswellSask 30, 331 N.R. 116, 257 Sask. R. 171, 342 W.A.C. 171 (S.C.C.), allowing appeal by provincial government from judgment reported at *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2003), 232 D.L.R. (4th) 495, 238 Sask. R. 250, 305 W.A.C. 250, 2003 SKCA 93, 2003 CarswellSask 628, [2004] 3 W.W.R. 589 (Sask. C.A.) and holding that s. 6 of *Tobacco Control Act* was not constitutionally inoperative on basis of doctrine of federal legislative paramountcy.

MOTIFS SUPPLÉMENTAIRES à l'arrêt publié à *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005), 2005 CarswellSask 29, 2005 CarswellSask 30, 331 N.R. 116, 257 Sask. R. 171, 342 W.A.C. 171 (S.C.C.), qui a accueilli le pourvoi du gouvernement provincial à l'encontre de arrêt publié à *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2003), 232 D.L.R. (4th) 495, 238 Sask. R. 250, 305 W.A.C. 250, 2003 SKCA 93, 2003 CarswellSask 628, [2004] 3 W.W.R. 589 (Sask. C.A.) et a statué que l'art. 6 de la *Tobacco Control Act* n'était pas constitutionnellement inopérant en raison de la doctrine de la prépondérance de la loi fédérale.

***Major J.*:**

1 The question on this appeal is whether Saskatchewan legislation, and in particular s. 6 of *The Tobacco Control Act*, S.S. 2001, c. T-14.1, is sufficiently inconsistent with s. 30 of the federal *Tobacco Act*, S.C. 1997, c. 13, so as to be rendered inoperative pursuant to the doctrine of federal legislative paramountcy. At the end of the hearing, the Court concluded that that question should be answered in the negative and allowed the appeal, with reasons to follow.

I. Facts

2 In 1997, Parliament enacted the *Tobacco Act*. Section 4 of the statute speaks to its purpose as follows:

> 4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
>
> (c) to protect the health of young persons by restricting access to tobacco products; and
>
> (d) to enhance public awareness of the health hazards of using tobacco products.

3 Section 19 of the *Tobacco Act* prohibits the promotion of tobacco products and tobacco product-related brand elements, except as authorized elsewhere in the *Tobacco Act* or its regulations. Section 18 of the *Tobacco Act* defines "promotion" as:

tab 9

1997 CarswellQue 1521
Cour supérieure du Québec

Rothman's, Benson & Hedges inc. c. Canada (Procureur général)

1997 CarswellQue 1521, [1997] R.J.Q. 2786

Rothman's, Benson & Hedges Inc., demanderesse c. Procureur Général du Canada, défenderesse

RJR-MacDonald Inc., demanderesse c. Procureur Général du Canada, défenderesse

Imperial Tobacco Limited, demanderesse c. Procureur Général du Canada, défenderesse et Société Canadienne du Cancer, Fondation Pour les Maladies du Coeur du Canada, Association Pulmonaire Canadienne, Le Conseil Canadien Pour le Contrôle du Tabac, Dr Marcel Boulanger, Dr Andrew Pipe et Dr William Evans, Intervenants

J. Grenier

Jugement: 28 août 1997
Dossier: C.S. Montréal 500-05-031306-978, 500-05-031299-975, 500-05-031332-974

Avocat: *Me Carole Tremblay*, Avocats de la demanderesse Rothman's, Benson & Hedges Inc.
Me Colin K. Irving, Avocats de la demanderesse RJR-MacDonald Inc.
Me Simon V. Potter, Avocats de la demanderesse Imperial Tobacco Ltd.
Me Guy Gilbert et *Me Maurice Régnier*, Avocats du Procureur général du Canada.
Me Marc-André G. Fabien et *Me Julie Desrosiers*, Avocats des intervenants.
Me Robert Cunningham et Me Richard Swann, Avocats des intervenants.

Sujet: Constitutional; Civil Practice and Procedure

***Danielle Grenier*:**

Jugement

1 Le Tribunal est saisi d'une demande présentée par la Société canadienne du cancer, la Fondation pour les maladies du coeur, l'Association pulmonaire canadienne, le Conseil canadien pour le contrôle du tabac ainsi que les Dr Marcel Boulanger, Andrew Pipe et William Evans pour être autorisés à intervenir dans une action intentée par les demanderesses pour contester la validité de certaines dispositions de la *Loi sur le tabac* [1], qui, selon elles, portent notamment atteinte à leur droit à la liberté d'expression garanti par l'alinea 2b) de la *Charte canadienne des droits et libertés* [2].

2 Les demanderesse allèguent que la *Loi sur le tabac* comporte plusieurs restrictions à la publicité du tabac identiques à celles prévues dans la *Loi réglementant les produits du tabac* (LRPT) et dont la Cour suprême a prononcé l'invalidité dans l'arrêt *RJR MacDonald c. Canada (P.G.)* [3].

3 Plus particulièrement, les demanderesses soutiennent que la nouvelle *Loi sur le tabac* comporte des restrictions à la publicité tout aussi contraignantes que celles qui ont été déclarées invalides par la Cour suprême notamment:

1) une interdiction complète de publicité aux lieux de vente des produits de tabac;

2) une interdiction complète de publicité sur les tableaux afficheurs;

3) l'interdiction d'utiliser la marque de commerce des produits de tabac sur des produits qui n'en sont pas.

4 Le Procureur général du Canada a déjà indiqué son intention de s'opposer à la contestation des demanderesses en présentant une défense fondée sur l'article premier de la *Charte*. Il soutiendra, entre autres, qu'en adoptant la *Loi sur le tabac*, le législateur a tenu compte des mesures proposées par les juges Mc Lachlin et Iacobucci dans l'arrêt *RJR MacDonald*, précité, afin que l'atteinte à la liberté d'expression des demanderesses satisfasse aux exigences prévues à l'article 1 de la *Charte*[4].

5 Les requérants désirent intervenir pour soutenir le Procureur général du Canada dans la défense de la validité de la *Loi sur le tabac*, défense qui portera principalement sur les éléments suivants:

> 1) l'objet de la loi, soit la protection de la santé des canadiens est suffisamment important pour justifier une violation au droit à la liberté d'expression des demanderesses;
>
> 2) les moyens choisis pour atteindre cet objet sont proportionnels à l'objectif et à l'effet de la loi;
>
> • les mesures choisies ont un lien rationnel avec l'objectif;
>
> • elles restreignent le moins possible le droit ou la liberté garantie (test de l'atteinte minimale);
>
> • il existe une proportionnalité globale entre les effets préjudiciables de la mesure et les effets salutaires de la loi.

Les Requérants

6 Les requérants s'intéressent tous, dans leurs activités respectives, à la santé publique. Ils sont engagés dans la lutte contre le tabagisme et ont initié des travaux de recherche afin d'établir un lien entre la publicité et la consommation de tabac.

7 Depuis sa fondation en 1938, la *Société canadienne du cancer* s'intéresse à la recherche sur le cancer. Elle a consacré de nombreux efforts à sensibiliser l'opinion publique aux dangers liés à la consommation des produits de tabac. Elle soutient que depuis les dix dernières années, elle a concentré ses efforts sur la promotion et la consommation. Elle a témoigné devant le comité de la Chambre des communes et du Sénat en faveur de l'adoption de la *Loi sur le tabac*. Son intervention a été autorisée dans le débat initié en Cour Fédérale, en 1989, par Rothman Benson & Hedges[5] et son intervention a été reçue par la Cour suprême dans l'arrêt *RJR Mac Donald*, précité. En Cour supérieure, le juge Chabot avait rejeté sa demande d'intervention[6].

8 La *Fondation pour les maladies de coeur* concentre une partie de sa recherche à l'établissement d'un rapport entre certaines maladies du coeur et la consommation de tabac. Elle aurait participé financièrement à plusieurs travaux de recherche sur les liens entre la publicité et le tabac. Sa demande d'intervention a été reçue par la Cour suprême dans *RJR Mac Donald*, précité.

9 *L'Association pulmonaire canadienne* a joué un rôle actif dans la mise en place de politiques non-fumeurs sur les lieux de travail. Elle a initié et subventionné plusieurs projets de recherche sur les effets du tabac sur la santé. La Cour suprême lui a également reconnu le statut « d'intervenant » dans *RJR MacDonald*, précité.

10 Le *Conseil canadien pour le contrôle du tabac* a pour objectif de contribuer à l'adoption par les gouvernements de lois sur le contrôle du tabac et de rendre accessibles tous les travaux de recherche sur le tabac y compris les effets de la publicité du tabac sur la consommation. Le Conseil a été l'un des promoteurs de la *Loi sur le tabac*. Son intérêt pour intervenir dans un débat semblable a été reconnu par la Cour suprême dans *RJR Mac Donald*, précité.

11 Les *Dr Boulanger, Pipe et Evans* sont trois médecins qui travaillent avec des patients souffrant de maladies reliées à la consommation du tabac.

Prétentions des Requérants

12 Les requérants soutiennent qu'ils sont en mesure de jeter un éclairage nouveau sur certains aspects du débat et que leur expertise dans le domaine de la santé compensera l'absence d'intérêt direct dans l'issue du litige. Ils auraient une vision distincte de celle du Procureur général du Canada qui doit tenir compte de toutes les facettes - culturelle, économique, sociale et politique

- de l'intérêt public. En revanche, les requérants n'auraient qu'une seule préoccupation: la santé des canadiens. Ils estiment que la *Loi sur le tabac* aurait pu comporter des restrictions plus importantes à la publicité des produits de tabac et que ces restrictions auraient été justifiées en vertu de l'article 1 de la *Charte*.

13 La pertinence de leur intervention serait d'autant plus justifiée que le Procureur général aurait fait défaut de rencontrer le fardeau de preuve qui lui incombait lors de la contestation de la LRPT dans l'arrêt *RJR Mac Donald*, précité. La Cour suprême a conclu qu'il n'existait aucune preuve directe de nature scientifique de l'existence d'un lien causal entre une interdiction totale de publicité et la diminution de l'usage du tabac. Les requérants soutiennent que plusieurs études sur l'impact de la publicité sur la consommation de tabac étaient disponibles à cette époque, que le Procureur général avait accès à ces documents et qu'il a choisi de ne pas en faire état. Ils ajoutent que si le passé est garant de l'avenir, leur intervention risque d'être fort utile au tribunal de première instance.

Position des Demanderesses

14 Selon elles, la demande d'intervention des requérants est basée sur la présomption que le Procureur général est en conflit d'intérêts et qu'il n'est pas en mesure de défendre adéquatement la *Loi sur le tabac*. Alors que le Procureur général propose le témoignage d'un seul expert, les requérants ont manifesté leur intention d'élargir considérablement le débat (Interrogatoires hors cour de Kyle et de Forsythe). Les demanderesses soutiennent qu'en tant que représentant du gouvernement, il est normal que le Procureur général représente des intérêts diversifiés. Il n'appartient qu'à lui de décider quelle preuve il entend présenter pour défendre la validité de la loi.

15 Selon les demanderesses, les requérants sont des « lobbyistes » qui ont lutté pour que la loi soit adoptée. Ils chercheraient une deuxième tribune pour faire valoir des arguments qui ne font pas l'objet du débat actuel. La crainte que le Procureur général ne représente pas adéquatement l'intérêt public ne serait ni justifiée, ni réelle. L'intervention ne ferait que rendre la cause plus ardue et plus complexe.

Discussion

16 En droit civil, celui qui demande l'autorisation d'intervenir dans des procédures auxquelles il n'est pas partie doit rendre son intérêt vraisemblable. Les articles pertinents du *Code de procédure civile* se lisent comme suit:

> 208. Celui qui a un intérêt dans un procès auquel il n'est pas partie, ou dont la présence est nécessaire pour autoriser, assister ou représenter une partie incapable, peut y intervenir en tout temps avant jugement.
>
> 209. L'intervention volontaire est dite agressive lorsque le tiers demande que lui soit reconnu, contre les parties ou l'une d'elles, un droit sur lequel la contestation est engagée; elle est dite conservatoire lorsque le tiers désire seulement se substituer à l'une des parties pour le représenter, ou se joindre à elle pour l'assister, pour soutenir sa demande ou appuyer ses prétentions.
>
> 212. Les parties en cause peuvent s'opposer oralement, pour défaut d'intérêt de l'intervenant, à la réception de l'intervention, mais celle-ci doit être reçue si l'intervenant rend son intérêt vraisemblable.
>
> 55. Celui qui forme une demande en justice, soit pour obtenir la sanction d'un droit méconnu, menacé ou dénié, soit pour faire autrement prononcer sur l'existence d'une situation juridique, doit y avoir un intérêt suffisant.

17 Dans l'arrêt *Jeunes canadiens pour une civilisation chrétienne c. Fondation du Théâtre du Nouveau-Monde*[7], la Cour d'appel a établi que la règle en droit commun est que, pour être suffisant au sens de l'article 55 C.p.c., l'intérêt doit, entre autres, être direct et personnel.

18 Aucune des parties « intervenantes » ne peut justifier d'un intérêt direct et personnel puisque la loi contestée ne les atteint aucunement dans leurs droits propres.

19 Toutefois, dans les litiges de droit public ou constitutionnel [8] et plus particulièrement en matière de charte [9], les tribunaux ont élargi la notion d'intérêt et ont développé le concept relativement récent « d'intérêt en droit public ». La reconnaissance de l'intérêt d'une personne de participer à un débat de droit public relève de l'exercice du pouvoir discrétionnaire des tribunaux qui ont retenu plusieurs critères d'une importance relative selon la nature des questions en cause.

20 Les critères reconnus par la jurisprudence sont les suivants:

> 1. Le tiers qui demande l'autorisation d'intervenir est-il touché directement par l'issue du litige et, à défaut, a-t-il un intérêt véritable dans les questions qui seront débattues devant le Tribunal?
>
> 2. Existe-t-il une question à régler par adjudication judiciaire et cette question soulève-t-elle un débat d'intérêt public?
>
> 3. S'agit-il d'un cas où il semble n'y avoir aucun autre moyen raisonnable ou efficace de soumettre la question aux tribunaux?
>
> 4. La position du tiers qui se propose d'intervenir est-elle défendue adéquatement par l'une des parties au litige?
>
> 5. L'intérêt de la justice sera-t-il mieux servi si la demande d'intervention est accueillie?
>
> 6. Le Tribunal est-il en mesure de statuer sur le fond sans autoriser l'intervention?
>
> 7. Le tiers qui veut intervenir peut-il donner à la question un éclairage différent dont saura profiter le Tribunal? [10]

21 La Cour d'appel a par ailleurs reconnu que « l'intervention d'un tiers dans un procès déjà engagé est plus simple que celui de l'intérêt à déclencher un litige » [11]. Le pouvoir discrétionnaire des tribunaux en pareille matière vise essentiellement à assurer que le tiers qui demande d'intervenir pourra apporter une contribution appréciable dans la solution du litige tout en s'assurant que l'intervention n'aura pas pour effet de dissiper les ressources judiciaires en allongeant inutilement le débat [12]. Afin de déterminer si la demande d'intervention est justifiée, le Tribunal doit donc évaluer la situation en soupesant les avantages et les inconvénients.

22 Il faut donc répondre à la question suivante: l'intérêt de la justice sera-t-il mieux servi si la demande d'intervention est accueillie?. Il s'agit en quelque sorte de déterminer si les avantages que pourraient procurer l'intervention sont plus importants que les inconvénients qui y sont rattachés. Tel que le soulignait Lavine dans un article intitulé « Advocating Values: Public interest intervention in Charter Litigation », le test est le suivant:

> In applying both « directly affected » criterion in the public interest standing test and the « unique and different perspective » criterion in public interest intervention applications, the Court is required to weigh the value of public participation against the preservation of judicial resources [13].

23 Même si les requérants ne sont pas touchés directement par l'issue du litige, on ne peut nier qu'ils ont un intérêt véritable dans l'une des questions qui sera débattue devant le tribunal, soit la question de savoir si les dispositions de la loi qui restreignent la publicité des produits de tabac rencontrent les critères de l'article 1 de la Charte.

24 L'existence d'une question à régler par adjudication judiciaire qui soulève un véritable débat d'intérêt public est évidente et la question de savoir s'il n'y a aucun autre moyen raisonnable ou efficace de soumettre la question aux tribunaux n'est pas pertinente lorsqu'il s'agit d'une demande d'intervention conservatoire.

25 Le débat, tel qu'engagé, est un débat de société. Il concerne tous et chacun des canadiens. Il incombe normalement au Procureur général de défendre les lois adoptées par le Parlement. Il est faux de dire qu'il est en conflit d'intérêts du seul fait qu'il soit sensible à l'existence d'une multiplicité d'intérêts. La position qu'il adopte doit nécessairement refléter tous les secteurs et activités concernés. Le Procureur général est en mesure de défendre la loi et le tribunal n'a aucunement l'intention d'endosser

les remarques du juge Rouleau dans l'affaire *Rothman, Benson & Hedges*, précitée. Ce dernier avait exprimé des doutes quant à la capacité ou la volonté du Procureur général de défendre les dispositions attaquées de la L.R.P.T.

26 Toutefois, cette constatation ne suffit pas à écarter la demande d'intervention. La plupart des autorités citées par les requérants font état de demandes d'intervention qui ont été accueillies par des Cours d'appel ou par la Cour suprême du Canada. C'est avec justesse que les requérants soulignent le caractère insolite d'une telle situation. C'est devant le tribunal de première instance que la preuve sous l'article 1 devrait normalement être versée afin d'éviter de se retrouver devant les instances supérieures avec des éléments de preuve insuffisants.

27 Si les tribunaux ont été plus stricts dans l'application du test en première instance, c'était évidemment dans le but d'éviter la prolongation inutile de l'instance et les coûts excessifs que pourraient entraîner les demandes d'intervention. À cela il existe un remède. La demande d'intervention étant de nature discrétionnaire, les tribunaux ont le pouvoir d'en tracer les limites et d'étuder ainsi l'impact négatif qu'elle pourrait avoir.

28 Compte tenu des critères développés par la jurisprudence, le Tribunal est d'avis que seule la Société canadienne du cancer devrait être autorisée à intervenir dans le présent débat. Elle a subventionné et initié de nombreuses recherches visant à établir et à prouver l'existence d'un lien entre la publicité et la consommation de tabac. Les autres intervenants, qui sont représentés par les mêmes procureurs, n'ont pas le même degré d'expertise. Leur contribution serait superfétatoire et risquerait de prolonger inutilement le processus judiciaire. Nul doute que la Société canadienne du cancer aura recours à leur assistance si elle le juge à propos.

29 La crainte exprimée par les demanderesses quant à l'élargissement du litige est réelle. Les interrogatoires des « affiants » laissent entendre qu'ils veulent reprendre le débat à la case de départ. Pour que la contribution de la Société canadienne du cancer soit bénéfique à toutes les parties, il faudra qu'elle se libère d'une certaine humeur de combat et qu'elle comprenne que son rôle est d'assister le Tribunal dans la recherche de la vérité sans déborder le cadre d'un débat qui, rappelons-le, a déjà eu lieu. Sans vouloir anticiper sur les moyens que la Société canadienne du cancer entend utiliser pour mener à bien sa tâche, elle devra éviter la redondance et le superfétatoire. Il ne faudrait pas que les aspirations de la Société canadienne du cancer l'emportent en importance, en intérêt immédiat, sur le litige tel qu'engagé par les principaux intéressés.

30 Il ne faut pas perdre de vue que les arguments invoqués dans la présente instance ont déjà fait l'objet d'un long et coûteux débat. Il ne s'agit donc pas d'arguments invoqués pour la première fois dans le contexte de la Charte. La Cour suprême a déjà débroussaillé le terrain et les tribunaux peuvent désormais tirer avantage de ses enseignements. Elle a indiqué que l'adoption par le Parlement de mesures moins attentatoires pourraient recevoir l'aval des tribunaux. Il s'agira donc essentiellement de décider si la nouvelle *Loi sur le tabac rencontre* ces exigences.

31 L'intervention de la Société canadienne du cancer devra être circonscrite et limitée. Il ne s'agit pas de réécrire la loi ni de prouver que des restrictions plus sévères à la publicité des produits de tabac auraient mieux servi les intérêts des canadiens. Le Parlement est responsable de l'adoption des lois, pas la Société canadienne du cancer. Elle devra donc restreindre le champ de son intervention à la question de savoir si les dispositions contestées de la *Loi sur le tabac* relatives à la publicité constituent des violations au droit à la liberté d'expression qui peuvent être justifiées à la lumière de l'article 1 de la Charte. Elle n'est pas autorisée à faire valoir son point de vue sur les autres questions en litige.

32 *PAR CES MOTIFS, LE TRIBUNAL*:

33 *ACCUEILLE* en partie la requête en intervention des requérants;

34 *AUTORISE* la Société canadienne du cancer à intervenir en tenant compte des paramètres établis dans le présent jugement;

35 *FRAIS* à suivre.

Notes de bas de page

1 1997. S.C. c. 13.

2 Partie I de la Loi constitutionnelle de 1982, annexe B, Loi de 1982 sur le Canada, 1982, c. II (R.-U.).

3 [1995] 3 R.C.S. 199.

4 Cet article prévoit que les droits et libertés qui y sont garantis ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

5 *Rothman Benson & Hedges c. Canada (P.G.)*, [1990] 1 C.F. 74 confirmé par la Cour d'appel fédérale, [1990] 1 C.F. 90 (C.A.).

6 *Imperial Tobacco c. Canada (P.G.)*, [1989] R.J.Q. 367.

7 [1979] C.A. 491, 492-494.

8 *Noir Thorson c. Canada (P.C.)*, [1975] 1 R.C.S. 138; *Nova Scotia Board of Censors c. Mc Neil*, [1978] 2 R.C.S. 662: *Ministère de la justice du Canada c. Borowski*, [1980] 2 R.C.S. 575.

9 *Mac Millan Bloedel Ltd. C. Mullen*, [1985] 3 W.W.R. 380

10 *Rothmans, Benson & Hedges Inc. c. Canada (P.G.)*, [1990] 1 C.F.74, 79, confirmé par la Cour d'appel fédérale [1990] 1 C.F. 90; *Imperial Tobacco Ltd. c. Canada (P.G.)*, [1989] R.J.Q. 367, 373

11 *Caron c. Canada (P.G.)*, [1988] R.J.Q. 2333, 2337.

12 *Id.*; *Adler c. Ontario*, [1992] 88 D.L.R. (4th) 632.

13 [1993] 2 N.J.C.L., p. 37

Fin du document

tab 10

Most Negative Treatment: Varied
Most Recent Varied: J.T.I. MacDonald Corp. c. Canada (Procureure générale) | 2005 QCCA 726, 2005 CarswellQue 13746, 2005 CarswellQue 6366, [2005] J.Q. No. 10915, [2005] Q.J. No. 10915, J.E. 2005-1552, EYB 2005-93794, J.E. 2007-1276, [2005] R.J.Q. 2018, 260 D.L.R. (4th) 224, 142 A.C.W.S. (3d) 424 | (C.A. Que, Aug 22, 2005)

2002 CarswellQue 3403
Cour supérieure du Québec

J.T.I. MacDonald Corp. c. Canada (Procureure Générale)

2002 CarswellQue 3403, 2002 CarswellQue 3404, [2002] J.Q. No. 5550,
[2003] R.J.Q. 181, 102 C.R.R. (2d) 189, J.E. 2003-137, REJB 2002-36273

J.T.I. MacDonald Corporation, Plaintiff v. The Attorney General of Canada, Defendant and The Canadian Cancer Society, Intervener

Rothmans and Benson & Hedges Inc., Plaintiff v. The Attorney General of Canada, Defendant and The Canadian Cancer Society, Intervener

Imperial Tobacco Canada Limited, Plaintiff v. The Attorney General of Canada, Defendant and The Canadian Cancer Society, Intervener

Denis, J.C.S.

Judgment: December 13, 2002
Docket: 500-05-031299-975, 500-05-031306-978, 500-05-031332-974

Counsel: Doug Mitchell, Catherine McKenzie, Georges Thibaudeau, for plaintiff, J.T.I. MacDonald Corporation
Simon Potter, Gregory Bordan, Marc Prévost, Sophie Perreault, Johanne Gauthier, for plaintiff, Imperial Tobacco Canada Limited
Marc-André Blanchard, Chantal Masse, Gérald Tremblay, Yan Paquette, for plaintiff, Rothmans, Benson & Hedges Inc.
Claude Joyal, Marie Marmet, Marc Ribeiro, Bernard Mandeville, Maurice Régnier, Guy Gilbert, Jean Leclerc, Sophie Truesdell-Ménard, for the defendant
Julie Desrosiers, Christian Trépanier, Rob Cunningham, for the intervener

Subject: Constitutional; Public
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.v Advertising
Health law
I Constitutional issues

Denis, J.C.S.:

Foreword

1 In 1988, the Parliament of Canada passed the *Tobacco Products Control Act* (T.P.C.A.).

Conclusions

512 The Court has done its utmost to address all the questions of law raised by the parties and offer its opinion, an opinion guided by the principle of the rule of law.

513 The rule of law comprises the guidelines we as human beings set for ourselves so that we can live together in relative, if not perfect, harmony.

514 Our concept of the rule of law is constantly evolving and is rooted in common sense. In 1904, a Quebec court ruled that Balzac's *La comédie humaine* was contrary to good morals. [154] In 1960, the Court of the Sessions of the Peace in Montreal declared *Lady Chatterley's Lover* by D.H. Lawrence obscene. The decision was unanimously upheld by the Court of Appeal, but the Supreme Court of Canada overturned the lower court's decision in a five-to-four split decision, setting aside the obscenity charge. [155]

515 The case at bar was demanding in every respect. The issues at stake are difficult ones that require us to plot a course between two perils: demagoguery on one side and naiveté on the other.

516 Smokers are not social outcasts. They should not be crucified for exercising their right to chose to smoke.

517 Tobacco companies have a right to produce and sell cigarettes.

518 However...

519 ...we must remind ourselves of what the evidence has shown and common sense dictates as this debate draws to a close. To do so is no affront to the rule of law.

520 We live in a country where the state assumes the costs of health care. Such is not necessarily the case elsewhere in the world.

521 Dr. Davis, former Surgeon General of Maryland and director of one of the largest private health-care centres in the United States, pointed out that, at this moment, 40 million Americans do not have access to health care because they cannot afford it. That is more people than the entire population of Canada.

522 Cigarettes kill 45,000 Canadians each year, more than the population of Drummondville, Quebec or Prince Albert, Saskatchewan.

523 The testimony of cardiologist Dr. Nancy-Michelle Robitaille was troubling. Smokers die, on average, 15 years prematurely and enjoy a greatly diminished quality of life. When we hear that one of her patients begged her to disconnect his heart monitor so he could go smoke a cigarette, we come to the realization that the fight to curb smoking is not a witch hunt; rather, it is a struggle against a very real social problem.

524 Nicotine is powerfully addictive. This is not mere conjecture. It is a fact.

525 When Dr. Robitaille spoke about the anguish of patients whose smoking had caused them to develop erectile dysfunctions, nobody was laughing.

526 The evidence shows that second-hand smoke harms everyone, both smokers and non-smokers, and that the children of smokers are particularly affected. This is not an attempt to lay blame. It is a fact.

527 Fact: there is incontrovertible evidence that advertising and sponsorship encourage people, especially adolescents, to consume tobacco products. Advertising is designed to reassure smokers and relies on associating cigarettes with a positive lifestyle.

528 Fact: the supposedly less-irritating cigarette is merely the creation of a tobacco company's marketing department; filters allow every single carcinogenic gas contained in cigarette smoke to pass through; and there is no such thing as a "light" or "healthier" cigarette.

529 Fact: tobacco companies "select" the tobacco leaves they use so that they can put less tobacco in their cigarettes while still maintaining the same levels of nicotine.

530 Fact: tobacco companies have been aware of these facts for a long time, in some cases for over 50 years, and have always denied them or refused to disclose them to consumers.

531 It should therefore come as no surprise that the government, as fiduciary of public health, would so doggedly pursue a comprehensive policy aimed at curbing smoking and informing Canadians about tobacco's effects. In Canada, the health costs attributed to smoking are in the neighbourhood of $15 billion, more than the entire national budget of several countries in the world.

532 This is not to suggest that freedom of expression can be bought off for a fistful of dollars. At issue is a painful social problem, as well as freedom of expression that, it must be said, has hitherto not been used appropriately.

533 The tobacco companies are in a particularly difficult position. They sell a harmful product and know it. They have the right to sell it because outright prohibition would be unrealistic.

534 They offer no evidence to rebut the claimed ill effects of cigarettes because there is none. Their evidence respecting the effects of advertising was unconvincing.

535 They are trying to save an industry in inevitable decline. They have every right to do so.

536 Their rights, however, cannot be given the same legitimacy as the government's duty to protect public health.

537 Parliament is seeking to prohibit tobacco advertising, with a few specific exceptions. This is part of a worldwide trend, one that is far from unreasonable.

538 The evidence at trial compels the Court to exercise the degree of deference that common sense would dictate.

539 Therefore, this Court dismisses plaintiffs' actions.

Acknowledgements

540 As already mentioned, this trial has been a most demanding one. No fewer than 22 lawyers from all parties took part in it. The case could easily have degenerated but proper decorum was maintained, thanks in large part to the intelligence, discipline and unflagging determination of counsel.

541 Though the plaintiffs were unsuccessful, it was certainly through no fault of their more-than-capable lawyers.

542 The Court would like to thank the officers of the Court, who helped see this case through to its conclusion. In particular, the Court would like to thank Jacinthe Lamonde, the undersigned's assistant, who acted as clerk. Her attention to detail and exemplary devotion to duty throughout the trial and subsequent deliberations were of immeasurable assistance.

.....

For these Reasons, The Court:

544 *DISMISSES* the three actions,

545 *WITH COSTS.*

tab 11

J.T.I MacDonald Corp v. Attorney General of Canada, [2005] J.Q. no 10915

Jugements du Québec

Quebec Court of Appeal

Registry of Montreal

The Honourables Marc Beauregard J.A., André Brossard J.A and Pierrette Rayle J.A.

Heard: November 29 to December 3, 2004.

Judgment: August 22, 2005.

Unofficial translation.

No.: 500-09-013033-030 (500-05-031299-975)

[2005] J.Q. no 10915 [2005] Q.J. No. 10915 2005 QCCA 726 [2005] R.J.Q. 2018 260 D.L.R. (4th) 224 J.E. 2005-1552 142 A.C.W.S. (3d) 424 EYB 2005-93794

J.T.I. MACDONALD CORP., appellant - plaintiff v. ATTORNEY GENERAL OF CANADA, respondent - defendant and THE CANADIAN CANCER SOCIETY, intervener - intervener

(348 paras.)

Case Summary

Constitutional — Canadian Charter of Rights and Freedoms — Fundamental freedoms — Freedom of expression — The only relevant errors made by the trial judge were not noting the vagueness of certain provisions of the Act and not remarking upon the fact that certain exceptions allowing advertising were in reality so restrictive that Parliament had in fact gone against the Supreme Court's ruling. Appeal allowed in part.

Administrative — Legislative powers or function — Powers of parliament to legislate in tobacco law — The only relevant errors made by the trial judge were not noting the vagueness of certain provisions of the Act and not remarking upon the fact that certain exceptions allowing advertising were in reality so restrictive that Parliament had in fact gone against the Supreme Court's ruling. Appeal allowed in part.

J T.I. MacDonald Corp (***MacDonald***) appealed a judgment of the Superior Court which rejected its procedure impugning the legality of certain provisions of the Tobacco Act. The Supreme Court had decided that the Tobacco Act violated the freedom of expression of ***Macdonald*** and struck down and modified some of its provisions. Parliament modified the laws and considered that they were following the guidelines set out by the Supreme Court. ***MacDonald*** considered that the new law still violated its freedom of expression and that certain provisions were ultra vires the government. The Superior Court dismissed all of ***MacDonald***'s arguments. ***MacDonald*** contended that in reality the provisions of the new law created a total ban through explicit restrictions and that the provisions were so vague that manufacturers did not know what was permitted and what was not. It added that the trial judge failed to a detailed study of the impugned provisions and that consequently, he provided insufficient reasons in dismissing their claims.

HELD: Appeal allowed in part.

The packaging of cigarettes could contain promotion as long as it complied with other sections in the law. The trial judge failed to reply to certain of ***MacDonald***'s submissions. Sections 18 and 19 of the Law were determined to be of no force or effect because they prohibited ***MacDonald*** from financing scientific works that refer to a tobacco product. The definition of lifestyle advertising in the law was not clear, but was not declared inoperative. Banning advertising that could be appealing to young persons went too far and section 22(3) was declared inoperative. Banning advertising by means likely to create an erroneous impression went too far and section 20 was declared inoperative. A restriction on promotion by endorsement was justified. Banning advertising on non-tobacco products provided there were no reasonable grounds on which to construe them as appealing to young persons would have been impossible and section 27 was declared inoperative. The trial judge was right when he declared sections 24 and 25 to be justifiable limitations on freedom of expression. In requiring the packaging of a tobacco product to feature a warning that manufacturers may attribute to the government, Parliament in no way infringed on ***MacDonald***'s freedom of expression. The impugned regulations were intra vires the power of Parliament. The obligation to report to the government could not be considered an unlawful seizure. Appeal allowed in part.

Statutes, Regulations and Rules Cited :

Tobacco Act, 45-46 Elizabeth II, c. 38., s. 5 (1), s. 8, s. 18, s. 19, s. 20, s. 21 (1), s. 22 (2), s. 22 (3), s. 22 (4), s. 23, s. 24, s. 25, s. 26, s. 27, s. 28, s. 30

Tobacco Products Control Act, S.C. 1988, c. 20., s.

Canadian Charter of Rights and Freedoms, s. 1, s. 2, s. 7, s. 8

Constitution Act, 1982, s. 52

Act to amend the Tobacco Act, 46-47 Elizabeth II, c. 38.

Tobacco Reporting Regulations, C. Gaz. 2000.II, Vol. 134, no. 15 *S.O.R./2000-273, 26* June 2000.

Constitution Act, 1867, R.S.C. 1985, app. II, No. 5., s. 91 (1)

Canada Evidence Act, R.S.C. 1985, c. C-5., s. 39

Counsel

Douglas C. Mitchell and Catherine Elizabeth McKenzie (Irving, Mitchell & Associates, s.e.n.c.) and Georges R. Thibaudeau (Borden, Ladner, Gervais L.L.P.), attorneys for appellant. Claude Joyal, Bernard Mandeville, Marie Marmet, Marc Ribeiro (Coté, Marcoux & Joyal) and Maurice Régnier (Gilbert, Simard, Tremblay), attorneys for respondent. Julie Desrosiers (Fasken, Martineau, Dumoulin L.L.P.) and Rob Cunningham (Canadian Cancer Society-public issues), attorneys for intervener.

JUDGMENT

1 The Court; Ruling on the appeal by the appellant from a judgment of the Superior Court (Montréal, December

tab 12

2007 SCC 30
Supreme Court of Canada

J.T.I. MacDonald Corp. c. Canada (Procureure générale)

2007 CarswellQue 5573, 2007 CarswellQue 5574, 2007 SCC 30, [2007] 2 S.C.R. 610, [2007] S.C.J. No. 30, 158 C.R.R. (2d) 127, 281 D.L.R. (4th) 589, 364 N.R. 89

Attorney General of Canada, Appellant/Respondent on cross-appeal and JTI-Macdonald Corp., Respondent/Appellant on cross-appeal

Attorney General of Canada, Appellant/Respondent on cross-appeal and Rothmans, Benson & Hedges Inc., Respondent/Appellant on cross-appeal

Attorney General of Canada, Appellant/Respondent on cross-appeal and Imperial Tobacco Canada Ltd., Respondent/Appellant on cross-appeal and Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan and Canadian Cancer Society, Interveners

Abella J., Bastarache J., Binnie J., Charron J., Deschamps J., Fish J., LeBel J., McLachlin C.J.C., Rothstein J.A.

Heard: February 19, 2007
Judgment: June 28, 2007
Docket: 30611

Proceedings: Reversed 2005 CarswellQue 6366, EYB 2005-93794, J.E. 2005-1552, (sub nom J.T.I. MacDonald Corp. v. Canada (Procureure Générale)) 260 D.L.R. (4th) 224, 2005 QCCA 726, [2005] R.J.Q. 2018 (Que. C.A.); Varied, (sub nom. J.T.I. MacDonald Corp. v. Canada (Attorney General)) 102 C.R.R. (2d) 189, 2002 CarswellQue 3403, 2002 CarswellQue 3404, J.E. 2003-137, [2003] R.J.Q. 181, REJB 2002-36273 (Que. S.C.)

Counsel: Claude Joyal, Bernard Mandeville, Maurice Régnier, for Appellant/Respondent on cross-appeal
Douglas C. Mitchell, Georges R. Thibaudeau, Catherine McKenzie, for Respondent/Appellant on cross-appeal, JTI-Macdonald Corp.
Steven I. Sofer, Rachel Ravary, for Respondent/Appellant on cross-appeal, Rothmans, Benson & Hedges Inc.
Simon V. Potter, Gregory B. Bordan, Sophie Perreault, for Respondent/Appellant on cross-appeal, Imperial Tobacco Canada Ltd.
Robin K. Basu, Mark Crow, for Intervener, Attorney General of Ontario
Dominique A. Jobin, Caroline Renaud, for Intervener, Attorney General of Quebec
Gaétan Migneault, for Intervener, Attorney General of New Brunswick
Cynthia Devine, for Intervener, Attorney General of Manitoba
Craig Jones, Jonathan Penner, for Intervener, Attorney General of British Columbia
Thomson Irvine, for Intervener, Attorney General for Saskatchewan
Julie Desrosiers, Robert Cunningham, for Intervener, Canadian Cancer Society

Subject: Constitutional; Public; Human Rights
Related Abridgment Classifications
Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.v Advertising
Health law
I Constitutional issues

Headnote

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Advertising

In 1995, Supreme Court of Canada struck down advertising provisions of Tobacco Products Control Act — Act broadly prohibited all advertising and promotion of tobacco products and required affixing unattributed warning labels on tobacco product packaging — In response to Court's decision, Parliament enacted Tobacco Act ("TA") and regulations — TA was challenged and trial judge upheld provisions as constitutional — Quebec Court of Appeal upheld most of TA but found parts of some of provisions to be unconstitutional — Attorney General of Canada appealed findings of unconstitutionality and tobacco manufacturers cross-appealed on some of provisions that Court of Appeal held constitutional — Appeals allowed and cross-appeals dismissed — Main issue was whether limits certain provisions of TA imposed on freedom of expression were justified as reasonable under s. 1 of Canadian Charter of Rights and Freedoms ("Charter") — TA should be assessed in light of proportionality analysis — Section 19 TA set out general ban on promotion of tobacco products — Section 18(2) excluded some forms of promotion from ban so long as no consideration was given for use or depiction of tobacco product — Expressive activity of publishing scientific research was valuable and prohibitions on it had impact on right to free expression in serious manner — Properly construed, ss. 18 and 19 permitted publication of legitimate scientific works sponsored by tobacco manufacturers — Section 20 banned "false, misleading or deceptive" promotion and clearly infringed freedom of expression — Parliament's objective of combating promotion of tobacco products constituted pressing and substantial objective — Prohibiting such forms of promotion was rationally connected to Parliament's public health and consumer protection purposes — Right of free expression was not impaired more than was necessary to achieve objective and requirement of proportionality of effects was met — Section 22(3) banned advertising appealing to young persons and infringed s. 2(b) of Charter — Section 22(3) was not vague — Prohibited speech was of low value and Parliament could not be said to have gone farther than necessary in blocking advertising that might influence young persons to start smoking — Section 22(3) met requirement of proportionality of effects and limit on free expression, properly interpreted, was justified as reasonable under s. 1 of Charter — Section 22(3) also carved out lifestyle advertising from permitted information and brand-preference advertising and, thus, infringed s. 2(b) as well — Distinction between advertising directed to market share and advertising directed to increased consumption and new smokers was difficult to capture in legal terms — Properly interpreted, ban on lifestyle advertising in s. 22(3) constituted reasonable and justified limit on right of freedom of expression — Sections 24 and 25 prohibited use by tobacco manufacturers of brand elements or names to sponsor events and use on sports or cultural facilities — Evidence established that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as substitute form of lifestyle promotion — Aim of curbing such promotion justified imposing limits on free expression — Given nature of problem, and in view of limited value of expression in issue compared with beneficial effects of ban, proposed solution was proportional and impugned sponsorship provisions were reasonable limit justified under s. 1 of Charter — Regulations pursuant to TA increased minimum size of mandatory health warnings on tobacco packaging to 50 per cent of principal display surfaces and, thus, infringed s. 2(b) — Parliament's objective in requiring that large part of packaging be devoted to warning was pressing and substantial — Evidence established rational connection between Parliament's requirement for warnings and its objectives of reducing incidence of smoking and of disease and death it causes — Proportionality of effects was established: benefits flowing from larger warnings were clear and detriments to manufacturers' expressive interest in creative packaging were small — Requirement for warning labels minimally impaired freedom of expression and infringement was justified as reasonable limit under s. 1 of Charter.

Health law --- Constitutional issues — Charter of Rights and Freedoms

In 1995, Supreme Court of Canada struck down advertising provisions of Tobacco Products Control Act — Act broadly prohibited all advertising and promotion of tobacco products and required affixing unattributed warning labels on tobacco product packaging — In response to Court's decision, Parliament enacted Tobacco Act ("TA") and regulations — TA was

challenged and trial judge upheld provisions as constitutional — Quebec Court of Appeal upheld most of TA but found parts of some of provisions to be unconstitutional — Attorney General of Canada appealed findings of unconstitutionality and tobacco manufacturers cross-appealed on some of provisions that Court of Appeal held constitutional — Appeals allowed and cross-appeals dismissed — Main issue was whether limits certain provisions of TA imposed on freedom of expression were justified as reasonable under s. 1 of Canadian Charter of Rights and Freedoms ("Charter") — TA should be assessed in light of proportionality analysis — Section 19 TA set out general ban on promotion of tobacco products — Section 18(2) excluded some forms of promotion from ban so long as no consideration was given for use or depiction of tobacco product — Expressive activity of publishing scientific research was valuable and prohibitions on it had impact on right to free expression in serious manner — Properly construed, ss. 18 and 19 permitted publication of legitimate scientific works sponsored by tobacco manufacturers — Section 20 banned "false, misleading or deceptive" promotion and clearly infringed freedom of expression — Parliament's objective of combating promotion of tobacco products constituted pressing and substantial objective — Prohibiting such forms of promotion was rationally connected to Parliament's public health and consumer protection purposes — Right of free expression was not impaired more than was necessary to achieve objective and requirement of proportionality of effects was met — Section 22(3) banned advertising appealing to young persons and infringed s. 2(b) of Charter — Section 22(3) was not vague — Prohibited speech was of low value and Parliament could not be said to have gone farther than necessary in blocking advertising that might influence young persons to start smoking — Section 22(3) met requirement of proportionality of effects and limit on free expression, properly interpreted, was justified as reasonable under s. 1 of Charter — Section 22(3) also carved out lifestyle advertising from permitted information and brand-preference advertising and, thus, infringed s. 2(b) as well — Distinction between advertising directed to market share and advertising directed to increased consumption and new smokers was difficult to capture in legal terms — Properly interpreted, ban on lifestyle advertising in s. 22(3) constituted reasonable and justified limit on right of freedom of expression — Sections 24 and 25 prohibited use by tobacco manufacturers of brand elements or names to sponsor events and use on sports or cultural facilities — Evidence established that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as substitute form of lifestyle promotion — Aim of curbing such promotion justified imposing limits on free expression — Given nature of problem, and in view of limited value of expression in issue compared with beneficial effects of ban, proposed solution was proportional and impugned sponsorship provisions were reasonable limit justified under s. 1 of Charter — Regulations pursuant to TA increased minimum size of mandatory health warnings on tobacco packaging to 50 per cent of principal display surfaces and, thus, infringed s. 2(b) — Parliament's objective in requiring that large part of packaging be devoted to warning was pressing and substantial — Evidence established rational connection between Parliament's requirement for warnings and its objectives of reducing incidence of smoking and of disease and death it causes — Proportionality of effects was established: benefits flowing from larger warnings were clear and detriments to manufacturers' expressive interest in creative packaging were small — Requirement for warning labels minimally impaired freedom of expression and infringement was justified as reasonable limit under s. 1 of Charter.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Liberté d'expression — Publicité

En 1995, la Cour suprême du Canada a annulé des dispositions de la Loi réglementant les produits du tabac — Cette loi établissait une interdiction générale de toute publicité et promotion des produits du tabac et exigeait que des mises en garde non attribuées figurent sur l'emballage de ces produits — Pour répondre à la décision de la Cour, le législateur a adopté la Loi sur le tabac (« LT ») et son règlement — LT a été contestée et le juge de première instance a conclu à la constitutionnalité des dispositions en cause — Cour d'appel du Québec a confirmé la validité de la majeure partie de la LT mais a toutefois conclu que certaines dispositions étaient inconstitutionnelles — Procureur général du Canada a formé un pourvoi contre les conclusions d'inconstitutionnalité alors que les fabricants de produits du tabac ont formé des pourvois incidents à l'égard de certaines dispositions que la Cour d'appel a jugées constitutionnelles — Pourvois accueillis et pourvois incidents rejetés — Question principale était de savoir si les limites imposées à la liberté d'expression par certaines dispositions de la LT étaient justifiées au sens de l'article premier de la Charte canadienne des droits et libertés (« Charte ») — LT devrait être abordée en appliquant l'analyse de la proportionnalité — Article 19 LT établissait une interdiction générale de la promotion des produits du tabac — Article 18(2) soustrayait à cette interdiction certaines formes de promotion, pourvu qu'aucun fabricant ou détaillant n'ait donné une contrepartie pour la représentation du produit dans ces oeuvres — Publication des résultats d'une recherche scientifique était une activité expressive valable dont l'interdiction avait de graves répercussions sur le droit à la liberté d'expression — Correctement interprétés, les art.

18 et 19 permettaient la publication des oeuvres scientifiques légitimes commanditées par les fabricants de produits du tabac — Article 20 interdisait la promotion faite « d'une manière fausse ou trompeuse » et, de toute évidence, violait la garantie de liberté d'expression — Objectif du législateur consistant à combattre la promotion des produits du tabac constituait un objectif urgent et réel — Interdiction de ces formes de promotion était rationnellement liée aux objectifs du législateur en matière de santé publique et de protection du consommateur — Termes contestés ne portaient pas plus atteinte au droit à la liberté d'expression que ce qui était nécessaire pour réaliser l'objectif en cause et satisfaisaient à l'exigence de proportionnalité des effets — Article 22(3) interdisait la publicité attrayante pour les jeunes et contrevenait à l'art. 2b) de la Charte — Article 22(3) n'était pas imprécis — Activité expressive interdite avait peu de valeur et on ne saurait prétendre que le législateur est allé plus loin que nécessaire en interdisant la publicité qui pourrait inciter les jeunes à commencer à fumer — Article 22(3) satisfaisait à l'exigence de proportionnalité des effets et la restriction de la liberté d'expression imposée, correctement interprété, était justifiée en tant que limite raisonnable au sens de l'article premier de la Charte — Article 22(3) excluait également la publicité de style de vie de la publicité informative et de la publicité préférentielle et contrevenait aussi à l'art. 2(b) — Distinction entre les publicités destinées à gagner une part du marché et la publicité destinée à accroître l'usage du tabac et le nombre de nouveaux fumeurs était difficile à traduire en termes juridiques — Correctement interprétée, l'interdiction de la publicité de style de vie était une restriction raisonnable et justifiée à la liberté d'expression — Articles 24 et 25 établissaient que les fabricants de produits du tabac ne pouvaient ni utiliser leurs éléments de marque ou leur nom pour commanditer des manifestations, ni apposer leurs éléments de marque ou leur nom sur des installations sportives ou culturelles — Preuve démontrait que, au fur et à mesure qu'étaient renforcées les restrictions de la publicité sur le tabac, les fabricants se sont tournés vers la commandite d'activités sportives et culturelles pour remplacer la promotion de style de vie — Objectif consistant à enrayer cette forme de promotion justifiait l'imposition de limites à la liberté d'expression — Compte tenu de la nature du problème et de la valeur limitée de l'activité expressive en cause par rapport aux effets bénéfiques de l'interdiction, la solution proposée était proportionnelle et les dispositions contestées relatives aux commandites étaient justifiées en tant que limites raisonnables au sens de l'article premier de la Charte — Règlement d'application de la LT a augmenté la taille minimale des mises en garde obligatoires sur les emballages des produits du tabac, la faisant passer à la moitié de la principale surface exposée et, ainsi, contrevenait à l'art. 2(b) — Objectif que le législateur visait en exigeant qu'une bonne partie de l'emballage soit consacrée à une mise en garde était urgent et réel — Preuve démontrait l'existence d'un lien rationnel entre l'exigence du législateur que des mises en garde soient apposées et son objectif de diminution de l'usage du tabac, ainsi que des maladies et des décès qui en résultent — Proportionnalité des effets était établie: les effets bénéfiques des mises en garde de plus grande dimension étaient manifestes et les effets négatifs sur la liberté des fabricants de s'exprimer de manière créative sur l'emballage de leurs produits étaient négligeables — Exigence concernant la mise en garde constituait une atteinte minimale à la liberté d'expression et était une mesure raisonnable dont la justification pouvait se démontrer au sens de l'article premier de la Charte.

Droit de la santé --- Questions d'ordre constitutionnel — Charte canadienne des droits et libertés

En 1995, la Cour suprême du Canada a annulé des dispositions de la Loi réglementant les produits du tabac — Cette loi établissait une interdiction générale de toute publicité et promotion des produits du tabac et exigeait que des mises en garde non attribuées figurent sur l'emballage de ces produits — Pour répondre à la décision de la Cour, le législateur a adopté la Loi sur le tabac (« LT ») et son règlement — LT a été contestée et le juge de première instance a conclu à la constitutionnalité des dispositions en cause — Cour d'appel du Québec a confirmé la validité de la majeure partie de la LT mais a toutefois conclu que certaines dispositions étaient inconstitutionnelles — Procureur général du Canada a formé un pourvoi contre les conclusions d'inconstitutionnalité alors que les fabricants de produits du tabac ont formé des pourvois incidents à l'égard de certaines dispositions que la Cour d'appel a jugées constitutionnelles — Pourvois accueillis et pourvois incidents rejetés — Question principale était de savoir si les limites imposées à la liberté d'expression par certaines dispositions de la LT étaient justifiées au sens de l'article premier de la Charte canadienne des droits et libertés (« Charte ») — LT devrait être abordée en appliquant l'analyse de la proportionnalité — Article 19 LT établissait une interdiction générale de la promotion des produits du tabac — Article 18(2) soustrayait à cette interdiction certaines formes de promotion, pourvu qu'aucun fabricant ou détaillant n'ait donné une contrepartie pour la représentation du produit dans ces oeuvres — Publication des résultats d'une recherche scientifique était une activité expressive valable dont l'interdiction avait de graves répercussions sur le droit à la liberté d'expression — Correctement interprétés, les art. 18 et 19 permettaient la publication des oeuvres scientifiques légitimes commanditées par les fabricants de produits du tabac — Article 20 interdisait la promotion faite « d'une manière fausse ou trompeuse » et, de toute évidence, violait la garantie de liberté d'expression — Objectif du législateur consistant à combattre la promotion des produits du tabac constituait un objectif

urgent et réel — Interdiction de ces formes de promotion était rationnellement liée aux objectifs du législateur en matière de santé publique et de protection du consommateur — Termes contestés ne portaient pas plus atteinte au droit à la liberté d'expression que ce qui est nécessaire pour réaliser l'objectif en cause et satisfaisaient à l'exigence de proportionnalité des effets — Article 22(3) interdisait la publicité attrayante pour les jeunes et contrevenait à l'art. 2b) de la Charte — Article 22(3) n'était pas imprécis — Activité expressive interdite avait peu de valeur et on ne saurait prétendre que le législateur est allé plus loin que nécessaire en interdisant la publicité qui pourrait inciter les jeunes à commencer à fumer — Article 22(3) satisfaisait à l'exigence de proportionnalité des effets et la restriction de la liberté d'expression imposée, correctement interprété, était justifiée en tant que limite raisonnable au sens de l'article premier de la Charte — Article 22(3) excluait également la publicité de style de vie de la publicité informative et de la publicité préférentielle et contrevenait aussi à l'art. 2(b) — Distinction entre les publicités destinées à gagner une part du marché et la publicité destinée à accroître l'usage du tabac et le nombre de nouveaux fumeurs était difficile à traduire en termes juridiques — Correctement interprétée, l'interdiction de la publicité de style de vie était une restriction raisonnable et justifiée à la liberté d'expression — Articles 24 et 25 établissaient que les fabricants de produits du tabac ne pouvaient ni utiliser leurs éléments de marque ou leur nom pour commanditer des manifestations, ni apposer leurs éléments de marque ou leur nom sur des installations sportives ou culturelles — Preuve démontrait que, au fur et à mesure qu'étaient renforcées les restrictions de la publicité sur le tabac, les fabricants se sont tournés vers la commandite d'activités sportives et culturelles pour remplacer la promotion de style de vie — Objectif consistant à enrayer cette forme de promotion justifiait l'imposition de limites à la liberté d'expression — Compte tenu de la nature du problème et de la valeur limitée de l'activité expressive en cause par rapport aux effets bénéfiques de l'interdiction, la solution proposée était proportionnelle et les dispositions contestées relatives aux commandites étaient justifiées en tant que limites raisonnables au sens de l'article premier de la Charte — Règlement d'application de la LT a augmenté la taille minimale des mises en garde obligatoires sur les emballages des produits du tabac, la faisant passer à la moitié de la principale surface exposée et, ainsi, contrevenait à l'art. 2(b) — Objectif que le législateur visait en exigeant qu'une bonne partie de l'emballage soit consacrée à une mise en garde était urgent et réel — Preuve démontrait l'existence d'un lien rationnel entre l'exigence du législateur que des mises en garde soient apposées et son objectif de diminution de l'usage du tabac, ainsi que des maladies et des décès qui en résultent — Proportionnalité des effets était établie: les effets bénéfiques des mises en garde de plus grande dimension étaient manifestes et les effets négatifs sur la liberté des fabricants de s'exprimer de manière créative sur l'emballage de leurs produits étaient négligeables — Exigence concernant la mise en garde constituait une atteinte minimale à la liberté d'expression et était une mesure raisonnable dont la justification pouvait se démontrer au sens de l'article premier de la Charte.

In 1995, the Supreme Court of Canada struck down the advertising provisions of the Tobacco Products Control Act. This Act broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required affixing unattributed warning labels on tobacco product packaging. The majority of the Court in that case held that the provisions limited free expression and that the government had failed to justify the limitations under s. 1 of the Charter. In response to the Court's decision, Parliament enacted the Tobacco Act ("TA") and regulations.

The TA was challenged and the trial judge upheld the provisions as constitutional. The Quebec Court of Appeal upheld most of the scheme, but found parts of some of the provisions to be unconstitutional.

The Attorney General of Canada appealed the findings of unconstitutionality and the tobacco manufacturers cross-appealed on some of the provisions that the Court of Appeal held constitutional

Held: The appeals were allowed and the cross-appeals were dismissed.

The main issue was whether the limits certain provisions of the Act imposed on freedom of expression were justified as reasonable under s. 1 of the Charter. The Crown had to show that limitations on free expression imposed by the legislation were demonstrably justified in a free and democratic society, as required by s. 1 of the Charter. The mere fact that the legislation represented Parliament's response to a decision of the Supreme Court of Canada did not militate for or against deference.

The Act should be assessed in light of the knowledge, social conditions and regulatory environment revealed by the evidence presented in this case. This engaged what in law is known as the proportionality analysis. Examining the objective was the first step. Examining the means by which this objective was pursued was the second step.

Determining the objective of a statute for the purposes of the proportionality analysis may be difficult. An objective will be deemed proper if it is for the realization of collective goals of fundamental importance. The broad objective of the limitations on freedom of expression at issue was to deal with the public health problem posed by tobacco consumption by protecting Canadians against debilitating and fatal diseases associated with tobacco consumption.

The means by which Parliament had chosen to pursue its objective involved a limitation on free expression which is protected by the Constitution. The government had to establish that the means it had chosen were linked to the objective. At the very least, it had to be possible to argue that the means could help to bring about the objective. Deference could be appropriate in assessing whether the requirement of rational connection was made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

The means not only had to be rationally connected to the objective; they had to be shown to be "minimally impairing" of the right. Again, a certain measure of deference had to be appropriate, where the problem Parliament was tackling was a complex social problem. The minimal impairment analysis in this case was also coloured by the relationship between constitutional review and statutory interpretation.

The final question was whether there was proportionality between the effects of the measure that limited the right and the law's objective.

Section 19 TA set out a general ban on the promotion of tobacco products, subject to specific exceptions. Section 18(2) excluded some forms of promotion from this ban so long as no consideration was given for the use or depiction of the tobacco product. A ban on the publication of all sponsored scientific work would be difficult to justify. Even if it could be argued that such a ban met the rational connection test on the basis that sponsored research might produce results that could encourage tobacco consumption, such a ban would likely not minimally intrude on the right of free expression. The expressive activity of publishing scientific research is valuable, and prohibitions on it would have an impact on the right to free expression in a serious manner. However, the provisions, properly interpreted, did not impose a total ban on sponsored scientific research. Properly construed, ss. 18 and 19 permitted the publication of legitimate scientific works sponsored by the tobacco manufacturers.

Section 20 banned "false, misleading or deceptive" promotion, as well as promotion "likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions". Section 20 clearly infringed the guarantee of freedom of expression. The s. 1 inquiry into the justification of the ban imposed by s. 20 of the Act had to be set in the factual context of a long history of misleading and deceptive advertising by the tobacco industry. The phrase "likely to create an erroneous impression" was directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveyed an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. Parliament's objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constituted a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion was rationally connected to Parliament's public health and consumer protection purposes. The impugned phrase did not impair the right of free expression more than was necessary to achieve the objective. Finally, the impugned phrase met the requirement of proportionality of effects. On the one hand, the objective was of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence showed that banning advertising by half-truths and by invitation to false inference would help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attested to this. On the other hand, the expression at stake was of low value. On balance, the effect of the ban was proportional.

Section 22(3) banned advertising appealing to young persons. There was no doubt that this ban limited free expression and thus infringed s. 2(b) of the Charter. Again, the question was what Parliament intended to mean. Both overbreadth and vagueness could be considered in determining whether a limit on free expression was justified under s. 1 of the Charter, although the two concepts raised distinct considerations. Overbreadth was concerned with whether the provision on its face caught more expression than necessary to meet the legislator's objective. Vagueness, by contrast, focused on the generality and imprecision of the language used. Two things must have ben shown in order to refute a claim of vagueness and overbreadth: first, the provision must have given adequate guidance to those expected to abide by it; and second, it must have limited the discretion of state officials responsible for its enforcement. The first striking aspect of s. 22(3) was its insistence on "reasonable grounds" for concluding that the advertising was within the prohibited designation. Section 22(3) must be read as creating a ban for information and brand-preference advertising that could be appealing to a particular segment of society, namely young people and, properly construed, was not vague. Given the sophistication and subtlety of tobacco advertising practices in the past, Parliament could not be said to have gone farther than necessary in blocking advertising that might influence young persons to start smoking. Section 22(3) met the requirement of proportionality of effects. The prohibited speech was of low value.

Information about tobacco products and the characteristics of brands could have some value to the consumer who was already addicted to tobacco but it was not great. On the other hand, the beneficial effects of the ban for young persons and for society at large could be significant. The restrictions could impose a cost in terms of the information and brand-preference advertising they could be able to receive but that cost was small; all that was prohibited was advertising that could be specifically appealing to young people. Moreover, the vulnerability of the young could justify measures that privilege them over adults in matters of free expression. The Court concluded that the limit on free expression imposed by s. 22(3), properly interpreted, was justified as reasonable under s. 1 of the Charter.

Section 22(3) also carved out lifestyle advertising from permitted information and brand-preference advertising. Section 22(4) defined lifestyle advertising. This provision infringed the s. 2(b) guarantee of freedom of expression. The distinction between information and brand-preference advertising directed to market share, on the one hand, and advertising directed to increased consumption and new smokers, on the other, was difficult to capture in legal terms. The Court concluded that properly interpreted, the ban on lifestyle advertising in s. 22(3) constituted a reasonable and justified limit on the right of free expression.

Section 24 banned the display of tobacco-related brand elements or names in promotions that were used, directly or indirectly, in the "sponsorship of a person, entity, event, activity or permanent facility". Section 25 prohibited the display of tobacco-related brand elements or names on a permanent facility, if the brand elements or names are thereby associated with a sports or cultural event or activity. Together, these sections meant that tobacco manufacturers were not permitted to use their brand elements or names to sponsor events, nor to put those brand elements or names on sports or cultural facilities. The evidence established that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. The aim of curbing such promotion justified imposing limits on free expression. Given the nature of the problem, and in view of the limited value of the expression in issue compared with the beneficial effects of the ban, the proposed solution was proportional. The impugned sponsorship provisions were a reasonable limit justified under s. 1 of the Charter.

The regulations pursuant to the Act increased the minimum size of the mandatory health warnings on tobacco packaging from 33 per cent under the old Act to 50 per cent of the principal display surfaces. To hold that minor restrictions or requirements with respect to packaging violated the s. 2(b) guarantee of freedom of expression could trivialize the guarantee. However, the requirement that manufacturers place the government's warning on one half of the surface of their package arguably rose to the level of interfering with how they chose to express themselves. Therefore, s. 2(b) was infringed by the warning requirements in general, and specifically the requirement that 50 per cent of the principal display surfaces of the package be devoted to the warnings. The infringement was justified as a reasonable limit under s. 1 of the Charter. Parliament's objective in requiring that a large part of the packaging be devoted to a warning was pressing and substantial. It was to inform and remind potential purchasers of the product of the health hazards it entailed. This was designed to further Parliament's larger goal of discouraging tobacco consumption and preventing new smokers from taking up the habit. The importance of warnings was reinforced by the trial judge's finding that consumers and the general public were not well informed on the dangers of smoking. The evidence as to the importance and effectiveness of such warnings established a rational connection between Parliament's requirement for warnings and its objectives of reducing the incidence of smoking and of the disease and death it causes. The requirement for warning labels, including their size, minimally impaired the guarantee. The evidence established that bigger warnings could have a greater effect. The reasonableness of the government's requirement was supported by the fact that Australia, Belgium, Switzerland, Finland, Singapore and Brazil required warnings at least as large as Canada's, and the minimum size in the European Union was 48 per cent of the package. The WHO Framework Convention stipulated that warning labels "should" cover at least 50 per cent and "shall" cover at least 30 per cent of the package. Proportionality of effects was established. The benefits flowing from the larger warnings were clear. The detriments to the manufacturers' expressive interest in creative packaging were small.

En 1995, la Cour suprême du Canada a annulé des dispositions de la Loi réglementant les produits du tabac. Cette loi établissait une interdiction générale de toute publicité et promotion des produits du tabac, sous réserve d'exceptions particulières, et exigeait que des mises en garde non attribuées figurent sur l'emballage de ces produits. La Cour à la majorité a conclu que les dispositions en cause dans cette affaire restreignaient la liberté d'expression et que le gouvernement n'avait pas justifié ces restrictions au regard de l'article premier de la Charte canadienne des droits et libertés. Pour répondre à la décision de la Cour, le législateur a adopté la Loi sur le tabac (« LT ») et son règlement.

La LT a été contestée et le juge de première instance a conclu à la constitutionnalité des dispositions en cause. La Cour d'appel du Québec a confirmé la validité de la majeure partie de la LT mais a toutefois conclu que certaines dispositions étaient inconstitutionnelles.

Le Procureur général du Canada a formé un pourvoi contre les conclusions d'inconstitutionnalité alors que les fabricants de produits du tabac ont formé des pourvois incidents à l'égard de certaines dispositions que la Cour d'appel a jugées constitutionnelles.

Arrêt: Les pourvois ont été accueillis et les pourvois incidents ont été rejetés.

La question principale était de savoir si les limites imposées à la liberté d'expression par certaines dispositions de la LT étaient justifiées au sens de l'article premier de la Charte. La Couronne avait le fardeau d'établir que la justification des restrictions que la mesure législative imposait à la liberté d'expression pouvait se démontrer dans le cadre d'une société libre et démocratique, comme l'exige l'article premier de la Charte. Le simple fait que la mesure législative constituait la réponse du législateur à un arrêt de la Cour suprême du Canada ne militait ni pour ni contre la déférence.

La LT devait être appréciée en fonction des connaissances, des conditions sociales et du cadre réglementaire qui ressortaient de la preuve présentée en l'espèce. Ceci faisait intervenir ce qu'on s'appelle en droit l'analyse de la proportionnalité. L'analyse de l'objectif en constituait la première étape. L'analyse des moyens mis en oeuvre pour atteindre cet objectif en constituait la deuxième étape.

Il peut être difficile de déterminer l'objectif d'une loi pour les besoins de l'analyse de la proportionnalité. Un objectif sera considéré comme légitime s'il vise la réalisation d'objectifs collectifs d'une importance fondamentale. Les restrictions de la liberté d'expression qui étaient en cause avaient pour objectif général de régler le problème de santé publique que pose l'usage du tabac, en protégeant les Canadiens contre les maladies débilitantes ou mortelles liées à l'usage du tabac.

Les moyens choisis par le législateur pour atteindre son objectif comportaient une restriction de la liberté d'expression garantie par la Constitution. Le gouvernement devait établir que les moyens choisis étaient liés à l'objectif. Il devait, à tout le moins, être possible de soutenir que ces moyens pouvaient aider à réaliser l'objet en question. Il peut y avoir lieu de faire montre de déférence lorsqu'il s'agit de déterminer si l'exigence d'un lien rationnel est respectée. Il se peut qu'il ne soit pas simple ou facile de trouver des solutions efficaces à des problèmes sociaux complexes, tel l'usage du tabac. Il peut y avoir lieu de débattre de ce qui fonctionnera ou ne fonctionnera pas, et il est possible que le résultat ne soit pas mesurable du point de vue scientifique. La décision du législateur sur les moyens à adopter devrait faire l'objet d'une grande déférence en pareils cas.

Non seulement les moyens devaient-ils avoir un lien rationnel avec l'objectif mais encore devait-il être démontré qu'ils ne portaient qu'une atteinte minimale au droit en question. Là encore, une certaine déférence pouvait être indiquée lorsque le problème auquel s'attaquait le législateur était un problème social complexe. L'analyse de l'atteinte minimale en l'espèce était également influencée par le lien entre l'examen constitutionnel et l'interprétation législative.

Il s'agissait enfin de savoir s'il y avait proportionnalité entre les effets de la mesure qui restreignait le droit en question et l'objectif de la loi.

L'article 19 LT établissait une interdiction générale de la promotion des produits du tabac, sous réserve d'exceptions particulières. L'article 18(2) soustrayait à cette interdiction certaines formes de promotion pourvu qu'aucune contrepartie n'ait été donnée pour la représentation du produit du tabac. Une interdiction de la publication de toutes les oeuvres scientifiques commanditées serait difficile à justifier. Même si l'on pouvait prétendre qu'elle satisfaisait au critère du lien rationnel, en raison de la possibilité que des recherches commanditées produisent éventuellement des résultats susceptibles d'encourager l'usage du tabac, cette interdiction ne constituerait probablement pas une atteinte minimale au droit à la liberté d'expression. La publication des résultats d'une recherche scientifique est une activité expressive valable dont l'interdiction aurait de graves répercussions sur le droit à la liberté d'expression. Toutefois, les dispositions, correctement interprétées, n'établissaient pas une interdiction totale de la recherche scientifique subventionnée. Correctement interprétés, les art. 18 et 19 permettaient la publication des oeuvres scientifiques légitimes commanditées par les fabricants de produits du tabac.

L'article 20 interdisait la promotion faite « d'une manière fausse ou trompeuse », de même que celle faite d'une manière « susceptible de créer une fausse impression sur les caractéristiques, les effets sur la santé ou les dangers pour celle-ci du produit ou de ses émissions ». De toute évidence, l'art. 20 violait la garantie de liberté d'expression. L'examen fondé sur l'article premier et portant sur la justification de l'interdiction prévue à l'art. 20 de la Loi devait s'inscrire dans le contexte factuel de la publicité trompeuse à laquelle se livrait depuis longtemps l'industrie du tabac. Les termes « susceptible de créer une fausse impression » visaient la promotion qui, sans être vraiment fausse ou trompeuse au sens juridique traditionnel, transmettaient une fausse

impression au sujet des effets du produit du tabac, en ce sens qu'elle amenait les consommateurs à faire des inférences erronées. L'objectif du législateur consistant à combattre la promotion des produits du tabac faisant appel à des demi-vérités et incitant à faire de fausses inférences constituait un objectif urgent et réel qui était susceptible de justifier des restrictions du droit à la liberté d'expression. L'interdiction de ces formes de promotion était rationnellement liée aux objectifs du législateur en matière de santé publique et de protection du consommateur. Les termes contestés ne portaient pas plus atteinte au droit à la liberté d'expression que ce qui était nécessaire pour réaliser l'objectif en cause. Enfin, le libellé contesté satisfaisait à l'exigence de proportionnalité des effets. D'une part, l'objectif était d'une très grande importance, rien de moins qu'une question de vie ou de mort pour les millions de personnes susceptibles d'être touchées, et la preuve montrait que l'interdiction de la publicité faisant appel à des demi-vérités et incitant à faire de fausses inférences pouvait aider à réduire l'usage du tabac. Le fait que les fabricants de produits du tabac aient eu recours à cette forme de publicité le confirmait. D'autre part, la forme d'expression en jeu avait peu de valeur. Tout bien considéré, l'effet de l'interdiction était proportionnel.

L'article 22(3) consistait à interdire la publicité attrayante pour les jeunes. Il ne faisait aucun doute que cette interdiction restreignait la liberté d'expression et contrevenait, de ce fait, à l'art. 2b) de la Charte. Il fallait de nouveau s'interroger sur le sens que le législateur avait voulu donner à cette disposition. La portée excessive et l'imprécision pouvaient être pris en considération pour déterminer si une restriction de la liberté d'expression était justifiée au regard de l'article premier de la Charte, bien que ces deux notions fassent intervenir des considérations différentes. En ce qui concernait la portée excessive, il fallait déterminer si, à première vue, la disposition visait plus d'activités expressives que ce qui était nécessaire pour réaliser l'objectif du législateur. L'imprécision, au contraire, était axée sur le caractère général et vague du libellé employé. Il fallait démontrer deux choses pour réfuter un argument voulant qu'il y ait imprécision et portée excessive: premièrement, la disposition devait fournir des indications suffisantes à ceux qui sont appelés à s'y conformer; deuxièmement, elle devait limiter le pouvoir discrétionnaire des représentants de l'État chargés de l'appliquer. L'article 22(3) frappait par l'accent qu'il mettait sur les « motifs raisonnables » de conclure que la publicité était visée par l'interdiction. Il fallait considérer que l'art. 22(3) interdisait la publicité informative et la publicité préférentielle qui pourraient être attrayantes pour une couche sociale particulière, à savoir les jeunes et, correctement interprété, n'était pas imprécis. Compte tenu de la complexité et de la subtilité des pratiques qui avaient été adoptées antérieurement dans le domaine de la publicité des produits du tabac, on ne saurait prétendre que le législateur était allé plus loin que nécessaire en interdisant la publicité qui pourrait inciter les jeunes à commencer à fumer. L'article 22(3) satisfaisait à l'exigence de proportionnalité des effets. L'activité expressive interdite avait peu de valeur. L'information concernant les produits du tabac et les caractéristiques des marques pouvait avoir une certaine valeur pour le consommateur qui avait déjà développé une dépendance au tabac mais cette valeur n'était pas très grande. Par contre, les effets bénéfiques de l'interdiction pour les jeunes et la société en général pouvaient être considérables. Les restrictions pouvaient avoir une incidence sur la publicité informative et la publicité préférentielle qu'ils pouvaient recevoir mais cette incidence était peu importante; ce qui était interdit, c'était uniquement la publicité qui pourrait être particulièrement attrayante pour les jeunes. En outre, la vulnérabilité des jeunes pouvait justifier la prise de mesures qui, en matière de liberté d'expression, les favorisaient par rapport aux adultes. La Cour a conclu que la restriction de la liberté d'expression imposée par l'art. 22(3), correctement interprété, était justifiée en tant que limite raisonnable au sens de l'article premier de la Charte.

L'article 22(3) excluait également de la publicité informative et de la publicité préférentielle autorisée la publicité de style de vie. L'article 22(4) définissait la publicité de style de vie. Cette disposition portait atteinte à la liberté d'expression garantie par l'art. 2b). La distinction entre les publicités informative et préférentielle destinées à gagner une part du marché, d'une part, et la publicité destinée à accroître l'usage du tabac et le nombre de nouveaux fumeurs, d'autre part, était difficile à traduire en termes juridiques. Correctement interprétée, l'interdiction que l'art. 22(3) établissait à l'égard de la publicité de style de vie constituait une restriction de la liberté d'expression qui était raisonnable et dont la justification pouvait être démontrée.

L'article 24 de la Loi interdisait d'utiliser, directement ou indirectement, un élément de marque d'un produit du tabac ou le nom d'un fabricant sur le matériel relatif à la « promotion d'une personne, d'une entité, d'une manifestation, d'une activité ou d'installations permanentes ». L'article 25 interdisait d'apposer un élément de marque d'un produit du tabac ou du nom d'un fabricant sur des installations permanentes, si l'élément ou le nom est de ce fait associé à une manifestation ou à une activité sportive ou culturelle. Ensemble, ces dispositions signifiaient que les fabricants de produits du tabac ne pouvaient ni utiliser leurs éléments de marque ou leur nom pour commanditer des manifestations, ni apposer leurs éléments de marque ou leur nom sur des installations sportives ou culturelles. La preuve démontrait que, au fur et à mesure qu'étaient renforcées les restrictions de la publicité sur le tabac, les fabricants s'étaient tournés vers la commandite d'activités sportives et culturelles pour remplacer

la promotion de style de vie. L'objectif consistant à enrayer cette forme de promotion justifiait d'imposer des limites à la liberté d'expression. Compte tenu de la nature du problème et de la valeur limitée de l'activité expressive en cause par rapport aux effets bénéfiques de l'interdiction, la solution proposée était proportionnelle. Les dispositions contestées relatives aux commandites étaient justifiées en tant que limites raisonnables au sens de l'article premier de la Charte.

Le règlement d'application de la Loi a augmenté la taille minimale des mises en garde obligatoires sur les emballages des produits du tabac, la faisant passer de 33 pour 100, selon l'ancienne Loi, à la moitié de la principale surface exposée. Conclure que des restrictions ou exigences mineures en matière d'emballage violaient la garantie de liberté d'expression prévue à l'art. 2b) risquait de banaliser cette garantie. Toutefois, on pourrait soutenir que l'exigence que les fabricants apposent la mise en garde du gouvernement sur la moitié de la surface exposée de leur emballage constituait un obstacle à la façon dont ils choisissent de s'exprimer. En général, les exigences de mise en garde contrevenaient donc à l'art. 2b), et plus particulièrement celle voulant que la mise en garde occupe la moitié de la principale surface exposée de l'emballage. Cette contravention était justifiée en tant que limite raisonnable au sens de l'article premier de la Charte. L'objectif que le législateur visait en exigeant qu'une bonne partie de l'emballage soit consacrée à une mise en garde était urgent et réel. La mise en garde visait à rappeler aux acheteurs potentiels les dangers que le produit présentait pour la santé. Elle contribuait ainsi à la réalisation de l'objectif général du législateur qui consistait à décourager l'usage du tabac et à empêcher les gens de commencer à fumer. L'importance des mises en garde était renforcée par la conclusion du juge de première instance selon laquelle les consommateurs et l'ensemble de la population n'étaient pas bien informés des dangers du tabagisme. La preuve concernant l'importance et l'efficacité des mises en garde démontrait l'existence d'un lien rationnel entre l'exigence du législateur que des mises en garde soient apposées et son objectif de diminution de l'usage du tabac, ainsi que des maladies et des décès qui en résultent. L'exigence des mises en garde, en ce qui concerne leur taille notamment, portait atteinte à la garantie de façon minimale. La preuve a démontré que des mises en garde de plus grande dimension pouvaient avoir une plus grande influence. Le caractère raisonnable de l'exigence du gouvernement était étayé par le fait que l'Australie, la Belgique, la Suisse, la Finlande, Singapour et le Brésil prescrivaient des mises en garde au moins aussi grandes que celles requises au Canada, et que l'Union européenne exigeait qu'elles occupent au moins 48 pour 100 de l'emballage. La Convention-cadre de l'OMS pour la lutte antitabac stipulait que les mises en garde « devraient » couvrir au moins la moitié de l'emballage, mais pas moins de 30 pour 100. La proportionnalité des effets était établie. Les effets bénéfiques des mises en garde de plus grande dimension étaient manifestes. Les effets négatifs sur la liberté des fabricants de s'exprimer de manière créative sur l'emballage de leurs produits étaient négligeables.

Table of Authorities

Cases considered by *McLachlin C.J.C.*:

Canada v. Pharmaceutical Society (Nova Scotia) (1992), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353 (S.C.C.) — referred to

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 B.H.R.C. 210, 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463 (S.C.C.) — referred to

Ford c. Québec (Procureur général) (1988), 10 C.H.R.R. D/5559, (sub nom. *Ford v. Quebec (Attorney General))* [1988] 2 S.C.R. 712, 90 N.R. 84, 54 D.L.R. (4th) 577, 19 Q.A.C. 69, 36 C.R.R. 1, 1988 CarswellQue 155, 1988 CarswellQue 155F (S.C.C.) — referred to

Imperial Tobacco Canada Ltée v. La Procureure Générale le du Canada (2005), 2005 QCCA 725 (C.A. Que.) — referred to

Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — considered

Lavigne v. O.P.S.E.U. (1991), 91 C.L.L.C. 14,029, 48 O.A.C. 241, 4 C.R.R. (2d) 193, 126 N.R. 161, 81 D.L.R. (4th) 545, [1991] 2 S.C.R. 211, 1991 CarswellOnt 1038F, 1991 CarswellOnt 1038, 3 O.R. (3d) 511 (note) (S.C.C.) — considered

Osborne v. Canada (Treasury Board) (1991), 37 C.C.E.L. 135, 91 C.L.L.C. 14,026, 125 N.R. 241, 41 F.T.R. 239 (note), 82 D.L.R. (4th) 321, 4 C.R.R. (2d) 30, [1991] 2 S.C.R. 69, 1991 CarswellNat 830, 1991 CarswellNat 348 (S.C.C.) — considered

Québec (Procureur General) v. Carrières Ste-Thérèse Ltée (1985), [1985] 1 S.C.R. 831, (sub nom. *P.G. Quebec c. Carrières Ste-Thérèse Ltée)* 13 Admin. L.R. 144, (sub nom. *Quebec v. Carrières Ste-Thérèse Ltée)* 59 N.R. 391, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée)* 20 C.C.C. (3d) 408, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée)* 20 D.L.R. (4th) 602, 1985 CarswellQue 109, 1985 CarswellQue 85 (S.C.C.) — considered

R. v. Lucas (1998), 224 N.R. 161, 157 D.L.R. (4th) 423, [1998] 1 S.C.R. 439, 50 C.R.R. (2d) 69, 163 Sask. R. 161, 165 W.A.C. 161, 14 C.R. (5th) 237, [1999] 4 W.W.R. 589, 123 C.C.C. (3d) 97, 1998 CarswellSask 93, 1998 CarswellSask 94, 5 B.H.R.C. 409 (S.C.C.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — followed

R. v. Sharpe (2001), 264 N.R. 201, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1, 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 88 B.C.L.R. (3d) 1, 146 B.C.A.C. 161, 239 W.A.C. 161 (S.C.C.) — considered

R. v. Videoflicks Ltd. (1986), 1986 CarswellOnt 1012, 87 C.L.L.C. 14,001, (sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, 71 N.R. 161, 19 O.A.C. 239, 30 C.C.C. (3d) 385, 55 C.R. (3d) 193, 28 C.R.R. 1, 58 O.R. (2d) 442 (note), 1986 CarswellOnt 141 (S.C.C.) — referred to

R. v. Wholesale Travel Group Inc. (1991), 1991 CarswellOnt 117, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 1029, 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.) — considered

R. v. Zundel (1992), 95 D.L.R. (4th) 202, 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, 10 C.R.R. (2d) 193, (sub nom. *R. v. Zundel (No. 2))* 56 O.A.C. 161, [1992] 2 S.C.R. 731, (sub nom. *R. v. Zundel (No. 2))* 140 N.R. 1, 1992 CarswellOnt 109, 1992 CarswellOnt 995 (S.C.C.) — considered

Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada) (1990), 1990 CarswellMan 378, 1990 CarswellMan 206, 77 C.R. (3d) 1, 48 C.R.R. 1, [1990] 1 S.C.R. 1123, 109 N.R. 81, 68 Man. R. (2d) 1, [1990] 4 W.W.R. 481, 56 C.C.C. (3d) 65 (S.C.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

RJR-Macdonald Inc. c. Canada (Procureur général) (1993), (sub nom. *Canada (Procureur général) c. RJR-MacDonald Inc.)* [1993] R.J.Q. 375, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 53 Q.A.C. 79, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 102 D.L.R. (4th) 289, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 48 C.P.R. (3d) 417, 1993 CarswellQue 176 (C.A. Que.) — considered

RJR-Macdonald Inc. c. Canada (Procureur général) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* [1995] 3 S.C.R. 199, 1995 CarswellQue 119, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 187 N.R. 1, 1995 CarswellQue 119F (S.C.C.) — considered

Rothmans, Benson & Hedges Inc. v. Canada (Procureure générale) (2005), 2005 QCCA 727 (C.A. Que.) — referred to

Statutes considered:

Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.)

s. 64 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(b) — considered

s. 7 — considered

Food and Drugs Act, R.S.C. 1985, c. F-27

s. 5(1) — referred to

Radiation Emitting Devices Act, R.S.C. 1985, c. R-1

s. 5(1) — referred to

Tobacco Act, S.C. 1997, c. 13

Generally — referred to

Pt. IV — referred to

s. 4 — considered

s. 4(a) — considered

s. 4(b) — considered

s. 4(c) — considered

s. 4(d) — considered

s. 18 — considered

s. 18(1) "promotion" — considered

s. 18(2) — considered

s. 18(2)(a) — considered

s. 18(2)(b) — considered

s. 18(2)(c) — referred to

s. 19 — considered

s. 20 — considered

s. 21 — referred to

s. 22 — considered

s. 22(1) — considered

s. 22(2) — considered

s. 22(2)(a) — considered

s. 22(2)(b) — considered

s. 22(3) — considered

s. 22(4) "lifestyle advertising" — considered

s. 23 — considered

s. 24 — considered

s. 25 — considered

s. 26 — referred to

s. 27 — considered

s. 27(a) — considered

s. 28 — considered

s. 29 — considered

s. 30 — considered

s. 31 — considered

s. 32 — considered

s. 43 — considered

s. 47 — considered

s. 49 — considered

s. 50 — considered

Tobacco Products Control Act, S.C. 1988, c. 20

Generally — referred to

Treaties considered:

WHO Framework Convention on Tobacco Control , 2003

Generally — referred to

Article 11 ¶ 1(a) — considered

Article 13 ¶ 4(a) — considered

Regulations considered:

Tobacco Act, S.C. 1997, c. 13

Tobacco Products Information Regulations, SOR/2000-272

Generally — referred to

s. 2 — considered

s. 3 — considered

s. 4 — considered

s. 5 — considered

s. 5(2)(b) — considered

APPEAL by Attorney General of Canada and CROSS-APPEAL by tobacco manufacturers from judgment reported at *J.T.I. MacDonald Corp. c. Canada (Procureure générale)* (2005), 2005 CarswellQue 6366, (sub nom. *J.T.I. MacDonald Corp. v.*

tab 13

2000 CarswellQue 1931, [2000] R.J.Q. 2571, J.E. 2000-1825, REJB 2000-20218

2000 CarswellQue 1931
Cour supérieure du Québec

Rothman's, Benson & Hedges inc. c. Canada (Procureur général)

2000 CarswellQue 1931, [2000] R.J.Q. 2571, J.E. 2000-1825, REJB 2000-20218

Imperial Tobacco Limited, Demanderesse - Requérante c. Procureure Générale du Canada, Défenderesse - Intimée et Société Canadienne du Cancer, Intervenante

Rothman's, Benson & Hedges Inc., Demanderesse - Requérante
c. Procureure Générale du Canada, Défenderesse - Intimée

JTI-MacDonald Inc., Demanderesse - Requérante c. Procureure Générale du Canada, Défenderesse - Intimée

Grenier J.C.S.

Jugement: 20 septembre 2000
Dossier: C.S. Qué. Montréal 500-05-031306-978, 500-05-031299-975, 500-05-031332-974

Avocat: *Me Gérald Tremblay*, *Me Marc-André Blanchard* et *Me Chantal Masse*, pour la requérante, Rothman's, Benson & Hedges inc.
Me Colin Irving et *Me Douglas Mitchell*, pour la requérante, JTI-MacDonald inc.
Me Simon V. Potter et *Me Gregory Brian Bordan*, pour la requérante, Imperial Tobacco Limited.
Me Maurice Régnier, *Me Claude Joyal* et *Me Marie Marmet*, pour l'intimée, Procureure générale du Canada.
Me Julie Desrosiers et *Me Rob Cunningham*, pour l'intervenante, Société canadienne du Cancer.

Sujet: Civil Practice and Procedure; Public

***Grenier J.C.S.*:**

1 Les trois requérantes demandent au tribunal d'être libérées de toute obligation de se conformer aux dispositions du *Règlement sur l'information relative aux produits de tabac* (*DORS/2000-272*) (*RIPT*) [1] jusqu'à ce qu'un jugement final soit rendu dans les actions principales. Elles prétendent avoir droit à une ordonnance interlocutoire qui aurait pour effet de les maintenir dans une situation qui ne leur causera pas de préjudice en attendant l'issue du litige, de façon à ce que le tribunal puisse rendre ultérieurement une décision qui ne sera pas dénuée d'efficacité advenant le cas où les dispositions attaquées de la *Loi sur le tabac* et du *Règlement* précité seraient déclarées inconstitutionnelles.

I. Les Principes Applicables en Matière de Sursis.

2 Le critère en trois étapes développé dans l'arrêt *Metropolitan Stores* [2] et repris dans l'arrêt *RJR-MacDonald* [3], doit s'appliquer aux demandes d'injonction interlocutoire visant l'exemption de l'application d'une disposition législative ou visant carrément sa suspension.

3 À la première étape, le requérant doit convaincre le tribunal que les questions soulevées sont sérieuses.

4 La deuxième étape impose au requérant l'obligation de démontrer qu'il subira un préjudice irréparable si le redressement recherché est refusé.

5 La troisième étape exige une détermination quant à la prépondérance des inconvénients. C'est à cette étape qu'il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'affecter l'une ou l'autre des parties.

II. Application des Principes en l'Espèce.

A. La question sérieuse à juger

6 Le *Règlement sur l'information relative aux produits de tabac* précise les renseignements qui doivent obligatoirement figurer sur tous les produits du tabac vendus au détail au Canada. Il impose l'affichage de mises en garde contre les dangers pour la santé ainsi que la publication de renseignements en matière de santé sur les emballages.

7 À l'heure actuelle, les mises en garde contre les dangers pour la santé et les renseignements complémentaires sur les émissions toxiques sont affichés sur les emballages de produits de tabac sur une base volontaire. Elles occupent généralement 35% de la surface du produit et ne comprennent que du texte.

8 Les seize mises en garde imposées par la nouvelle réglementation doivent être réparties également entre toutes les marques et types d'emballages et comportent à la fois un message écrit et un message graphique qui occupent, d'une part, 50% de la surface exposée de l'emballage en des couleurs se rapprochant le plus possible de celles des mises en garde énoncées dans le document « *Mises en garde et informations sur la santé pour les produits de tabac* » (par. 5(2)b)) et, d'autre part, « *avec le plus de clarté possible, compte tenu de la technique d'impression utilisée* » (par. 3(3)a) et b)).

9 Le nouveau règlement oblige également les fabricants ou importateurs de cigarettes et autres produits de tabac à afficher, à l'intérieur d'une même marque, seize messages relatifs à l'information sur la santé, c'est-à-dire, neuf messages portant sur le renoncement au tabac, et sept messages portant sur les maladies que l'usage du tabac est susceptible de provoquer. Des renseignements sur les émissions toxiques dans la fumée du tabac doivent également apparaître sur un côté de l'emballage (art. 9 et 10).

10 Le nouveau règlement permet aux fabricants et importateurs de produits de tabac d'attribuer à Santé Canada les renseignements exigés par le règlement.

11 Les requérantes invoquent plusieurs arguments à l'appui de leur contestation.

1) La réglementation excède les pouvoirs attribués au gouverneur général en Conseil en vertu de la *Loi sur le tabac*;

2) La réglementation relève du champ de compétence des provinces;

3) La réglementation constitue une expropriation déguisée;

4) La réglementation est à ce point imprécise qu'il est impossible de s'y conformer sans s'exposer à des peines sévères pouvant aller jusqu'à l'emprisonnement;

5) La réglementation va à l'encontre de la *Charte canadienne des droits et libertés* qui garantit la liberté d'expression, cette garantie ayant été interprétée comme incluant le discours commercial.

12 Dans l'arrêt *Metropolitan Stores* [4], le juge Beetz a formulé plusieurs raisons qui militent en faveur d'un examen moins rigoureux que celui que nécessite l'audition au fond lorsqu'il s'agit d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*. Il a souligné les difficultés associées à l'étude de questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, et les difficultés pratiques à procéder à une analyse fondée sur l'article premier de la *Charte* à ce stade.

13 Dans *RJR-MacDonald (1994)* [5], la Cour suprême a retenu le critère développé par la Chambre des Lords dans *American Cyanamid Co. c. Edhicon Ltd.* [6], puis endossé par la suite par le juge Beetz dans l'arrêt *Metropolitan Stores*. Au stade interlocutoire, il suffit de démontrer « *que la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à*

trancher est sérieuse » [7]. C'est en se fondant sur le bon sens et une analyse extrêmement restreinte de l'affaire que le tribunal doit décider.

14 Qu'il suffise de dire, à ce stade, que la présente affaire soulève des questions sérieuses à trancher, particulièrement en ce qui concerne les restrictions imposées à la liberté d'expression des requérantes, question qui commande l'étude de l'application des critères du lien rationnel et de l'atteinte minimale en vertu de l'article premier de la *Charte*.

B. Le préjudice irréparable

15 Les requérantes soutiennent que si elles n'obtiennent pas de redressement interlocutoire, elles devront faire immédiatement des dépenses considérables de l'ordre de 26 M$ pour se conformer à la nouvelle réglementation et que, advenant le cas où elles auraient gain de cause ultérieurement, elles ne seraient pas en mesure de recouvrer la perte économique ni de revenir à leurs méthodes actuelles d'emballage sans engager de nouvelles dépenses.

16 Les requérantes ont déjà fait valoir avec succès ces moyens devant la Cour suprême. Dans l'arrêt *RJR-MacDonald* (*1994*), la Cour suprême a émis l'opinion que lorsque le gouvernement est la partie qui échoue dans un litige relevant de la *Charte*, un demandeur aura par la suite beaucoup de difficulté à obtenir une réparation monétaire quelconque. Elle a jugé que les dépenses requises pour se conformer immédiatement à la réglementation en matière d'affichage dans cette affaire causeraient un préjudice irréparable aux requérantes si elles devaient avoir gain de cause dans l'action principale. Comme l'analogie avec la présente affaire est frappante, il n'y a pas lieu d'épiloguer plus longuement sur cette question.

C. La prépondérance des inconvénients et l'intérêt public

17 Il s'agit à la présente étape de déterminer laquelle des deux parties subira le plus grand préjudice selon que le tribunal refuse ou accorde le redressement demandé en attendant de se prononcer sur le fond. Il s'agit d'une étape cruciale où la plupart des procédures interlocutoires sont véritablement décidées.

18 Il y a de nombreux facteurs à considérer dans l'appréciation du critère de la prépondérance des inconvénients et ces facteurs varient d'un cas à l'autre.

> *Il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public* [8].

19 À la présente étape, chaque partie doit tenter de convaincre le tribunal que le préjudice qu'elle va subir si le redressement est ou n'est pas accordé est plus important que celui que subira l'autre partie. Elle peut aussi faire pencher la balance en sa faveur en démontrant que l'intérêt public commande l'octroi ou le refus du redressement recherché [9]. Dans les litiges de nature constitutionnelle, bien que l'intérêt public soit un élément important à considérer dans l'appréciation de la prépondérance des inconvénients, il faut toutefois reconnaître que l'intérêt public ne milite pas toujours en faveur de l'application continue de la loi.

20 Rares sont les cas où un tribunal bénéficie d'un précédent qui comporte des enseignements aussi pertinents que ceux développés par la Cour suprême dans l'arrêt *RJR-MacDonald* (*1994*), d'autant plus que dans le cas présent, les questions factuelles et les questions juridiques à trancher sont à peu près identiques, pour ne pas dire analogues.

21 Les requérantes soutiennent être dans une situation différente de celle qui a été étudiée par la Cour suprême dans l'arrêt précité. À leur avis, les inconvénients qu'elles subiront si leur demande de redressement est refusée sont beaucoup plus importants que ceux que prétend subir la Procureure générale en invoquant l'intérêt public.

22 Leurs arguments portent essentiellement sur les points suivants:

- Le fardeau économique;
- La faisabilité d'imprimer les nouvelles mises en garde;

- L'inefficacité des mises en garde.

- Le maintien du statu quo

• *Le fardeau économique*

23 L'obligation de se conformer à la nouvelle réglementation d'ici la fin de décembre 2000 imposera aux requérantes un fardeau financier qu'elles évaluent à 26.1 MS. Advenant le cas où les requérantes ont gain de cause dans l'action principale, non seulement ces sommes ne pourront être recouvrées par la suite mais les requérantes devront investir d'importantes sommes d'argent pour revenir à l'emballage utilisé présentement.

24 Dans l'arrêt *RJR-MacDonald (1994)*, précité, la Cour suprême n'a pas retenu cet argument. Elle a considéré que même si le fardeau économique était important, les requérantes pouvaient facilement reporter tout accroissement de leurs dépenses sur leurs clients par le biais de la majoration des prix.

25 La situation n'est aucunement différente et ce moyen, à lui seul, ne milite pas en faveur de l'octroi du redressement interlocutoire.

• *La faisabilité d'imprimer les nouvelles mises en garde*

26 Les requérantes prétendent que les deux entreprises qui produisent les emballages actuels ne possèdent pas la technologie nécessaire pour se conformer aux nouvelles exigences.

27 La preuve démontre que le nombre de couleurs utilisées dans l'impression des paquets varie d'une marque à l'autre. Il semblerait n'y avoir aucun imprimeur au Canada qui puisse imprimer en utilisant plus de 8 couleurs. Certaines marques emploient les huit couleurs disponibles, d'autres en utilisent moins. Pour ces dernières, il est possible d'ajouter des couleurs additionnelles alors que pour les autres il faudra ou bien composer avec les couleurs disponibles pour reproduire les mises en garde « *en des couleurs se rapprochant le plus possible* » des échantillons qui se retrouvent dans le document source de Santé Canada, ou bien modifier l'équipement actuel, ou bien faire affaire avec des imprimeurs à l'extérieur du Canada.

28 Comme on peut le constater, les arguments relatifs à la faisabilité sont de nature strictement économique. Encore une fois, il ne s'agit pas d'un facteur qui, à lui seul, fait pencher la balance en faveur des requérantes.

29 Quant aux informations de santé et aux informations sur les émissions et constituants toxiques, les requérantes n'invoquent aucun argument sérieux pour demander la suspension des dispositions réglementaires s'y rapportant.

30 Les requérantes soutiennent également que le par. 3(3) du *Règlement* est à ce point imprécis, qu'elles ne peuvent s'y conformer sans s'exposer à des sanctions sévères pouvant même aller jusqu'à l'emprisonnement

31 L'argument relatif à l'imprécision du *Règlement* est une question qui sera éventuellement discutée au fond. Le nouveau règlement n'impose pas aux requérantes de reproduire des mises en garde identiques. De plus, les requérantes peuvent soumettre à Santé Canada, comme elles l'ont déjà fait, des échantillons de mises en garde qui se rapprochent le plus possible des nouvelles normes. Il semblerait que les échantillons qui ont déjà été soumis à Santé Canada représentaient, aux dires mêmes de Fred Prinzen, vice-président de Shorewood Packaging Corporation, le « *lowest common denomination* ».

32 Les requérantes sont des entreprises compétitrices. Elles favorisent volontairement l'apposition de mises en garde identiques sur les divers emballages, quelle que soit la marque, afin d'éviter d'ajouter à la concurrence de marque, la concurrence de « la mise en garde ». Elles admettent qu'à la limite, elles peuvent reproduire exactement les échantillons qui se retrouvent dans le document source mais que pour certaines marques, cela exigerait de faire affaire avec des imprimeurs aux Etats-Unis.

33 À ce stade, il est impossible au tribunal de trancher une question purement factuelle à partir d'éléments de preuve aussi limités. Qu'il suffise de dire que ce ne sont pas toutes les marques qui sont touchées par la nouvelle réglementation à compter

de décembre 2000 mais seulement celles dont les ventes représentent plus de 2% des ventes totales de cigarettes au Canada. Les autres marques doivent se conformer à la réglementation dans un délai d'une année.

34 La preuve démontre que cela représente:

1° Pour Rothman's Benson & Edges, une seule marque sur 125:

- Rothman's King Size;

2° Pour JTI MacDonald, deux marques sur 127, soit:

- Export "A" Medium et
- Export "A" Full Flavor (interrogatoire de Michel Poirier);

3° Pour Imperial Tobacco, dix marques sur 189, soit:

- Matinée Extra Mild KS
- Du Maurier KS
- Du Maurier Light KS
- Du Maurier Extra Light KS
- Du Maurier Reg.
- Du Maurier Light Reg
- Players Light KS
- Players Filtre Reg.
- Players Extra Light Reg.
- Players Light Reg.

• *L'inefficacité des mises en garde.*

35 Selon les requérantes, il n'existe aucune preuve sérieuse qui démontre que les mises en garde ont un impact réel sur l'usage du tabac. Les nouvelles exigences seraient trop attentatoires et ne seraient pas justifiables rationnellement en vertu de l'article premier de la *Charte* même si elles sont populaires et compatibles avec les sondages d'opinion publique.

36 La Procureure générale soutient que le tribunal ne peut ni ne doit, au stade interlocutoire, se prononcer sur l'opportunité ou l'efficacité de la réglementation. Selon elle, les mises en garde sont nécessaires pour sensibiliser la population aux méfaits du tabagisme. Elles n'ont pas nécessairement un effet dissuasif mais il faut à ce stade prendre pour acquis qu'elles sont susceptibles de décourager la consommation. Les experts aussi bien que les requérantes reconnaissent que les messages actuels ne sont plus accrocheurs. Il faut donc, selon elle, les changer.

37 Dans l'arrêt *RJR-MacDonald (1994)*, la Cour suprême a refusé la demande de sursis des requérantes en indiquant clairement que, selon elle, le gouvernement avait adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir l'intérêt public.

38 Le règlement dont les dispositions étaient contestées en Cour suprême imposait l'obligation d'apposer des mises en garde plus grandes et plus visibles que celles qui étaient imposées par le règlement antérieur [10] sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-Être Canada.

39 Les requérantes prétendaient que les nouvelles exigences leur portaient préjudice en ce qu'elles exigeaient une conception nouvelle des emballages qui entraînerait des dépenses non recouvrables si la loi habilitante devait être déclarée inconstitutionnelle.

40 Pour trancher la question relative à la prépondérance des inconvénients et déterminer que le redressement demandé occasionnerait plus d'inconvénients au Procureur général du Canada qu'aux requérantes, la Cour suprême a pris en considération les facteurs suivants:

- Il ne s'agissait pas d'une demande d'exemption mais plutôt « *d'une sorte de cas de suspension* » puisqu'il n'existe que trois sociétés de production de tabac au Canada;

- Le règlement en cause avait été adopté dans l'intention de protéger la santé publique;

- Il n'appartenait pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleraient des exigences particulières de la réglementation d'autant plus qu'il s'agissait essentiellement de la question principale à trancher au fond;

- Les requérantes n'avaient pas tenté de faire valoir que l'intérêt public commandait l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences.

41 Dans cette affaire, il semble que les parties reconnaissaient que des études réalisées dans le passé avaient démontré que les mises en garde apposées sur les emballages de produits de tabac produisaient des résultats « *en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société* » [11]. En référant à ces études, les juges Sopinka et Cory écrivaient:

> *Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et* ***s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi****. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.* [12] **soulignements ajoutés**

42 Selon les requérantes, il est maintenant impossible de prétendre, comme c'était le cas en 1994, que les mises en garde ont un impact positif sur la santé des Canadiens compte tenu: 1) des résumés d'étude d'impact récents; 2) de l'avis du Dr William Leiss; 3) de l'incapacité pour le gouvernement de prouver l'efficacité des mises en garde; 4) de l'absence de fiabilité des études consultées par Santé Canada; 5) de l'absence d'étude canadienne sur l'incidence des mises en garde.

1) Les études d'impact

43 Dans les études d'impact publiées en 1989 et en 1993 et sur lesquelles s'appuyaient le Procureur général en 1994, lors de l'audition de la demande de sursis en Cour suprême, Santé Canada soutenait que les mises en garde contribuaient à réduire l'usage du tabac avec chiffres à l'appui. [13]

44 Au chapitre des avantages, le *Résumé de l'étude d'impact* publié en avril 2000 suppose que le *Règlement* fera diminuer de 1%, à long terme, l'usage des produits de tabac, et de 1%, par conséquent, la mortalité mettant en cause le tabac. On y mentionne que « *selon une hypothèse prudente, la réduction de la mortalité s'opérera de façon graduelle et ne sera pas complète tant que la population adolescente et adulte actuelle n'aura pas 65 ans* ». Le gouvernement mentionne également que si la consommation

des produits de tabac a diminué de 5% entre 1990 et 1999, elle a augmenté considérablement chez les jeunes de 15 à 19 ans. En 1999, 28% des adolescents canadiens fumaient, une augmentation de 8% par rapport à 21% en 1990 [14].

2) L'avis du Dr William Leiss

45 Les requérantes soutiennent également que les propos du Dr William Leiss, un expert retenu par le gouvernement lors de la contestation en Cour suprême, démontrent clairement que les mises en garde ne sont d'aucune efficacité. Le Dr Leiss a, au moins à deux reprises, qualifié la politique gouvernementale en matière d'étiquetage et de publicité de « *policy failure of massive proportions* » [15].

3) L'impossibilité pour le gouvernement de prouver l'efficacité des mises en garde.

46 Les requérantes se demandent pourquoi le gouvernement les oblige pour une troisième fois à modifier l'étiquetage sur leurs produits alors que ce même gouvernement admet être dans l'impossibilité de démontrer que les mises en garde contribuent à diminuer l'usage des produits de tabac et qu'il se pourrait même qu'à la rigueur, les mises en garde encouragent la consommation du tabac chez les jeunes qui éprouvent un certain plaisir à consommer un produit dangereux.

47 La Procureure générale admet être dans l'impossibilité de prouver que les mises en garde puissent avoir un impact positif sur la consommation des produits de tabac. Elle fait cependant remarquer que les statistiques actuelles ne sont pas fiables puisque la contrebande de cigarettes pendant la première moitié de la décennie 1990 a eu pour effet d'en réduire le prix et, en les rendant ainsi plus accessibles, a contribué à l'augmentation du tabagisme chez les jeunes. Selon elle, le rôle des mises en garde n'est pas uniquement de dissuader mais également de sensibiliser et d'informer. Les messages actuels ont perdu de leur efficacité. Tous les experts en la matière le reconnaissent, y compris les requérantes.

4) L'absence de fiabilité des études consultées par Santé et Bien-Être Canada.

48 Le *Résumé de l'étude d'impact* traite de l'incidence des mises en garde dans les termes suivants:

> **Incidence des mises en garde**
>
> *Afin de déterminer l'incidence possible des nouvelles mises en garde sur la consommation de tabac, on a réalisé un examen de la documentation publiée à l'échelle internationale à ce propos. Dans le sous-ensemble de documents traitant directement de la question des mises en garde, on constate que leur incidence est considérable, mais on estime aussi que cette incidence varie de négligeable à une diminution de 13.6% de la demande pour le tabac. En l'absence de données supplémentaires, et pour estimer cette incidence de façon prudente, on a choisi le millieu de la portée (6,8%) comme incidence de l'introduction des mises en garde. Cette décision est prudente parce que, la partie inférieure de la portée, établie à partir de preuves en Australie, est basée sur une étiquette qui ne reflète pas une mise en garde plus stricte qui a été mise en place subséquemment et qui serait beaucoup plus efficace selon les constatations.*
>
> *Bien qu'une réduction de la demande de tabac de l'ordre de 6,8% est l'estimation intermédiaire de l'effet de l'introduction des mises en garde, l'effet additionnel découlant du passage des étiquettes actuelles à des étiquettes plus strictes sera vraisemblablement plus faible. En l'absence d'autres preuves et à la lumière de recherches effectuées récemment par Santé Canada sur la visibilité et l'utilisation d'images graphiques, l'incidence du renforcement proposé des mises en garde est estimée à la moitié de l'efficacité de l'introduction des mises en garde, soit une diminution de 3,4% de la demande pour les produits du tabac.*
>
> *En raison de la dépendance que provoque les produits de tabac, on estime que cette réduction de 3,4% se produira avec le temps. Un modèle économique de la demande de produits provoquant la dépendance a été utilisé pour déterminer que cette diminution de 3,4% se produirait vraisemblablement en dix ans.*

49 Ce dernier passage laisse entendre que plusieurs études ont été consultées et qu'elles révèlent l'existence d'une incidence des mises en garde sur la consommation de tabac. Toutefois, comme le font remarquer les requérantes, la recherche effectuée

par Hara Associates est loin d'être fiable et concluante. Les auteurs du rapport admettent n'avoir consulté que trois études dont l'une effectuée en Turquie et sur laquelle sont basées les statistiques que l'on retrouve dans l'étude d'impact.

50 Il est évident que l'étude effectuée par la firme Tansel en 1993 ne peut servir sérieusement de modèle. On y fait état de la combinaison de multipes facteurs qui auraient contribué à la réduction de l'usage de produits de tabac. Rien dans cette étude ne laisse supposer qu'à elles seules, les mises en garde puissent avoir un impact positif. D'ailleurs, l'étude australienne rapportée également dans l'étude d'impact de Santé Canada laisse carrément entendre que les mises en garde n'ont eu aucune incidence sur la consommation de tabac.

5) L'absence d'étude canadienne sur l'incidence des mises en garde

51 Selon les requérantes, il est fort étonnant sinon troublant de constater que le gouvernement les contraint à apposer des mises en garde depuis 10 ans sans réellement avoir effectué d'étude sérieuse sur l'incidence des mises en garde sur la consommation de tabac.

52 La Procureure générale s'étonne quant à elle de la position adoptée par les requérantes qui ne contestent pas le contenu des nouveaux messages mais qui s'opposent uniquement à ces derniers parce qu'ils prétendent qu'en les obligeant à accroître l'espace réservé à la mention des méfaits sur les paquets, qui passe de 35% à 50%, le gouvernement viole leur liberté d'expression et s'approprie leurs marques.

53 Bien que les requérantes soulèvent des doutes sérieux sur les avantages concrets pour le public d'une politique gouvernementale plus musclée en matière d'étiquetage, il ne s'agit pas d'un débat qui peut se faire dans la précipitation et dans l'abstrait. Il n'appartient pas à un tribunal au stade interlocutoire d'évaluer les véritables avantages qui découleront des exigences de la nouvelle réglementation ni d'examiner si le gouvernement gouverne bien. C'est ce que faisait remarquer la Cour suprême dans l'arrêt *RJR-MacDonald (1994)*:

> *Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisqu'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La Charte autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.* [16]

54 Dans une décision récente rendue par la Cour d'appel du Royaume-Uni, Lord Woolf tenait les mêmes propos:

> *53. In my judgment it is not for the court to second guess the Government's decision that it is in the public interest that there should be an early end to advertisement for public health reasons. The Government reached its decisions to make the Regulations after it was aware of the attack on the Directive and its evidence states this factor was taken into account when it decided nonetheless to bring the Regulations into force in December 1999 for public health reasons. I therefore consider that the judge was right to make the assumption to which he referred about the Government's assessment of the public interest. As Mr. Sumption accepts, "the extent to which a tobacco advertising ban would affect consumption is a difficult and controversial subject on which the parties differ, but on which neither claims to have a conclusive answer". In this situation, it is wise, especially on an interim application, to avoid making any findings on this subject other than to acknowledge the conflict of views.*
>
> (...)
>
> > *55. It may be correct that the reduction in consumption would be "fairly small" from the ban as the Tobacco Companies submit. However, even a small reduction which reduces the incidence of cancer even to a marginal degree is difficult to describe as a matter of insignifiance.* [17]

• *Le maintien du statu quo et l'intérêt public*

55 Les requérantes plaident qu'elles n'ont pas à démontrer que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences, autrement dit que la suspension de la réglementation sert l'intérêt public, comme semble le suggérer la Cour suprême dans l'arrêt *RJR-MacDonald (1994)*. Elles se fondent sur l'arrêt *143471 Canada inc. c. Québec (P.G.)* [18] pour étayer leur point de vue.

56 Dans ce dernier arrêt, le juge Cory, qui avait participé avec le juge Sopinka à la rédaction des motifs dans *RJR-MacDonald (1994)*, a jugé important de rectifier le tir. Il écrit:

> *Mon collègue* (le juge La Forest) *affirme, à la fin de ses motifs, qu'il incombe au requérant qui demande la suspension interlocutoire ou l'ordonnance d'entiercement (les intimés en l'espèce) de démontrer que la suspension ou l'ordonnance d'entiercement sert l'intérêt public. On ne conclut pas, dans l'analyse effectuée aux pp. 343 à 347 de l'arrêt RJR - MacDonald, sur laquelle mon collègue se fonde, que le requérant qui demande la suspension doit dans tous les cas démontrer qu'il est dans l'intérêt public d'accorder une telle ordonnance. En règle générale, le requérant n'a qu'à démontrer que l'ordonnance ne nuit pas à l'intérêt public. Ce passage renvoie au cas où le requérant fait valoir que le refus de la suspension nuira non seulement à son propre intérêt privé, mais encore à l'intérêt public. Dans ces circonstances, le particulier qui fait la demande doit satisfaire à des exigences minimales plus élevées que le gouvernement intimé pour établir que l'intérêt public est servi par sa position. Ce n'est pas le cas en l'espèce. Si, de façon générale, on peut dire qu'il est dans l'intérêt public d'empêcher les perquisitions inconstitutionnelles, les intimés en l'espèce n'invoquent pas cet intérêt public pour justifier les ordonnances d'entiercement. Ils font plutôt valoir leur propre droit à la vie privée et le fait que les ordonnances d'entiercement ne nuiront pas à l'intérêt public. Les intimés en l'espèce n'ont donc qu'à démontrer que la délivrance des ordonnances ne nuira pas à l'intérêt public, et non pas qu'elle le servira. C'est ce que les intimés ont fait.* [19]

57 Le tribunal partage l'avis du juge Cory. Comme les requérantes ne plaident pas que le refus de la suspension nuira à l'intérêt public, elles n'ont qu'à démontrer que la délivrance des ordonnances ne nuira pas à l'intérêt public, et non pas qu'elle le servira. De toute façon, une telle démonstration constituerait un défi impossible à relever.

58 L'article 4 de la *Loi sur le tabac* en spécifie les objets:

> *4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement*:
>
> a) *de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles*;
>
> b) *de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter*;
>
> c) *de protéger la santé des jeunes par la limitation de l'accès au tabac*;
>
> d) *de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.*

59 Le *Résumé de l'étude d'impact de la nouvelle réglementation* précise:

> *Le Règlement sur l'information relative aux produits de tabac (le « règlement ») spécifie les renseignements qui doivent obligatoirement figurer sur tous les produits du tabac vendus au détail au Canada. Ce règlement appuie la Loi sur le tabac (la « loi ») en apportant une réponse législative à un problème de santé national qui constitue une préoccupation importante et pressante. En particulier, le règlement aide à confirmer l'objet de la loi*:
>
> • *en protégeant la santé des Canadiens à la lumière de preuves concluantes à l'égard de l'usage du tabac à la suite de l'incidence de nombreuses maladies débilitantes et mortelles.*
>
> • *en protégeant les jeunes et d'autres personnes contre l'incitation à utiliser les produits du tabac et contre la dépendance subséquente qu'ils entraînent; et*

• *en augmentant la sensibilisation du public face aux risques pour la santé découlant de l'usage de produits du tabac.*

(...)

L'objectif premier de la stratégie de lutte contre le tabagisme du gouvernement fédéral est de réduire l'usage des produits du tabac chez tous les Canadiens et, dans la mesure du possible, les conséquences indésirables de l'usage du tabac pour la santé - y compris chez les jeunes. Le règlement, qui impose l'affichage de mises en garde contre les dangers pour la santé et de renseignements en matière de santé sur les emballages de produits de tabac, sera un élément clé de la campagne d'éducation publique du gouvernement fédéral sur l'usage du tabac.

(...)

L'inclusion de renseignements relatifs à la santé sur le produit lui-même est une exigence normale pour un grand nombre de produits. C'est la façon la plus efficace d'atteindre les utilisateurs des produits en question et de s'assurer que les renseignements sont pris en considération au moment de prendre la décision d'utiliser ou non les produits. La publicité dans les médias électroniques ou imprimés, aussi incontournable qu'elle soit, n'atteindra jamais tous les principaux groupes d'utilisateurs des produits. Les sites Web et les numéros 1-800 exigent un effort actif pour obtenir des renseignements. Les programmes scolaires et communautaires ne permettent pas d'atteindre tous les utilisateurs des produits.

(...)

Comme il a été indiqué plus tôt, les renseignements affichés sur les paquets doivent être évidents, crédibles, pertinents et mémorables pour être efficaces.

60 Les requérantes demandent à être exemptées de l'application totale du nouveau règlement. Comme il n'existe que trois sociétés de production de tabac au Canada, les demandes sont en réalité des cas de suspension qui auraient des répercussions sur l'ensemble de l'industrie canadienne du tabac [20].

61 Le fait que le gouvernement n'ait pas cherché à réglementer depuis l'adoption de la *Loi sur le tabac* en 1997 et qu'il le fasse en juin 2000 alors que la soussignée est saisie de l'action principale depuis 1997 n'est pas non plus un facteur qui milite en faveur de l'octroi du redressement demandé.

62 Les requérantes devront se conformer à la nouvelle réglementation à compter de décembre 2000 pour certaines marques et à compter de juin 2001 pour les autres marques. Comme elles aimeraient que l'action principale soit entendue dès février 2001, elles font valoir que le sursis sera en réalité de courte durée et qu'il ne nuira donc pas à l'intérêt public puisque la question constitutionnelle sera tranchée dans un délai relativement bref.

63 La soussignée est saisie du dossier depuis 1997. Si le passé est garant de l'avenir, il serait tout à fait naïf et irréaliste de penser que le débat se limitera à un jugement de première instance. Même en prenant pour acquis que l'affaire sera entendue en février 2001, ce qui est loin d'être certain, les avocats ont déjà prévu que le procès durera au moins trois mois, sans compter les nombreux aléas inhérents à toute procédure judiciaire. Le redressement interlocutoire serait donc d'une durée supérieure à six mois et nuirait à l'intérêt public.

64 Les requérantes ont peut-être raison de prétendre que la réglementation adoptée par le gouvernement dans la dernière décennie ouvre la porte à une érosion progressive de leur droit à la liberté d'expression sans pour autant constituer une mesure efficace pour enrayer l'usage du tabac au Canada. Toutefois, la question, à ce stade, doit demeurer sans réponse. Il importe de souligner que les requérantes ne contestent ni le contenu des mises en garde qui doivent être apposées sur l'emballage ni le contenu des informations de santé devant apparaître dans le paquet ou sur un prospectus ni la divulgation des émissions et constituants toxiques. Le mal dont elles se plaignent est de nature strictement économique si on exclue les questions de droit fondamentales qui seront nécessairement débattues au fond.

65 Il est loin d'être certain que la recrudescence de l'usage de tabac chez les jeunes tienne uniquement à la réduction des prix et il n'est pas certain non plus que des messages plus percutants régleront le problème. Bien des facteurs peuvent expliquer l'échec actuel. À ce stade, il faut toutefois reconnaître que la réglementation, malgré ses imperfections, a été vraisemblablement adoptée dans l'intérêt des citoyens. Ce serait contrecarrer la poursuite du bien commun que de lui enlever tout effet, pour un temps illimité, dans une procédure interlocutoire.

Par ces Motifs, Le Tribunal:

66 *REJETTE* la requête pour surseoir des requérantes;

67 *Avec dépens*.

Notes de bas de page

1 Ce règlement, entré en vigueur le 26 juin 2000, a été adopté en vertu des articles 17 et 33 de la *Loi sur le tabac*, L.C. 1988, c 20 qui est en vigueur depuis le 25 avril 1997.

2 *Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110

3 *RJR-MacDonald inc. c. Canada (P.G.)*, [1994] 1 R.C.S. 311.

4 Précité, note 2.

5 Précité, note 3.

6 [1975] A.C. 396.

7 *RJR-MacDonald*, précité, note 3, p 335.

8 *Id.*, p. 350.

9 *Id.*, p. 344

10 *Règlement sur les produits de tabac* (DORS 89-21).

11 *RJR MacDonald (1994)*, précité, note 3, p. 353.

12 *Id.*; Voir également: *Rothman's Benson & Hedges inc. et al. c. Canada (P.G.)*, C.S.M., nos 500-05-031306-978, 500-05-031299-955 et 500-05-031332-974. 29 avril 1997.

13 Voir: *Résumé de l'étude d'impact du Règlement sur les produits de tabac*, publié le 18 janvier 1989, Gazette du Canada, Partie II. Vol. 123, no 2. DORS 89-21 et *Résumé de l'étude d'impact du Règlement sur les produits de tabac - Modifications*. Gazette du Canada, Partie I, Vol. 127, no 12. DORS 93-389

14 Gazette du Canada, Partie I. 1 er avril 2000, p. 965.

15 William LEISS. « Risk Perception and Communication: Environmental Tobacco Smoke and Child Health », William Leiss, Eco-Research Chair in Environmental Policy, School of Policy Studies, Queen's University, Kingston, Ontario.

16 *RJR-MacDonald (1994)*, précité, note 3, p. 346.

17 *Imperial Tobacco Ltd. c. Secretary of State for Health*, 1 All E.R. 527 (Court of Appeal).

18 [1994] 2 R.C.S. 339.

19 *Id.*, p. 389-390.

20 *Id.*, p. 351.

Fin du document

tab 14

TLC The Land Conservancy of Canada: The Evolution of the Role of "Other" Interests in *Companies' Creditors Arrangement Act* Proceedings

Mary I A Buttery, H Lance Williams and Tijana Gavric[*]

I. INTRODUCTION

The recent restructuring of TLC The Land Conservancy of British Columbia ("TLC") under the *Companies' Creditors Arrangement Act*[1] (*CCAA*) highlights the important role interests, other than those of creditors, have come to play in *CCAA* proceedings. While *Re TLC The Land Conservancy of British Columbia*[2] is certainly not the first case where a *CCAA* court has considered interests other than those of creditors, it is perhaps one of the clearest examples of the lengths courts will go to in order to protect broader societal interests.

II. BACKGROUND

TLC is a non-profit, charitable land trust located in British Columbia. Its mission is to protect and educate the public about properties that have significant historical, cultural, scientific or scenic value.[3] It achieves this goal by either acquiring, through sale or donation, properties that other individuals or agencies were unable to protect or conserve, or participating in the

* Mary I A Buttery, H Lance Williams and Tijana Gavric, DLA Piper (Canada) LLP. The authors acknowledge the assistance of Justin Wong, summer articled student, for his assistance with research for this article.

1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

2 *Re TLC The Land Conservancy of British Columbia*, 2015 BCSC 656 [*Re TLC*].

3 *Ibid* at para 8.

formation of restrictive covenants for the subject properties. TLC was founded in 1996 and since then has preserved or protected over 250 properties, with many being transferred by TLC to other land trusts, or government agencies.

In 2013 TLC ran into significant financial difficulties, largely due to the fact that its portfolio of properties, numbering 50 at the time, and the administrative burden of the numerous covenants it held, could not be maintained on its income, funding, and donations.

III. TLC *CCAA* PROCEEDINGS

The Court noted that a *CCAA* filing became necessary because "TLC's desire to protect these properties appears to have overshadowed the needs to see that funding was secured to do so".[4] TLC filed for *CCAA* protection in October 2013 in an effort to permanently resolve its long-standing financial challenges. TLC commenced work with a land consultant to assess its properties and develop a plan for their care or their transfer that would be consistent with TLC's mandate, while recognizing its obligations to creditors.

Transfer of some of the properties was easy; there were ready buyers who would pay what the land consultant and the monitor considered commercially reasonable fair market value, while still preserving the property in a manner consistent with TLC's values. As the *CCAA* proceedings continued however, it became apparent that further property sales were going to be a problem for several reasons. First, a number of the properties were encumbered with restrictive covenants or were subject to potential trust claims. Second, if the properties were to be sold for a value consistent with their highest and best use, all of the creditors were likely to receive 100 cents per dollar of claim. However, the prospect of selling important historical and ecological properties to commercial parties, potentially for development, was an anathema to

4 *Ibid* at para 10.

TLC's fundamental purpose and was quickly ruled out as an option. The Court noted that TLC had the task of balancing the:

> ... competing goals of repaying its creditors and meeting its fundamental mandate of preserving and protecting important heritage and ecologically-sensitive properties.[5]

Uniquely, and fortunately for TLC, most of the creditors were also supporters of TLC and many were even donors.[6] These individuals and stakeholder groups communicated to TLC that their concern, first and foremost, was that the conservation goal of the particular properties, be it cultural, historical or ecological, be preserved before the creditors recovered payment of amounts owing to them. In other words, there was a clear indication to TLC that many creditors would be willing to forgo payment, or at least full payment, to preserve the properties.

The challenge for the Court, and the monitor, was that in regular *CCAA* proceedings, the monitor must opine and the court must be satisfied that the plan presents a better return to creditors than they would receive in bankruptcy.[7] However, TLC was adamant that its creditors were different and accordingly the result of any plan had to be as well. The Court noted that:

> The filing was unique in that TLC's circumstances were materially different than those of most insolvent entities that are attempting to deal with their creditors so as to stay in business. TLC's stated intention was to restructure its operations, assets and affairs to enable it to continue its conservation efforts and fulfill TLC's general purposes as a land trust in British Columbia.[8]

Accordingly, it became necessary for TLC to have some indication that its creditors would accept lesser payment, or an

5 *Ibid* at para 2.
6 *Ibid* at para 14.
7 *Northland Properties Ltd Excelsior v Life Ins Co of Can* (1989), 34 BCLR (2d) 122 (BCSC) at para 30. See also *Re Canadian Airlines Corp*, 2000 ABQB 442 at para 95 [*Canadian Airlines*].
8 *Re TLC*, *supra* note 2 at para 13.

increased risk of lesser payment, in exchange for preserving the properties. In conjunction with the monitor, TLC held an information session where it explained its plans and sought creditor support. The response from the meeting was highly positive.[9] It was followed by a "straw poll" of creditors for support.[10]

Based on that positive support from creditors, TLC was able to develop a plan of arrangement that sought to reach the balance between repayment of creditors and preservation of property. In the monitor's report to the Court regarding the plan, the monitor noted the unique characteristics of TLC's *CCAA* filing, including the fact that TLC's governing principles of land conservancy were in conflict with the commercial norms associated with the *CCAA*, such as maximizing the recovery to creditors in a restructuring. The monitor also noted that TLC's board of directors and management struggled to achieve a balance between the significant net equity in TLC's properties and the need to ensure those properties are sold in accordance with land conservancy principles. Notwithstanding the reality that TLC's plan of reorganization may not offer creditors more than they would receive in a liquidation, creditor support was overwhelmingly in favour of the plan both from secured and unsecured creditors.[11]

At the hearing for a sanction order to approve TLC's plan of arrangement, the Court extensively reviewed the facts surrounding TLC's insolvency and the test to be applied. In determining whether the plan was fair and reasonable, the Court reviewed the factors cited by the Ontario Superior Court of Justice in *Re Canwest Global Communications Corp.*[12] Those factors include:[13]

---

9 *Ibid* at para 20.
10 *Ibid.*
11 *Ibid* at para 43.
12 *Re Canwest Global Communications Corp*, 2010 ONSC 4209 (Ont SCJ [Commercial List]) [*Canwest*].
13 *Ibid* at para 21.

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

The Court in *Re TLC* noted the overwhelming support of the creditors, and that:

> The endorsement of the Plan as fair and reasonable, by the substantial majority of creditors, remains important. This is so given the unique circumstances here where commercial considerations have clearly been overtaken by the broader wish to ensure that TLC remains a viable entity able to deal with its properties responsibly and in accordance with its mandate, and that even after completion of the property dispositions, TLC remains a viable member of the land conservation movement. Despite the considerable uncertainties as to whether TLC will be able to monetize its remaining interests and repay its debts, in whole or in part, the creditors are overwhelmingly in support.
>
> For this reason, the factors relating to alternatives, and what might be recovered in a bankruptcy and liquidation, are of less relevance here to the extent that one might even accurately assess what that might be in this case.[14]

The Court went on to note the importance of considering the broader stakeholders.[15] The support of the social stakeholders, being the environment, the local governments, various preservation charities and community groups, were important factors for the Court, which noted that:

---

14 *Re TLC, supra* note 2 at paras 58 and 59.
15 *Ibid* at para 63.

> This is not one of those cases where the Court has to speculate about what those broader interests might entail. It is beyond dispute that in TLC's case, such broader interests were engaged and the Court has heard directly from many of those interests on the important issues raised during the course of these proceedings... The Plan clearly discloses that many other community groups and societies were and remain involved in assisting in TLC's efforts while ensuring that TLC respects any trust requirements or other restrictions in relation to the properties...
>
> Further, although technically creditors of TLC (regarding property taxes), many local government authorities ... remain involved in ensuring the protection and preservation of important ecological, heritage and cultural properties within their communities for the benefit of the public.[16]

The Court sanctioned the plan of arrangement,[17] finding that:

> All of these stakeholders, including the creditors, have contributed and assisted, no doubt in varying degrees, in TLC's efforts and to its success in developing the Plan. The success achieved to date and any future success, as contemplated by the Plan, will not only be the success of TLC, but the success of them all.[18]

The Court's consideration of the broader social stakeholders illustrates that it was cognizant of TLC's community-based mandate and the fact that any plan of arrangement would largely be driven by non-economic considerations that would benefit the large constituency of TLC's supporters.

While the emphasis the Court placed on broader social stakeholders was largely driven by TLC's community-based mandate, the case is nonetheless illustrative of the willingness of courts to consider a broader constituency of interests.

Re TLC is the latest and most striking case in an evolving body of cases where courts have considered a broader constituency of interests.

---

16 *Ibid* at paras 65-66.
17 *Ibid* at para 71.
18 *Ibid* at para 68.

IV. HISTORICAL OVERVIEW OF JUDICIAL CONSIDERATION OF "OTHER" INTERESTS UNDER THE *CCAA*

Some of the earliest examples of judicial consideration of "other" interests were cases where courts used the *CCAA* to interfere with the contractual rights of third parties, or non-creditors. One of the earliest cases where a stay order affected the rights of a third party was the 1997 decision of the Ontario Court of Justice in *Re T Eaton Co.*[19] In that case, the Court had previously pronounced an order (the "Order") that, *inter alia*, prevented tenants at retail shopping centres in which T Eaton Company Limited ("Eaton's") was an anchor tenant from terminating their leases during the restructuring period. Dylex operated retail stores in shopping centres of which Eaton's was one of the anchor tenants. Dylex brought an application seeking to vary the Order to permit it to exercise its rights under the leases to terminate or otherwise amend the terms of the leases if Eaton's ceased to operate its store in a shopping centre. The argument of Dylex was that the relationship between it and the landlords was outside of the *CCAA* proceedings as there was no contractual arrangement including Eaton's.

The Court found that if it were to grant the order Dylex was seeking, it would have to grant the same relief to other tenants in a similar position, which would seriously jeopardize Eaton's restructuring plan. Justice Houlden noted:

> Although I have considerable sympathy for the problem facing Dylex as a result of the closing of anchor stores by Eaton's, I must do all in my power to bring about a successful plan of compromise and arrangement. Eaton's has more than 15,000 full and part-time employees. It has sales of about $1,500,000,000 a year and the continuation of that source of business is of great importance to Eaton's suppliers.[20]

In dismissing Dylex's motion, the Court adopted the submissions set out in a factum submitted by another landlord, which noted that if Eaton's restructuring was not successful, the

19 *Re T Eaton Co* (1997), 46 CBR (3d) 293 (Ont Gen Div) [*Eaton*].
20 *Ibid* at para 5.

ensuing economic harm "could have a ripple effect throughout the local economies and cause further job loss".[21]

The *Eaton* case is significant in that the Court made a decision that altered the rights of a third party that had no relationship with the debtor company, based on the Court's finding that it was necessary to permit a successful restructuring. As noted by the Court of Appeal of Alberta in *Luscar Ltd v Smoky River Coal Limited*,[22] the Court in *Eaton* confirmed that "s 11 and the inherent jurisdiction of the Court" give courts the power "to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan".[23]

The Court in *Luscar* further confirmed that the language of the *CCAA* was broad enough to give judges the authority to permanently affect the contractual rights of third parties and that this interpretation was consistent with the remedial objectives of the statute.[24]

The *Eaton* and *Luscar* cases illustrate that courts will use the wide discretion afforded to them under the *CCAA* to fill in the gaps in the statute and fashion extraordinary remedies to facilitate the restructuring of insolvent entities. These remedies have often impacted the rights of non-creditors.

In other cases, courts have broadened their focus from the facilitation of restructurings, and fashioning remedies to that effect, to broader considerations of the effect of a proposed course of action on a wide constituency of interests, including non-economic interests. While the focus remains primarily on how restructurings benefit creditors, whose interests are generally paramount in *CCAA* proceedings, courts are increasingly considering the interests of other stakeholders. As noted by the Supreme Court of Canada:

---

21 *Ibid* at para 7.
22 *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179[*Luscar*].
23 *Ibid* at para 58.
24 *Ibid* at para 60.

> ...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 ... 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.[25]

The Supreme Court of British Columbia made similar remarks in the 2004 decision, *Re Doman Industries et al*,[26] noting that:

> The interests of the broad constituency of stakeholders in taking reasonable steps to ensure the ongoing viability of the business will often outweigh the prejudice caused to parties having their contracts or other arrangements with the debtor company terminated and their consequential damage claim being included in the plan of arrangement.[27]

As the following *CCAA* decisions illustrate, broader societal interests have increasingly become an important factor in the judicial balancing of interests, particularly where the nature of the insolvent entity's business has implications on the society as a whole.

One of the earliest cases where courts took note of broader societal factors was the 1992 decision of the Supreme Court of British Columbia in *Re Quintette Coal Ltd.*[28] In that case, the debtor company operated a coal mine. It was granted an initial stay of proceedings, which was subsequently extended. The company eventually sought an order sanctioning its plan of arrangement. In sanctioning the plan, the Court acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the company's employees and their families. The Court also acknowledged "the general public's desire to see the negotiations end and the work begin".[29]

---

25 *Eaton, supra* note 19 at para 60.
26 *Re Doman Industries et al*, 2004 BCSC 733.
27 *Ibid* at para 33.
28 *Re Quintette Coal Ltd* (1992), 68 BCLR (2d) 219 (BCSC).
29 *Ibid* at 246.

Broader societal interests played a pivotal role in the 1998 decision of the Ontario Court of Justice in *Re Canadian Red Cross Society/ Société Canadienne de la Croix-Rouge*[30] where the Court approved the sale of substantially all of the assets of the Canadian Red Cross Society before any restructuring plan was put to creditors. In that case, the Canadian Red Cross Society was facing $8 billion of tort claims from people who contracted diseases from contaminated blood products. The society sought and obtained a stay of proceedings with a view to putting forward a plan of arrangement and as part of a national process in which responsibility for the Canadian blood supply would be transferred from the Red Cross to two new agencies, which were to form a new national blood authority. Prior to putting forward a plan of arrangement to its creditors, the Canadian Red Cross Society sought, *inter alia*, court approval of the sale and transfer of its blood supply assets and operations to the two new agencies. The Court approved the sale having regard to the "public interest imperative which requires a Canadian blood supply with integrity"[31] and the interests in the Red Cross being able to put forward a plan that may enable it to avoid bankruptcy and continue with its non-blood supply humanitarian efforts.

The *Red Cross* decision is perhaps one of the clearest examples of the importance courts will attribute to non-economic interests in *CCAA* proceedings. The broader societal interest of having a Canadian blood supply with integrity was a paramount consideration in the Court's decision to approve a sale in circumstances where those with the largest economic stake in the process, namely the creditors, had not yet voted on a plan of arrangement. The decision was undoubtedly influenced by the fact that the Red Cross is a public entity with a public mandate and illustrates that restructuring debtors with broader-based public operations are grounded on a wider

30 *Re Canadian Red Cross Society/ Société Canadienne de la Croix-Rouge* (1998), 81 ACWS (3d) 932 (Ont Gen Div [Commercial List]) [*Red Cross*].

31 *Ibid* at para 50.

notion of community responsibility.[32] As noted by Kevin McElcheran:

> The *Red Cross* case utilized the *CCAA* as a mechanism to protect the broader public interest and to recognize the contribution made by the Red Cross to the community. Rather than place the continuity of the blood services provided by the Red Cross at the mercy of a creditor vote in a restructuring proceeding, the early sale put the purchaser in a position to provide hospitals and other medical institutions with an uninterrupted supply of blood products.[33]

Notably, the *Red Cross* decision pre-dated the 2009 enactment of section 36 of the *CCAA*, which codified the concept of a liquidating *CCAA* and authorized courts to approve asset sales outside of the ordinary course of an insolvent entity's business.

Broader societal interests are also an important consideration in assessing whether a proposed plan of arrangement is fair and reasonable. In the 2000 decision of the Court of Queen's Bench of Alberta in *Canadian Airlines*,[34] the Court considered social factors in assessing the fairness of the proposed plan of arrangement. In that case, the petitioners were major Canadian airlines who collectively employed over 16,000 employees. Following the granting of the initial stay of proceedings and subsequent extensions, they prepared a plan of arrangement, which was eventually approved by the requisite majority of their creditors. They brought a motion seeking the Court's sanction of their plan. In assessing the fairness of the plan, the Court noted that it could not limit its assessment to the effect of the plan on the direct participants but that it must also consider the business of the petitioners as a national and international airline employing over 16,000

---

32 V W DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Thomson Carswell, 2009) at 369.

33 K McElcheran, *Commercial Insolvency Law in Canada* (Toronto: Butterworths, 2005) at 272-273.

34 *Canadian Airlines*, *supra* note 7.

people.[35] In finding that the plan was fair and reasonable, the Court noted:

> The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.[36]

The Ontario Superior Court of Justice also noted the effect on the public in approving a proposed plan of arrangement in *Canwest*.[37] The petitioners ("CMI Entities") were in the national television broadcasting business and sought court sanction of their plan of arrangement. In assessing the fairness and reasonableness of the plan, the Court noted that:

> [The Plan] will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.[38]

The Supreme Court of British Columbia noted the importance of considering a wide range of interests in its 2001 decision *Re Skeena Cellulose Inc.*[39] Skeena Cellulose Inc ("Skeena") operated sawmills and a pulp mill in northwestern British Columbia and was a large employer in the region. It was granted an initial 30-day stay of proceedings and subsequently sought an extension. In granting the extension, the Supreme Court of British Columbia noted that the consequences of

35 *Ibid* at para 171.
36 *Ibid* at para 174.
37 *Canwest, supra* note 12.
38 *Ibid* at para 26.
39 *Re Skeena Cellulose Inc*, 2001 BCSC 1423.

terminating the stay would have a drastic impact on northwestern British Columbia, and in particular the employees, contractors and suppliers of Skeena, as well as residents and property tax payers in the region.

Further, Skeena was a party to various replaceable logging contracts. As part of its restructuring plan, Skeena renewed some of those contracts and purported to terminate others. The contractors whose contracts Skeena sought to terminate brought a motion seeking an order restraining Skeena from terminating. Skeena's plan of arrangement was subsequently sanctioned by the Court and the Court accordingly dismissed the contractors' motion. The contractors appealed. On appeal, the British Columbia Court of Appeal characterized the issue as whether:

> ...the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant[s] considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?[40]

In dismissing the appeal, the Court noted the importance of considering a wide range of interests beyond those of the contractors:

> ...the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered.[41]

V. PURPOSE OF THE *CCAA*

The increased willingness of courts to consider non-economic interests is rooted in the purpose of the *CCAA*.

40 *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 at para 4.

41 *Ibid* at para 60.

The *CCAA* is intended to facilitate the restructuring of an insolvent company such that it is able to continue operations for the benefit of all of its stakeholders. Its remedial purpose is well-established in the jurisprudence. As noted by the Supreme Court of Canada:[42]

> ...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.
>
> ...
>
> 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. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees.

Further, "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority".[43]

Given the skeletal nature of the *CCAA*'s legislative framework, *CCAA* decisions are often based on judicial discretion. As a result, "judicial decision making under the *CCAA* takes many forms".[44] The Supreme Court of Canada recognized 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.[45]

The *Re TLC* decision is the most recent example of a restructuring where the broader public interest was engaged and heavily influenced the court's decision-making.

---

42 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 15 and 18.
43 *Ibid* at para 70.
44 *Ibid* at para 60.
45 *Ibid.*

VI. CONCLUSION

Regardless of how courts choose to exercise their discretion, such discretion must be "exercised in furtherance of the *CCAA*'s purposes".[46] As the above cases illustrate, the remedial purpose of the *CCAA* remains the primary consideration.

Despite the unique circumstances surrounding TLC's restructuring given its status as a not-for-profit organization, and the absence of purely commercial stakeholders, the Court's decision-making was an expression of the evolving decision-making under the *CCAA* rooted in the recognition of the diverse interests often involved. Although the interests and support of creditors remain of paramount importance, broader societal interests can play a significant role and influence the court's ultimate decisions, particularly where the insolvent company's restructuring has material non-economic implications for the broader community. *Re TLC* is part of an expanding line of cases and the authors believe it is not a "one off" but a sign of the growing importance of non-economic interests in *CCAA* proceedings.

46 *Ibid* at para 59.

tab 15

Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case

*Vern W. DaRe**

I. INTRODUCTION

"Mystifying" and "disheartening" is how the Court in *Red Cross*[1] recently characterized what many mass tort claimants infected with the HIV virus must feel about their treatment. It has been eight years since their claims were settled under the plan of arrangement approved by the Court[2] under the *Companies' Creditors Arrangement Act* (*CCAA*). Sadly, no payments have yet been made to these claimants under the plan, demonstrating just how risky it is to settle mass tort claims under the *CCAA*.

Writing more than a decade ago, I considered whether codifying the treatment of mass tort claims under the *CCAA* would reduce these risks.[3] The Act, as with so many other issues, was silent. In the U.S., law reformers had

---

* Gardiner Roberts LLP. The helpful comments on the first version of this Comment by Professor Janis Sarra and each Reviewer are gratefully acknowledged. The views expressed and any errors in the Comment, however, are those of the author.

1 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2008), 2008 CarswellOnt 6105 (Ont. S.C.J.), Cullity J. ("*Red Cross*"), at para. 7. Just to provide full disclosure to those reading this case comment, please note that in *Red Cross* at para. 34 Cullity J. generously states in his reasons dealing with the treatment of late claims under the *CCAA* that the "earlier authorities are discussed in a helpful annotation by Mr. Vern DaRe in 26 C.B.R. (4th) 142".

2 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2000), 2000 CarswellOnt 3269, [2000] O.J. No. 3421, 19 C.B.R. (4th) 158 (Ont. S.C.J.), Blair J. (Approval Order).

3 V. W. DaRe, "A Legal Framework for Unaccrued Mass Tort Claims under Canada's Bankruptcy Legislation" (1998), 3 C.B.R. (4th) 198.

been much more activist in dealing with the problem, leading to proposed bankruptcy reforms[4] including a statutory framework under Chapter 11 dealing with mass tort claims. In particular, the proposed framework would define "mass future claims", establish "trust mechanisms", allow for the appointment of "mass future claims representatives", empower the court to "estimate" and "determine" the amount of such claims and order "channelling injunctions", directing mass future claimholders to "a reasonably funded pool of resources" and away from the debtor company. At the time, I thought codification was the future and should seriously be considered under Canada's bankruptcy reforms. Despite my youthful exuberance, this idea fell on deaf ears. Even under the current bankruptcy reforms, notwithstanding the enthusiasm for more codification, the treatment of mass tort claims is still not on the radar screen.

In the Canadian tradition, the vacuum has been filled in practice and under the jurisprudence. Gap filling is always challenging under the *CCAA* but particularly so for insolvency professionals and the courts when dealing with mass tort claims. They are not your typical commercial claim or creditor. They are often personal, tragic and relate to the illness, disease or death of the claimant. One commentator has referred to them as "an epidemic in slow motion".[5] They often have "long tails", in that they are numerous, scattered geographically and damages may take decades to materialize. A latency period of several years may separate a victims' first exposure before the onset of the disease, illness or death.

These uncertainties affect each stakeholder in a restructuring under the *CCAA*. For the debtor, identifying, quantifying, binding, compromising and "channelling" such claims under a plan of arrangement is not without risk. To achieve a settlement, for example, the debtor may offer trust funds as a mechanism under the plan, which offers a greater recovery than the liquidation/ litigation value of the claims and essentially binds future tort claimants exposed to past actions of the debtor. Underlying the settlement offer, the debtor assumes that it has made an accurate estimate of the number and value of such claims and the amount of the trust fund.

As with any estimate or ex ante determination, this is not an exact science. The wrong estimate may result in the overcompensation or undercompensation of the tort claimants under the plan. If the estimated offer is too low from the perspective of these contingent creditors because they view their litigation or health related claim as having greater future value, the only alternative for the debtor may be bankruptcy and liquidation. If liquidation is a possibility and the debtor is a public agency or has a public mandate, another stakeholder affected is the government. Whether the "deep pockets" of govern-

4 National Bankruptcy Review Commission, "Bankruptcy: The Next Twenty Years" (October 20, 1997). (the "U.S Bankruptcy Review Commission")

5 Mancuso, *Preface* to B. Castleman, *Asbestos: Medical and Legal Aspects* (1984), at XVII.

ment will or will not come to the rescue of the debtor to permit a restructuring and avoid bankruptcy is another risk faced by the debtor in the circumstances. Without public aid, the debtor may have little choice but to bankrupt the company in the face of mass tort claims in the millions or billions of dollars or in the alternative, offer a substantially lower amount of money for such claims in reorganization proceedings, with the same result if the contingent creditors reject the offer.

Finally, claim bar dates or deadlines are always a "wild card". To achieve a final settlement and closure under the *CCAA* plan, the debtor will also rely on the sanctity of the claims bar process, where late mass tort claims will actually be "forever barred". Of course, there is no such sanctity; late claims are permitted on equitable grounds. If the late claim is against the debtor after the approval and implementation of the plan, there is the risk of reducing the cash or resources of the restructured debtor by permitting the claim.

As stakeholders, mass tort claims or claimants face related risks. The problem with estimates or ex ante determinations works both ways: the amount of the trust funds set aside for future claims may be insufficient and as a result, the mass tort claimants will be under-compensated under the plan. Similarly, while binding all future tort claimants under the plan may be necessary for the debtor to achieve closure, it can work to disenfranchise future tort claimants. They may be stuck with an under-compensated fund. They may not be eligible because they do not satisfy the definition of a mass tort claim. They may not have contracted the illness in the specified period. They may be unaware of their illness because of the latency period. If the sanctity of the claims bar process or date is upheld, their late claims will be "forever barred". On the other hand, even if their late claims against the trust fund are allowed, there is the risk to other, timely claimants that they will receive less money or their share reduced under the fund.

Again, another potential stakeholder facing risks is the public. Where the debtor has a public mandate, taxpayers may be asked to finance the restructuring. If they "foot the bill", some of the same risks facing the debtor in dealing with mass tort claims arise in the public domain: How much money is required in the trust fund? What is the estimated number and value of mass tort claims? Can the government/public rely on the claims bar date or deadline to bring finality to the settlement? Despite "deep pockets", they are not limitless and governments must be accountable. At the same time, the risks may be broader if the debtor is a public agency. The broader-based public operations of the debtor may be grounded on a wider notion of community responsibility or public obligation to compensate mass tort claimants regardless of fault (i.e., strict liability) and traditional causation. The risks inherent the settlement of mass tort claims under the *CCAA*, therefore, affects potentially not only individual players but also the general public.

These risks have also been addressed in the jurisprudence. The first case[6] in Canada to deal with mass tort claims as key creditors under the *CCAA* and by coincidence the latest one and the topic of this comment is *Red Cross*.[7] In a well reasoned and sensitive decision, Cullity J. sought to balance these risks and in the process added to the jurisprudence dealing with mass tort and late claims under the *CCAA*.

II. BACKGROUND

Most Canadians are aware of the national tragedy underlying the *Red Cross* case. Facing tort claims in the billions of dollars from thousands of Canadians ill or dying from contaminated blood products, the Canadian Red Cross Society (the "Red Cross") had to take action to avoid bankruptcy. By 1998, there were an estimated 230 actions and 10 class actions involving claimants suffering from Hepatitis C (HCV), HIV, Creutzfeld Jacob disease, or a combination of these illnesses, as the result of faulty testing and screening. Up to that time, Red Cross had a storied past. As a not-for-profit corporation, it had operated a blood donor operation since 1940. Since 1977, it operated Canada's National Blood System with funding from federal and provincial governments. Services provided were beneficial, humanitarian and international in scope. They included supply of blood and blood products, disaster relief, homemaker services, and international relief and crisis intervention. The services also created jobs, with almost ten thousand people being employed by Red Cross in 1998. All of this would be jeopardized by a bankruptcy. As a result, Red Cross filed for protection under the *CCAA*[8] and subsequently successfully negotiated an amended plan of arrangement (the "Plan") as sanctioned by court order on September 14, 2000 (the "Approval Order").

Unfortunately, the tragedy continued. After almost a decade and a national inquiry into Canada's blood system[9], one would have hoped for some resolution, closure or payment of these tort claims under the Plan. Sadly, as pointed out by Cullity J. in the recent *Red Cross*[10] case, "no distributions from the Trust have been made in the eight years since the Plan was approved"[11] and

---

6 *Canadian Red Cross Society, Re* (July 20, 1998), Court File No. 98-CL-002970 (Ont. S.C.J.), Blair J. (Initial Order). For a full discussion of this case, see Janis P. Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003).

7 *Red Cross, supra,* note 1.

8 *Red Cross* (IInitial Order), *supra*, note 6.

9 Mr. Justice Horace Krever, *Commission of Inquiry on the Blood System in Canada, Final Report,* (Ottawa: Government of Canada), Part IV at 1030.

10 *Red Cross, supra,* note 1.

11 *Ibid.*, at para. 5.

not missing the cruel irony, he observed that it is "tragic that a plan designed to provide compensation for innocent victims should be tied up in disputes over whether all, or only some of them, are to receive it – disputes that many and, perhaps, most of the eligible HIV Claimants must find mystifying and disheartening".[12]

While it is not clear in the decision why there have been no payouts from the HIV Fund over the past eight years (besides the limitations issue), it is my understanding that there have been serious issues in establishing causation, particularly where the victim is now dead and family members are seeking remedies. This has caused further litigation and delay.

III. FACTS

On a motion for advice and directions by the Trustee in *Red Cross*, it was asked whether the court had jurisdiction to relieve or allow the late claims or applications of HIV Claimants. The Plan established a trust (the "HIV Trust") for holding, administering and distributing a fund (the "HIV Fund") in satisfaction of the claims ("HIV Claims") of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood, blood derivatives or blood products collected or supplied by the Red Cross before September 28, 1998. There were other Funds and related trusts created under the Plan for individuals who contracted Creutzfeld-Jacob Disease and Hepatitis C. For example, the Hepatitis C Fund ("HCV Fund") was administered through the HCV Trust. The Trustee administered the various trusts. The Trustee's powers and responsibilities were governed by a trust agreement. As for payments under the Funds, they were based on an assessment. For example, payments from the HIV Fund were to be made in accordance with damages assessments by a Referee appointed under the Plan.[13]

The Plan also established claims bar dates or deadlines for voting, "channelling" and damages assessments/distribution purposes. There was a deadline for voting on the Plan. There was also a date when the claims of HIV Claimants against the Red Cross were extinguished or converted and "channelled" to the HIV Fund. On the Plan Implementation Date (October 5, 2001), Cullity J. observed that the rights of HIV Claimants against the Red Cross "were, in effect, converted into, or replaced by, rights to receive damages from the HIV Fund".[14] Finally, and pivotal to this motion, there was a four month deadline for applications for damages assessments/distribution purposes that expired on February 5, 2002. Article 5.10 of the Plan had the affect of extinguishing late HIV Claims. It provided, in part, that HIV Claimants may (i.e.,

12 *Ibid.*, at para. 7.

13 *Ibid.*, at para's 3, 4.

14 *Ibid.*, at para. 6.

permissive) apply to the Referee within four months after the Plan Implementation Date for a determination of damages under their HIV Claim. However, and this is the mandatory part of the article, any surplus remaining after disposition of all references filed within the four month period after the Plan Implementation Date shall be paid to the other, HCV Fund. In other words, any surplus in the HIV Fund must be computed and paid to the HCV Fund without regard to any late HIV Claims.[15]

Of the HIV Claimants, 89 infected persons or their family members made timely applications, meeting the February 5, 2002 deadline, while 38 or more did not. The Trustee believed that there could be more late claims in the future. Some of the reasons advanced for their tardiness included inadvertence, a misunderstanding of the language of the application forms, lack of notice or timely notice and the latency period of their illness (i.e., their HIV infection was discovered after the expiry of the deadline).[16]

IV. ISSUE

The Trustee sought directions as to whether the court, without reference to any particular case, had jurisdiction to extend or otherwise relieve against the effect of the deadline. Before addressing the jurisdictional question, Cullity J. made some preliminary findings or observations that highlight the risks of settling mass tort claims under the *CCAA*. Unfortunately, they would play out against the HIV Claimants, resulting in the HIV Trust being "bedevilled by problems and litigation since its inception", "limitations issues" and "no distributions" (to date) according to Cullity J.[17]

V. INHERENT RISKS

The first one concerned the estimate or ex ante determination of the amount of the HIV Fund. The original amount of approximately $14 million was too low. It was subsequently eroded by administration and litigation costs and according to Cullity J. would "undoubtedly be depleted further if the disputes continue".[18]

The second risk concerned the estimate of the number of potential HIV Claimants. As with the amount of the HIV Fund, the number of potential HIV Claimants was also originally underestimated. This incorrect estimate had serious consequences. As pointed out by Cullity J., much of the impetus for the

15 *Ibid.*, at para's 6-11.
16 *Ibid.*, at para's 11, 13, 14.
17 *Ibid.*, at para. 5.
18 *Ibid.*

litigation has stemmed from "an initial misapprehension that the number of the potential Claimants was significantly less than has since appeared to be the case".[19]

The third one is related to the latency period between the HIV Claimants' exposure to the contaminated blood and their discovery or awareness of being infected with the HIV virus. Put simply, some HIV Claimants did not become aware of being ill until after the deadline. As acknowledged by Cullity J., other "late-filed applications were made by, or on behalf of, individuals who state that they were unable to comply with the deadline as their HIV infection was discovered after the deadline had expired".[20]

Finally, at the preliminary stage of his decision, Cullity J. was well aware of the risks to the HIV Claimants regarding the "limitations issues". Should the court permit late claims or applications despite the deadline or four-month limitation period or should they be barred? As he noted, the answer would "have a significant effect on the size of the class of HIV Claimants".[21] Both timely and late claims were at risk. As Cullity J. astutely pointed out, there was a risk "not only to those whose [late] claims might be barred, but also to other [timely] Claimants whose entitlement would be reduced if the total damages awarded [as a result of allowing the late claims] exceed the amount of the HIV Fund". [22]

VI. DECISION

The court relied on three heads of jurisdiction to find it had jurisdiction to relieve late HIV Claims or HIV Claimants whose applications were irregular or out of time. The first related to the Trustee's supervisory role in the claims process. The source of the Trustee's powers partly stemmed from the Trust Agreement in connection with the HIV Trust. There is therefore, according to Cullity J., "first, the general jurisdiction of the court to exercise control over the administration of the trust and the exercise of a trustee's discretionary powers".[23]

However, this was not a traditional trust. According to the court, the HIV Trust had several special features, distinguishing it not only from traditional trusts but also settlements of class proceedings.[24] More important, the HIV Trust was created pursuant to the *CCAA* and therefore part of a compromise of the HIV Claims between the HIV Claimants and the Red Cross as sanctioned by

19 *Ibid.*, at para. 7.
20 *Ibid.*, at para. 14.
21 *Ibid.*, at para. 5.
22 *Ibid.* (emphasis added)
23 *Ibid.*, at para. 24.
24 *Ibid.*, at para. 16.

the Approval Order. Paragraph 12 of the Approval Order contemplated a continuing role for the court in the implementation of the Plan according to Cullity J.[25] Relying on this provision as the second head of jurisdiction, he concluded that it "reserved to the court the authority to make orders required for the purpose of implementing the plan".[26]

The third head of jurisdiction received the most attention by the court. As Cullity J. acknowledged, the treatment of late claims is not novel under the *CCAA*. A body of jurisprudence has evolved under the statute. He characterized this third head as a discretionary or equitable jurisdiction since it applied familiar principles of equity and was supported by the supervisory role of the court under the *CCAA*. [27]

After reviewing the leading case of *Re Blue Range Resources Corp.*,[28] its treatment in other cases and some related cases, Cullity J. set out the criteria and principles guiding whether a court should allow or bar late claims under the *CCAA*. He also added some special considerations when the late claims happen to be mass tort claims or health related claims. They may be summarized as follows:

(1) Was the delay caused by inadvertence (i.e., carelessness, negligence, accident, unintentional) and if so, did the claimant act in good faith?

(2) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay? The test of prejudice is whether the creditors by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done. In a *CCAA* context, the fact that creditors will receive less money if late claims are allowed is not prejudice relevant to this criterion. Reorganizations involve compromise and allowing legitimate creditors to share in the available proceeds is part of the process. A reduction in that share cannot be characterized as prejudice. The analysis of prejudice may be directed not only to other creditors but also the debtor company. In applying the criterion to the debtor company, a distinction will be made at what stage the late claim is filed in the *CCAA* proceeding, before or after distribution under the plan. Before distribution, a late claim will receive more favourable treatment. After distribution, a court will be more

25 *Ibid.*, at para. 17.

26 *Ibid.*, at para. 25.

27 *Ibid.*, at para's 26, 27.

28 *Re Blue Range Resources Corp.* (2000), (sub nom. *Enron Canada Corp. v. National Oil-Well Canada Ltd.*) 2000 CarswellAlta 1145, [2000] A.J. No. 1232 (Alta. C.A.), additional reasons at (2001), 2001 CarswellAlta 1059 (Alta. C.A.), leave to appeal refused (2001), 2001 CarswellAlta 1209 (S.C.C.) ("*Blue Range Resources*").

reluctant to permit a late creditor with access to the debtor corporation's post-arrangement assets and more likely to find the claim prejudicial to the debtor company. Where mass tort claims are "channelled" away from the debtor company to a trust fund, prejudice to the debtor company is not the issue since the debtor is released from the claims. Instead, prejudice to the timely, mass tort claimants under the trust fund, as a result of allowing the late mass tort claims, is the issue before the court. Knowledge of the possibility that late claims might be permitted may militate against a finding of prejudice; however, ignorance of this may not necessarily establish prejudice in the circumstances;

(3) If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

(4) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?[29]

(5) For the purpose of providing access to a trust fund, the *CCAA* plan should be given a liberal interpretation;[30]

(6) Mass tort claimants are often very different to commercial creditors affected by the *CCAA* and as a general rule, while the latter can be presumed to be knowledgeable and ready and willing to assert their claims, the same cannot be said of mass tort claimants who may not personally retain lawyers or directly participate in the *CCAA* proceeding and often prepare their claims or applications without professional assistance;[31]

(7) The equitable jurisdiction of the court to relieve against late claims is not ousted by a claims bar date or a claims bar order that purports to "forever bar" a late claim without a saving provision;[32] and

(8) Since the jurisdiction is essentially an equitable or discretionary jurisdiction, it should be exercised sparingly in light of the particular circumstances of each case including the compromise or settlement approved by the creditors and the court under the *CCAA*.[33]

---

29 *Red Cross, supra,* note 1; these four criteria from *Blue Range Resources* are set out and applied at para.'s 29, 41, 44, 45, 47 and 49 of *Red Cross.*

30 *Ibid.*, at para. 23. Cullity J. adopts the reasons of Blair J. (as he then was) from an earlier motion in *Red Cross*, namely that "for the purpose of providing access to the HIV Fund, the Plan should be given a liberal interpretation: (2005), 2005 CarswellOnt 4773, [2005] O.J. No. 4177, 19 E.T.R. (3d) 189 (Ont. S.C.J.) at para. 15".

31 *Ibid.*

32 *Ibid.*, at para. 37.

33 *Ibid.*, at para. 38.

Applying these principles, Cullity J. held that the court has jurisdiction to allow late HIV Claims or applications. Without deciding on a specific late or irregular application, he held that the following facts generally supported the exercise of this jurisdiction:

(1) the structure of the Plan with its provision of a separate Fund for HIV Claimants;
(2) the fact that no distributions from the HIV Fund have yet been made;
(3) the absence of prejudice that would be suffered by the Red Cross and other Claimants;
(4) the uncertainty created by the limitations issues;
(5) the circumstances of the Claimants that distinguish them from commercial creditors;
(6) the fact that adequate notice to them was essential if the Plan was to be effective;
(7) the application forms provided to Claimants were not clear on certain points related to the HIV Claims; and
(8) the selection of appropriate methods of disseminating notice of the deadline for applications may have been unduly limited and in some cases, the chosen method may not have been completely successful in reaching Claimants.[34]

After deciding the court had jurisdiction, Cullity J. had to decide whether separate hearings would be required for each late applicant. In providing advice and directions to the Trustee, he refused to adopt such a restrictive approach. To require a separate hearing for each late application would be timely and expensive and further deplete the HIV Fund. Cullity J. had confidence that the Trustee could do this more efficiently, noting that its powers over late and irregular applications "can be exercised with less formality and more expedition than the practice and procedure of the court".[35] To assist the Trustee in disposing of late and irregular applications, Cullity J. provided guidelines in an Appendix to his decision. If the Trustee was uncertain as to the application of the guidelines in any particular case, it could refer the matter to court in writing to be dealt with summarily. The Trustee also had to notify HIV Claimants whose applications were disallowed and advise them of their right to have the decision reviewed by the court. Any further procedural issues could be disposed of by way of a case conference according to Cullity J.[36]

34 *Ibid.*, at para. 49.
35 *Ibid.*, at para. 50.
36 *Ibid.*, at para's 50, 51, 52.

VII. INHERENT RISKS REVISITED: LATENCY PERIODS, DELAYED PAYOUT AND REDUCING THE SHARE OF THE TRUST FUND

Some HIV Claimants were late because they were not diagnosed with HIV until after the deadline. Latency periods pose a special risk to mass tort claimants, in that discovery of the illness or disease, despite earlier exposure, may occur after a claims bar date or deadline. In *Red Cross*, this disqualified the late HIV Claimants or rendered their late applications as ineligible. After acknowledging the difficulty of such cases, Cullity J. held that:

> The jurisdiction to relieve against untimely applications is, in my opinion, limited to applications by persons who could have established their eligibility within the four month's period. It would not apply to persons whose infection was not discovered before the expiration of the period. The intention to withhold damages from such persons is inherent in the imposition of the deadline. . .In my judgment, it is one thing to grant relief to persons who might have – but, for some reason, did not – claim within the four months' period and something fundamentally different to extend the class to persons who would not have been able to establish a claim within the period. The exclusion of the latter should, in my opinion, be considered to be part of the compromise effected by the Plan, and to that extent its provisions are to be respected.[37]

Latency periods, however, may not always pose a risk to the tort claimants' eligibility for damages. Some of these claims have "short tails". That is, the victim may experience immediate injuries after exposure to the defective product. In *Red Cross*, 89 HIV Claimants discovered their infection before the deadline and were eligible for damages. Those that discovered their infection after the deadline were ineligible for damages. As discussed below, whether latency periods should even determine eligibility to damages is questionable (notwithstanding the compromise under the Plan).

For those HIV Claimants that were eligible for damages, eight years has passed without a payment under the Plan. The delay raises further issues about the appropriateness of the tort remedy for damages including traditional causation when settling mass tort claims under the *CCAA*, as discussed below.

Finally, the inclusion of eligible late HIV Claims posed its own risks, namely to timely HIV Claimants and the reduction in their share of the HIV Fund. Since the HIV Fund will probably be inadequate to satisfy all of the qualified HIV Claimants, the share or amount of distribution to each timely, eligible HIV Claimant will be diluted or reduced by allowing untimely, eligible HIV Claims against the Fund. Relying on *Blue Range Resources*, it was argued

---

37 *Ibid.*, at para. 40.

that these late claims or applications should not be allowed because they would prejudice the timely HIV Claimants. In particular, they were prejudiced because:

(1) they believed before voting on the Plan that there were 34 HIV claimants and had they thought that there would be more claimants beyond this limited number or that the court would permit late claims they would have voted against the Plan;
(2) the additional late HIV Claims will dilute the HIV Fund and reduce their share of the available monies in the HIV Fund; and
(3) they did not know and were ignorant of there being additional HIV Claimants.

Applying the prejudice criterion in *Blue Range Resources*, as discussed above, Cullity J. held that the timely HIV Claimants were not prejudiced by the late applications for the following reasons[38]:

(1) the loss of an opportunity to vote against the Plan by reason of an erroneous belief that there were only 34 eligible Claimants is not a loss that would occur by reason of the late filings;
(2) a reduction in the share of the HIV Fund cannot be characterized as prejudice; and
(3) lack of knowledge or ignorance of potential, late or additional HIV Claimants is not prejudice in the circumstances since it had no bearing on the eligibility of late HIV Claims.

Citing from Blair J. in an earlier motion in these proceedings, Cullity J. held with approval that "the reason for establishing the HIV Fund was not to provide recourse to a limited number of HIV Claimants" but rather "to make the HIV Fund available to all those who had an [eligible] HIV Claim existing against the Society". [39]

VIII. CONCLUSIONS AND RECOMMENDATIONS

This is a well written, balanced and sensitive decision responding to the tragedy of unresolved HIV Claims in *Red Cross*. First, the decision highlights the risks of settling mass tort claims under the *CCAA*. The amount of the HIV Fund was underestimated under the Plan, as were the potential number of HIV Claimants. Some late HIV Claimants were "forever barred" because of the latency period and the fact they did not discover their illness or infection until

38 *Ibid.*, at para's 41 to 48.
39 *Ibid.*, at para. 45. (emphasis added)

after the deadline. Other timely HIV Claimants will potentially suffer a reduced or diluted share of money from the HIV Fund because of the inclusion of late claims or applications. In deciding which of the late HIV Claims were "eligible" or "ineligible" for equitable treatment, Cullity J. had to balance these risks.

Secondly, the decision adds to the jurisprudence. In particular, it provides guidance where the late claims under the *CCAA* are also mass tort claims. Where there is this interplay, the court in *Red Cross* listed other criteria that should be considered before allowing late claims. These included a liberal interpretation of a *CCAA* plan for the purpose of providing access to a trust fund; distinguishing commercial creditors affected by the *CCAA* from mass tort claimants; and applying the prejudice criterion in *Blue Range Resources* in an equitable way that does not undermine "eligible" late claims.

Finally, and most importantly, the court in *Red Cross* showed sensitivity to the plight of HIV Claimants. From the outset, Cullity J. emphasized that there had been no distributions from the HIV Fund in the eight years since the approval of the Plan and that the unfolding tragedy must seem "mystifying" and "disheartening" to the eligible HIV Claimants. This empathy for the eligible HIV Claimants expressed itself in various ways in the reasons. The Court was concerned with escalating costs and the further depletion of the HIV Fund. The decision to provide guidelines rather than require separate hearings for each late claim or application was one way of reducing litigation costs. Another way was by the Court's direction that certain outstanding and procedural issues be dealt with summarily or by case conference. This sensitivity was also shown by the Court's distinction between typical commercial creditors and HIV Claimants. The Court recognized that as a general rule mass tort claimants did not personally retain lawyers, participate in *CCAA* proceedings and prepare applications with professional assistance. With this sensitivity, it was easier for the Court to find that many of the HIV Claimants were not provided "user-friendly" application forms and adequate notice of the four month deadline, thereby justifying its discretionary or equitable jurisdiction to relieve the late claims or applications.

Despite this sensitivity, an eight year delay or more in the payment of eligible HIV Claimants under an approved *CCAA* Plan is not only tragic but it also represents treatment of mass tort claimants that should be avoided in the future. The same may be said about "forever barring" or rendering ineligible for damages tort claims with long "tails" or latency periods. The fact that Red Cross was a public agency or acted in the public domain is an added consideration to the discussion. What then are the recommendations that flow from *Red Cross* regarding the risks inherent settling mass tort claims under the *CCAA*?

The first recommendation addresses the limits of the tort remedy. The tort remedy for damages is generally restricted to those who can prove that their injuries were caused by exposure to the defective product. This requirement of cause and effect screens out many mass tort claims. As one commentator notes, "we must accept that as a matter of fact negligence law is relatively useless at

accomplishing anything of social value where negligently-caused illness is concerned".[40] The tort system's actual response to mass torts is sadly deficient in its allocation of monetary relief and only a small proportion of those theoretically entitled to a claim actually recover damages.[41] Very few disabled people, and fewer of those who suffer illness or infection, are able to benefit from the tort system. In *Red Cross,* the tort system has delayed payment under the HIV Fund, diluted the amount of the HIV Fund and rendered certain HIV Claimants ineligible for damages.

One reason for the eight year delay in payments to eligible HIV Claimants under the Plan has been related to the difficulty and timeliness of satisfying the dual requirement of cause and effect. In particular, proving causation has been difficult, timely and expensive especially for those deceased victims whose claims are being advanced by their family. Administration expenses and the costs of litigation have increased with the passage of time. As a result, the amount of the HIV Fund has been eroded or depleted. To add insult to injury, some HIV Claimants were considered ineligible for damages because of long latency periods or because the discovery of their infection (i.e., effect) after their exposure to contaminated blood (i.e., cause) occurred subsequent to the claims bar date or four month limitation period.

While this writer has no expertise in tort law, there has to be a better way. The delay in paying innocent victims, the depletion of the trust fund and the ineligibility of tort claims based on latency periods is simply not acceptable. My first recommendation, therefore, is that traditional tort law principles should be relaxed or dispensed with when dealing with the settlement of mass tort claims under the *CCAA*. Latency periods should not be the basis or grounds for eligibility to damages. Whether a person, after exposure, becomes ill immediately or later in four months and one day, does not make the late illness less severe nor should it be less eligible for damages. Also, evidentiary rules required to prove causation should be relaxed to avoid timely litigation and delays in payment. Perhaps, in some instances where the product is so toxic or defective that mere exposure leads to infection or illness, the requirement of evidentiary causation or timely discovery can be relaxed to permit immediate payment to the victim. The remaining recommendations consider how best to achieve these results.

One source is the *CCAA* Plan. In the future, mass tort claimants may want to consider certain terms in a *CCAA* plan that avoids or addresses the risks in *Red Cross*. Regarding delayed payments, evidentiary causation and latency periods or eligibility, perhaps the negotiated settlement under the *CCAA* plan can address these risks by providing different treatment to the tort claimants under separate trust funds. Entitlement or the amount of individual payments

40 B. Feldthusen, "If This Is Torts, Negligence Must Be Dead", in K. Cooper-Stephenson & E. Gibson, eds., *Tort Theory* (1993), 394 at 400-01.

41 *Ibid.*

under each fund would vary based on a declining threshold. For example, the largest trust fund with the highest payout to each mass tort claimant would be based on traditional tort principles. Another trust fund would have a reduced amount and offer less to each mass tort claimant but there would be a relaxation of some tort principles (i.e., evidentiary causation) and quicker payment. The trust fund with the lowest amount and offering the least in terms of payment to each mass tort claimant would dispense with tort principles, allowing the claimant quick payment based on exposure/cause alone with the discovery of the illness/effect not being a basis of eligibility. In the alternative, as seen in some recent *CCAA* plans, a Hardship Committee may be established to determine whether ineligible claimants should in any event be compensated based on humanitarian grounds. In *Red Cross*, the ineligible HIV Claimants would have been prime candidates for such treatment.

Another way to deal with these risks concerns the status of Red Cross as a public agency or having a public mandate. In these circumstances, compensation may be seen as a public obligation. While the "deep pockets" of government are not limitless, restructuring debtors with broader-based public operations are grounded on a wider notion of community responsibility. Arguably Red Cross had a broader duty to the public including the duty to compensate ineligible HIV Claimants who were "forever barred" simply because of long latency periods. Where the debtor under the *CCAA* has a public mandate, therefore, mass tort claimants may in the future want to be more aggressive in picking these "deep pockets" to avoid this risk.

Finally, if at first you don't succeed. . .; a decade ago I considered whether the codification of the treatment of mass tort claims under the *CCAA* might reduce these risks.[42] Since codification is back in vogue under the current bankruptcy reforms, perhaps the idea should be revisited. The statutory framework would provide the explicit recognition of "mass future claims", "mass tort representatives", "trust mechanisms" and "channelling injunctions". While codification is not a panacea and always has the danger of "freezing" concepts or duplicating existing jurisprudence, it could offer some safeguards in Canada or address some of the risks raised in *Red Cross*. For example, with respect to the mass tort claim being ineligible for damages because of the long latency period or because the injury does not manifest itself until after the limitation period, this risk is addressed by the proposed statutory definition of "mass future claim".

The U.S. Bankruptcy Reform Commission recommended that the term be added as a subset to "claim" and be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if:

---

42 DaRe, *supra*, note 3.

(1) the act(s) or omission(s) occurred before or at the time of the order for relief;
(2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
(3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
(4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
(5) the amount of such liability is reasonably capable of estimation.[43]

The statutory definition overcomes the risk of the claim being disqualified or held ineligible for damages because of a long latency period since the claim "arises" not when the claimant discovers his or her illness or infection but as a result of the debtor's culpable action or "acts or omissions" that are "sufficient to establish liability when injuries ultimately are manifested".

The statutory appointment of "mass tort representatives" could also play an important role. As pointed out by Cullity J. in *Red Cross*, mass tort claimants are different from commercial creditors affected by the *CCAA* and as a general rule are not as knowledgeable and ready and willing to assert their claims since they often do not personally retain lawyers or directly participate in the *CCAA*. In Canada, such representation is already ordered by the court. Whether an express provision under the *CCAA* adds anything is uncertain. One of the benefits of codifying the appointment, according to the U.S. Bankruptcy Reform Commission, is that it ensures that claimants unaware of their injuries would have representation in the plan negotiation process and therefore better protect their future interest.[44] To the extent that this is not achieved in Canada by current practice, codifying the appointment of the "mass tort representative" might have its advantages.

After defining mass future claims and providing for the appointment of representatives, the U.S. Bankruptcy Reform Commission recommended that the court be empowered to "estimate" and "determine the amount" of mass tort claims before the confirmation of a plan for purposes of allowance, voting and distribution.[45] No specific method of estimating such claims is prescribed but rather will depend on the circumstances. The Commission also recommended that the court be authorized to issue "channelling injunctions".[46] Whether these express provisions would add anything in Canada is uncertain since Canadian courts already order "channelling injunctions" and approve estimated amounts

43 *Ibid.*
44 *Ibid.*
45 *Ibid.*
46 *Ibid.*

of trust funds without statutory guidance under the *CCAA*. In *Red Cross*, the number and value of potential HIV Claimants was underestimated, as was the amount of the HIV Fund and it is unlikely that having these two express provisions under the *CCAA* would have changed this risk.

Having revisited the idea of whether codifying the treatment of mass tort claims under the *CCAA* is an improvement over no statutory guidance in dealing with the inherent risks of settling such claims, I reluctantly conclude that the results have been mixed. Perhaps it was youthful exuberance.

tab 16

2010 ONSC 4209
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5510, 2010 ONSC 4209, 191 A.C.W.S. (3d) 378, 70 C.B.R. (5th) 1

IN THE MATTER OF SECTION 11 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities
David Byers, Marie Konyukhova for Monitor
Robin B. Schwill, Vince Mercier for Shaw Communications Inc.
Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for Special Committee of the Board of Directors
Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Debtors were group of related companies that successfully applied for protection under Companies' Creditors Arrangement Act — Competitor agreed to acquire all of debtors' television broadcasting interests — Acquisition price was to be used to satisfy claims of certain senior subordinated noteholders and certain other creditors — All of television company's equity-based compensation plans would be terminated and existing shareholders would not receive any compensation — Remaining debtors would likely be liquidated, wound-up, dissolved, placed into bankruptcy, or otherwise abandoned — Noteholders and other creditors whose claims were to be satisfied voted overwhelmingly in favour of plan of compromise, arrangement, and reorganization — Debtors brought application for order sanctioning plan and for related relief — Application granted — All statutory requirements had been satisfied and no unauthorized steps had been taken — Plan was fair and reasonable — Unequal distribution amongst creditors was fair and reasonable in this case — Size of noteholder debt was substantial and had been guaranteed by several debtors — Noteholders held blocking position in any restructuring and they had been cooperative in exploring alternative outcomes — No other alternative transaction would have provided greater recovery than recoveries

contemplated in plan — Additionally, there had not been any oppression of creditor rights or unfairness to shareholders — Plan was in public interest since it would achieve going concern outcome for television business and resolve various disputes.

Table of Authorities

Cases considered by *Pepall J.*:

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

A&M Cookie Co. Canada, Re (2009), 2009 CarswellOnt 3473 (Ont. S.C.J. [Commercial List]) — referred to

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 3702 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (C.S. Que.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (C.S. Que.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 173 — considered

s. 173(1)(e) — considered

s. 173(1)(h) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — referred to

s. 36 — considered

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for related relief.

***Pepall J.*:**

1 This is the culmination of the *Companies' Creditors Arrangement Act* [1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary

Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the Plan must be fair and reasonable.

See *Canadian Airlines Corp., Re*[2]

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Canadian Airlines Corp., Re*[3].

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Canadian Airlines Corp., Re*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Armbro Enterprises Inc., Re*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

23 Similarly, in *Uniforêt inc., Re*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of

employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* [8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Air Canada, Re* [10] and *Calpine Canada Energy Ltd., Re* [11] I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its

shareholders and creditors. The CCAA is such an Act: *Beatrice Foods Inc., Re* [12] and *Laidlaw, Re* [13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *A&M Cookie Co. Canada, Re* [14] and *MEI Computer Technology Group Inc., Re* [15]

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Application granted.

Footnotes

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

2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

3 Ibid,at para. 64 citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993] O.J. No. 545 (Ont. Gen. Div.) and *Cadillac Fairview Inc., Re*, [1995] O.J. No. 274 (Ont. Gen. Div. [Commercial List]).

4 Ibid, at para. 3.

5 (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.).

6 *Ibid*, at para. 6.

7 (2003), 43 C.B.R. (4th) 254 (C.S. Que.).

8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).

9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).

12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).

13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).

14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8.

15 [2005] Q.J. No. 22993 (C.S. Que.) at para. 9.

End of Document

tab 17

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax
III.14 Collection and remittance
III.14.b GST held in trust

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute

provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur 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 modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur 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 modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded 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. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount

collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur 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 modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer

sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas 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 et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et 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.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (C.A. Que.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (C.S. Que.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

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

Generally — referred to

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

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

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to
Cités et villes, Loi sur les, L.R.Q., c. C-19
en général — referred to
Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

art. 2930 — referred to
Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3
Generally — referred to
Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to
Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Fairness for the Self-Employed Act, S.C. 2009, c. 33
Generally — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to
Interpretation Act, R.S.C. 1985, c. I-21
s. 44(f) — considered
Personal Property Security Act, S.A. 1988, c. P-4.05
Generally — referred to
Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30
Generally — referred to
Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67(2) — considered

s. 67(3) — considered
Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23 — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered
Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered
Statutes considered *Abella J.* (dissenting):
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

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

1. Facts and Decisions of the Courts Below

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

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

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

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a

purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

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

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

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

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

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

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

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

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

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more

limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

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

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

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

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

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

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

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

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

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

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

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 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. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and

intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

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

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

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

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

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

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far

from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

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

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

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

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

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

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), 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. Gen. Div. [Commercial List])), 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.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), 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 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4).

Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

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

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

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

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, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — 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) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(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 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, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), 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:

> **222 (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.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant).* But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails

despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore

circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

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 (i);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2)

of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of

the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

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

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or

an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

End of Document

tab 18

Most Negative Treatment: Distinguished
Most Recent Distinguished: Shermag Inc., Re | 2009 QCCS 537, 2009 CarswellQue 2487, [2009] R.J.Q. 1289, EYB 2009-156550, J.E. 2009-897, 51 C.B.R. (5th) 95 | (C.S. Qué., Mar 26, 2009)

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J. No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as Amended, Section 185

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

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000 *
Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.
S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.
F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.
G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.
C.J. Shaw, Q.C., for Unionized Employees.
T. Mallett and *C. Feasby*, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

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

XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.c Appeal from refusal or granting of leave

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Table of Authorities

Cases considered by *Paperny J.*:

Alabama, New Orleans, Texas & Pacific Junction Railway, Re (1890), [1891] 1 Ch. 213, 60 L.J. Ch. 221, [1886-90] All E.R. Rep. Ext. 1143, 64 L.T. 127, 7 T.L.R. 171, 2 Meg. 377 (Eng. C.A.) — referred to

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — referred to

Algoma Steel Corp. v. Royal Bank (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.) — referred to

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 22 O.T.C. 247 (Ont. Gen. Div.) — referred to

Cadillac Fairview Inc., Re (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]) — considered

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — referred to

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — referred to

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

Crabtree (Succession de) c. Barrette, 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, (sub nom. *Barrette v. Crabtree (Succession de)*) 53 Q.A.C. 279, (sub nom. *Barrette v. Crabtree (Succession de)*) 150 N.R. 272, (sub nom. *Barrette v. Crabtree Estate)* 101 D.L.R. (4th) 66, (sub nom. *Barrette v. Crabtree Estate)* [1993] 1 S.C.R. 1027 (S.C.C.) — referred to

Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 (B.C. S.C.) — referred to

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.) — referred to

Hochberger v. Rittenberg (1916), 54 S.C.R. 480, 36 D.L.R. 450 (S.C.C.) — referred to

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246 (N.S. C.A.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Pente Investment Management Ltd. v. Schneider Corp. (1998), 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — referred to

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — referred to

Repap British Columbia Inc., Re (1998), 1 C.B.R. (4th) 49, 50 B.C.L.R. (3d) 133 (B.C. S.C.) — considered

Royal Oak Mines Inc., Re (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) — considered

Sammi Atlas Inc., Re (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

Savage v. Amoco Acquisition Co. (1988), 60 Alta. L.R. (2d) lv, 89 A.R. 80n, 70 C.B.R. (N.S.) xxxii, 89 N.R. 398n, 40 B.L.R. xxxii (S.C.C.) — considered

SkyDome Corp., Re (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List]) — referred to

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — considered

T. Eaton Co., Re (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — considered

Wandlyn Inns Ltd., Re (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) — referred to

Statutes considered:

Aeronautics Act, R.S.C. 1985, c. A-2

Generally — referred to

Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.)

Generally — referred to

Business Corporations Act, S.A. 1981, c. B-15

Generally — referred to

s. 167 [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1) [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1)(e) — considered

s. 167(1)(f) — considered

s. 167(1)(g.1) [en. 1996, c. 32, s. 1(4)] — considered

s. 183 — considered

s. 185 — considered

s. 185(2) — considered

s. 185(7) — considered

s. 234 — considered

Canada Transportation Act, S.C. 1996, c. 10

Generally — referred to

s. 47 — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 5.1(1) [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 6 [am. 1992, c. 27, s. 90(1)(f); am. 1996, c. 6, s. 167(1)(d)] — considered

s. 12 — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

APPLICATION by airline for approval of plan of arrangement; COUNTER-APPLICATION by investment corporation for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

***Paperny J.*:**

I. Introduction

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the *Companies' Creditors Arrangement Act* ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

3 Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. Background

Canadian Airlines and its Subsidiaries

4 CAC and CAIL are corporations incorporated or continued under the *Business Corporations Act* of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key

international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. $100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *oneworldTM* Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act.* AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction.

The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
>
> b) sales for future air travel were down by approximately 10% compared to 1998;
>
> c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances

was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;

(b) allow for the return of aircraft not required by Canadian; and

(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
>
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");

b. Claims in respect of certain outstanding or threatened litigation involving Canadian;

c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;

d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;

e. Claims of tax authorities against Canadian; and

f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

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

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured

creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

57 Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the *Alberta Business Corporations Act* ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. Analysis

59 Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

60 Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
>
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 172 and *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

62 Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

(a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;

(c) the notice calling the meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

63 I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24 th and April 7 th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

67 Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

> a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
>
> b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

68 The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

> (a) consolidating all of the issued and outstanding common shares into one common share;
>
> (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
>
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
>
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
>
> (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
>
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

69 Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be "subject to an order for re-organization"; and

b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

70 The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

71 The relevant portions of section 167 provide as follows:

167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,

(g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

72 Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	**Subsection 167(1), ABCA**
(a) — consolidation of Common Shares	167(1)(f)
(b) — change of designation and rights	167(1)(e)
(c) — cancellation	167(1)(g.1)
(d) — change in shares	167(1)(f)
(e) — change of designation and rights	167(1)(e)
(f) — cancellation	167(1)(g.1)

73 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

74 In R. Dickerson et al, *Proposals for a New Business Corporation Law for Canada*, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed,

it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co., supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

87 Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

88 Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on *Crabtree (Succession de) c. Barrette*, [1993] 1 S.C.R. 1027 (S.C.C.) at 1044 and *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "*excluding the claims excepted by s. 5.1(2) of the CCAA*" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

92 While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

96 The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

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

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) and *Re Alabama, New Orleans, Texas & Pacific Junction Railway* (1890), 60 L.J. Ch. 221 (Eng. C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

99 The results of the unsecured vote, as reported by the Monitor, are:

> 1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
>
> 2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
>
> 3. Abstentions: 15 representing $968,036 in value.

100 The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

101 The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, *Hochberger v. Rittenberg* (1916), 36 D.L.R. 450 (S.C.C.)

102 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 192-3 aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.

> Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in *Re Northland Properties Ltd.*

104 If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

105 The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities "feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

107 Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

108 Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

110 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

111 As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

112 The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

113 Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

114 While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

115 The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

> 1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
>
> 2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
>
> 3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and

4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

116 The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

117 The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

119 Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

120 There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

121 The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

123 Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

124 There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

125 If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are *not* treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

127 Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

128 CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto — Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto — Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

129 Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the *Aeronautics Act* and the *Canada Transportation Act*, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto — Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

131 There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

133 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million. There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

135 The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

136 Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

138 The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in *T. Eaton Co.*, *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

139 Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.).

141 The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in *First Edmonton Place*, *supra* at 57:

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd.*, *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

144 To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens"

to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

145 It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

146 Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

148 The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

149 It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

150 At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to *all* creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

152 The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

154 The evidence demonstrates that the sales of the Toronto — Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

155 Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

156 I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

157 Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

158 The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

161 Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

163 The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased *after* the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350, if any, is unaffected by the Plan and may be pursued after the stay is lifted.

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

165 The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited

consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing.

e. The Public Interest

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, *Reorganizations Under the Companies' Creditors Arrangement Act* (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C. S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd.*, *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Algoma Steel Corp. v. Royal Bank* (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would

undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.), *Quintette Coal*, *supra* and *Repap*, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to *Algoma Steel v. Royal Bank*, *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

180 I find that in all the circumstances, the Plan is fair and reasonable.

IV. Conclusion

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

Application granted; counter-applications dismissed.

Footnotes

* Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

End of Document

tab 19

1998 CarswellOnt 5319
Ontario Court of Justice, General Division [Commercial List]

Anvil Range Mining Corp., Re

1998 CarswellOnt 5319, 7 C.B.R. (4th) 51

In the Matter of Anvil Range Mining Corporation

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

In the Matter of the Courts of Justice Act, R.S.C. 1990, c. C-43, as Amended

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, as Amended

In the Matter of a Plan of Compromise or Arrangement of **Anvil Range Mining** Corporation, Applicants

Blair J.

Judgment: August 20,
1998
Docket: 98-BK-001208

Counsel: *George Karayannides* and *Ken Kraft*, for the Moving Party, Deloitte & Touche Inc. in its capacity as Interim Receiver.
Frederick L. Myers and *Edward A. Sellers*, for Yukon Territorial Government.
Michael Kainer, for United Steelworkers of America, Local 1051.
James H. Grout, for certain lien claimants referred to as the "Leitch Lien Claimants".
David Hager, for Cominco Ltd.
Tony Reyes, for certain lien claimants referred to as the "Rudolph lien claimants".
Neil Saxe, for Yukon Energy Corporation.
Derek T. Ground, for Ross River Dena First Nation and Ross River Dena Development Corporation.
Lynne O'Brien, for Development of Indian Affairs and Northern Development.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale
Headnote
Bankruptcy --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale
Interim receiver brought motion for court approval of recommendation to sell equipment of **mine** — Recommendation was supported by all secured creditors and all but one creditor — Government opposed sale out of concern for jobs and general public interest — Motion adjourned to allow government to do further analysis of underlying assumptions and underlying reports on which receiver relied in making recommendation — Court to consider social consequences of receivership — Loss that would result from delay in sale of equipment was minor.
A **mine** located in the Yukon Territories was placed under interim receivership. The interim receiver's opinion was that the **mine** could not be **re**-opened for five years, if at all, and it recommended that the "residual equipment", without which the **mine** could not be **re**-opened, be sold. It was estimated that the equipment would sell for less than $1,000,000. The receiver brought a motion for the court's approval of the sale. The secured creditors and all but one creditor supported the receiver's recommendation. The Yukon government and the union opposed the sale, concerned about jobs and the general public interest.

The **mine** represented about 20 per cent of the territory's economy. The government requested an adjournment of the motion, to enable a further analysis of the underlying assumptions and underlying reports on which the interim receiver relied in making its recommendation.

Held: The motion for court approval was adjourned.

The entitlement of secured creditors to pursue their legal remedies is not completely unrestricted, particularly where a secured creditor has resorted to a court-appointed receiver. The court, in a supervisory capacity, has a broader mandate. In the circumstances, where the outcome would affect the social and economic fabric of the community, the court's mandate encompassed having an eye for the social consequences of the receivership. Although such interests cannot override the lawful interests of the secured creditors, they must be weighed in the balance. The potential cash to be generated from the sale of equipment was not large, and there was not likely to be a material change in the value of the equipment if it was not sold in the current season. The loss that would result from a delay in the sale of the equipment was not too great a price to pay to preserve the social and political spirit of those who wished to see the **mine re**-open. The request for court approval was adjourned to enable the government to do further analysis, at its own cost.

MOTION by interim receiver for court approval of sale of equipment.

Blair J.:

1 In accordance with my Order of July 29,1998 the Interim Receiver has reported back today, and has filed a **Fourth** Report. In that Report it opines that, on the basis of its Market Analysis, and the assumptions on which it is based, it is unlikely that the Faro **Mine** can be **re**-opened within the next 2-3 years and possibly as long as 5 years, if at all. The Interim Receiver recommends that what is referred to as "the Residual Equipment", i.e. the equipment without which the **Mine** cannot be **re**-opened, be sold. This equipment consists, essentially, of **mine** Shovels, drills, and certain related equipment. Estimates of the price which this equipment is likely to fetch on a sale are somewhat elastic, but it would appear that the price **range** is less than $1 million for the equipment which is essential.

2 The Interim Receiver is supported in its recommendation by the secured creditors and by virtually all of the creditors except the Yukon Territorial Government ("YTG"). In other words, those with an "economic" interest in the assets favour their immediate sale. The YTG and the United Steelworkers oppose the sale at the present time, however, or at least seek a postponement. They represent the "social stakeholders" in the drama i.e. workers, and the Yukon public generally. Their concerns are jobs and the general public interest. The Faro **Mine** represents about 20% of the economy of the Yukon.

3 On behalf of the YTG, Mr. Myers asks that the sale not be approved or that the motion be adjourned to October to enable a futher analysis to be done with respect to the underlying assumptions of the **Fourth** Report (which is dated August 14, **1998** - 6 days ago) and of the underlying reports of Strathcona Mineral Services on which the Interim Receiver relies (and which were only recently provided to the YTG).

4 The problem is that any further delay will mean that the equipment will not be able to be sold until next season as a result of the early freeze-up in the Yukon.

5 Mr. Myers and Mr. Kainer (for the Union) argue that it is premature and too high a price to pay to sanction the sale of equipment now if that sale may in effect mean that the **Mine** will never **re**-open. They concede that the chances of the **Mine re**-opening, at least in the near future, are slim; but they argue that tolling the death knell for the **Mines** at this stage is not warranted - having regard for the need for time to do further analysis and the relatively minor value of the equipment as compared to its significance to the potential **re**-opening of the **Mine**.

6 Mr. Grout and Mr. Hager and others on behalf of the creditors point out that the creditors are virtually all supportive of the Interim Receiver's recommendations and that it is the creditors who are entitled to pursue their remedies.

7 I agree that it is difficult to be very optimistic about the future prospects of the Faro **Mine**, including the chances of its **re**-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a "standby-mode" ready to be made operative quickly when a period

of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

8 The Court must always consider with great deference the opinion of its appointed officer, the receiver and give the Report and its recommendations great weight. I do. I accept the recommendations completely, if the only perspective from which they must be considered is that of the debtor and the economic condition.

9 I also agree with Mr. Grout that the secured creditors are title to pursue their remedies under the laws of this country. However, that entitlement is not completely unrestricted, and there are many instances when that is so, but it is particularly the case where the secured creditor resorts to a Court appointed receiver. The Court in its supervisory capacity has a broader mandate. In a receivership such as this one, which reaches well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

10 Here, it seems to me that the potential cash which may be generated by the proposed sale - less than $1 million on over $30 million of claims - is not terribly large, in the overall scheme of things. The evidence is that there is not likely to be a material change in the value of the equipment if it is not sold this season.

11 In all of the circumstances, I do not think that the interest saving on something less than $1 million over a year is too great a price to pay to preserve the social and political spirit of those who wish to see the **Mine** re-open if at all possible. The Interim Receiver itself has not asked that the **Mine** be closed permanently and indeed in para. 32 of its **Fourth** Report recommends that a new **Mine** Plan be prepared.

12 I do not dismiss the request for approval to sell the equipment. I am, however, adjourning it to enable the YTG to do its further analysis, until October 29/98, a date on which other **Anvil Range** matters are scheduled to come before the Court again. The YTG should not expect the Interim Receiver (and thus the creditors) to bear the costs of doing the analysis, though.

13 The Whitehorse home has been sold and on closing a payment of approximately $3,000 in property taxes will be required to be made. The Interim Receiver is authorized to make such payment.

14 The additional issues with respect to directions concerning property taxes are adjourned as well to October 29/98.

Motion adjourned.

tab 20

1998 CarswellOnt 3346
Ontario Court of Justice, General Division [Commercial List]

Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re

1998 CarswellOnt 3346, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299, 72 O.T.C. 99, 81 A.C.W.S. (3d) 932

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

In the matter of a plan of compromise or arrangement of the
Canadian Red Cross Society/La Société canadienne de la Croix-Rouge

Blair J.

Judgment: August 19, 1998 *
Docket: 98-CL-002970

Proceedings: additional reasons at (August 19, 1998), Doc. 98-CL-002970 (Ont. Gen. Div. [Commercial List]); further additional reasons at (August 19, 1998), Doc. 98-CL-002790 (Ont. Gen. Div. [Commercial List])

Counsel: *B. Zarnett, B. Empey* and *J. Latham*, for Canadian Red Cross.
E.B. Leonard, S.J. Page and *D.S. Ward*, for Provinces except Que. and for the Canadian Blood Services.
Jeffrey Carhart, for Héma - Québec and for the Government of Québec.
Marlene Thomas and *John Spencer*, for the Attorney General of Canada.
Pierre R. Lavigne and *Frank Bennett*, for Quebec '86-90 Hepatitis C Claimants.
Pamela Huff and *Bonnie Tough*, for the 1986-1990 Haemophiliac Hepatitis C Claimants.
Harvin Pitch and *Kenneth Arenson*, for the 1986-1990 Hepatitis C Class Action Claimants.
Aubrey Kaufman and *David Harvey*, for the Pre 86/Post 90 Hepatitis C Class Action Claimants.
Bruce Lemer, for B.C. 1986-90 Class Action.
Donna Ring, for HIV Claimants.
David A. Klein, for B.C. Pre-86/Post-90 Hepatitis C Claimants.
David Thompson - Agent for Quebec Pre-86/Post 90 Hepatitis C Claimants.
Michael Kainer, for Service Employees International Union.
I.V.B. Nordheimer, for Bayer Corporation.
R.N. Robertson, Q.C., and *S.E. Seigel*, for T.D. Bank.
James H. Smellie, for the Canadian Blood Agency.
W.V. Sasso, for the Province of British Columbia.
Justin R. Fogarty, for Raytheon Engineers.
Nancy Spies, for Central Hospital et al (Co-D).
M. Thomson, for various physicians.
C. H. Freeman, for Blood Trac System.

Subject: Intellectual Property; Property; Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Commercial law
II Bulk sales
II.4 Requirements for valid sale
II.4.d Judicial exemption
Intellectual property
III Trade-marks
III.7 Transfer of interest
III.7.b Licence
III.7.b.i General principles

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Canadian Red Cross Society sought and obtained insolvency protection and supervision of court under Companies' Creditors Arrangement Act — Society brought motion for approval of sale and transfer of its blood supply assets and operations to two new agencies — Purchase price for assets was to be used to satisfy claims of transfusion claimants — Group of transfusion claimants brought cross-motion for order directing holding of meeting of creditors to consider counter-proposal based on Society's continued operation of blood system — Motion granted and cross-motion dismissed — Assets owned and controlled by Society were important to continued viability of blood supply operations and to seamless transfer of operations in interests of public health and safety — Proposed purchase price for assets was fair and reasonable in circumstances, and as close to maximum as was reasonably likely to be obtained for assets — Counter-proposal did not offer workable or practical alternative solution as neither Society nor claimants had any control over making counter-proposal happen — Counter-proposal was political and social solution which had to be effected by governments and could not be imposed by court in context of restructuring — Sections 4 and 5 of Act do not give creditors right to meeting or right to put forward proposal but right to request court to order meeting — Court had jurisdiction, under s. 11 of Act and inherently, to make order approving sale of assets before plan had been put forward and placed before creditors for approval — There was no realistic alternative to sale and transfer of assets proposed — Circumstances warranted exemption from compliance with provisions of Bulk Sales Act — Sale allowed subject to caveat that final terms and settlement of order to be negotiated and approved by court before order issued — Bulk Sales Act, R.S.O. 1990, c. B.14, s. 3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 4, 5, 11.
Bulk sales --- Requirements for valid sale — Judicial exemption
Canadian Red Cross Society sought and obtained insolvency protection and supervision of court under Companies' Creditors Arrangement Act — Society brought motion for approval of sale and transfer of its blood supply assets and operations to two new agencies — Purchase price for assets was to be used to satisfy claims of transfusion claimants — Group of transfusion claimants brought cross-motion for order directing holding of meeting of creditors to consider counter-proposal based on Society's continued operation of blood system — Motion granted and cross-motion dismissed — Circumstances warranted exemption from compliance with provisions of Bulk Sales Act — Sale would not impair Society's ability to pay its creditors in full — Claimants did not qualify as "creditors" under Bulk Sales Act — Sale allowed, subject to caveat that final terms and settlement of order to be negotiated and approved by court before order issued — Bulk Sales Act, R.S.O. 1990. c. B.14, s. 3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Blair J.*:

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) — applied

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

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.) — considered

Statutes considered:

Bulk Sales Act, R.S.O. 1990, c. B.14

Generally — referred to

s. 3 — considered

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11 — considered

MOTION by Society for approval of sale and transfer of its blood supply assets and operations; CROSS-MOTION by transfusion claimants for order directing holding of meeting of creditors to consider counter-proposal based on Society's continued operation of blood system.

***Blair J.*:**

Background and Genesis of the Proceedings

1 The Canadian Red Cross Society/La Société Canadienne de la Croix Rouge has sought and obtained the insolvency protection and supervision of the Court under the *Companies' Creditors Arrangement Act* ("CCAA"). It has done so with a view to putting forward a Plan to compromise its obligations to creditors and also as part of a national process in which responsibility for the Canadian blood supply is to be transferred from the Red Cross to two new agencies which are to form a new national blood authority to take control of the Canadian Blood Program.

2 The Red Cross finds itself in this predicament primarily as a result of some $8 billion of tort claims being asserted against it (and others, including governments and hospitals) by a large number of people who have suffered tragic harm from diseases contacted as a result of a blood contamination problem that has haunted the Canadian blood system since at least the early 1980's. Following upon the revelations forthcoming from the wide-ranging and seminal Krever Commission Inquiry on the Blood System in Canada, and the concern about the safety of that system — and indeed alarm — in the general population as a result of those revelations, the federal, provincial and territorial governments decided to transfer responsibility for the Canadian Blood Supply to a new national authority. This new national authority consists of two agencies, the Canadian Blood Service and Héma-Québec.

The Motions

3 The primary matters for consideration in these Reasons deal with a Motion by the Red Cross for approval of the sale and transfer of its blood supply assets and operations to the two agencies and a cross-Motion on behalf of one of the Groups of Transfusion Claimants for an order dismissing that Motion and directing the holding of a meeting of creditors to consider a counter-proposal which would see the Red Cross continue to operate the blood system for a period of time and attempt to generate sufficient revenues on a fee-for-blood-service basis to create a compensation fund for victims.

4 There are other Motions as well, dealing with such things as the appointment of additional Representative Counsel and their funding, and with certain procedural matters pertaining generally to the CCAA proceedings. I will return to these less central motions at the end of these Reasons.

Operation of the Canadian Blood System and Evolution of the Acquisition Agreement

5 Transfer of responsibility for the operation of the Canadian blood supply system to a new authority will mark the first time that responsibility for a nationally co-ordinated blood system has not been in the hands of the Canadian Red Cross. Its first blood donor clinic was held in January, 1940 - when a national approach to the provision of a blood supply was first developed. Since 1977, the Red Cross has operated the Blood Program furnishing the Canadian health system with a variety of blood and blood products, with funding from the provincial and territorial governments. In 1981, the Canadian Blood Committee, composed

of representatives of the governments, was created to oversee the Blood Program on behalf of the Governments. In 1991 this Committee was replaced by the Canadian Blood Agency — whose members are the Ministers of Health for the provinces and territories — as funder and co-ordinator of the Blood Program. The Canadian Blood Agency, together with the federal government's regulatory agency known as BBR (The Bureau of Biologics and Radiopharmaceuticals) and the Red Cross, are the principal components of the organizational structure of the current Blood Supply System.

6 In the contemplated new regime, The Canadian Blood Service has been designated as the vehicle by which the Governments in Canada will deliver to Canadians (in all provinces and territories except Quebec) a new fully integrated and accountable Blood Supply System. Quebec has established Héma-Québec as its own blood service within its own health care system, but subject to federal standards and regulations. The two agencies have agreed to work together, and are working in a co-ordinated fashion, to ensure all Canadians have access to safe, secure and adequate supplies of blood, blood products and their alternatives. The scheduled date for the transfer of the Canadian blood supply operations from the Red Cross to the new agencies was originally September 1, 1998. Following the adjournment of these proceedings on July 31 st to today's date, the closing has been postponed. It is presently contemplated to take place shortly after September 18, 1998 if the transaction is approved by the Court.

7 The assets owned and controlled by the Red Cross are important to the continued viability of the blood supply operations, and to the seamless transfer of those operations in the interests of public health and safety. They also have value. In fact, they are the source of the principal value in the Red Cross's assets which might be available to satisfy the claims of creditors. Their sale was therefore seen by those involved in attempting to structure a resolution to all of these political, social and personal problems, as providing the main opportunity to develop a pool of funds to go towards satisfying the Red Cross's obligations regarding the claims of what are generally referred to in these proceedings as the "Transfusion Claimants". It appears, through, that the Transfusion Claimants did not have much, if any, involvement in the structuring of the proposed resolution.

8 Everyone recognizes, I think, that the projected pool of funds will not be sufficient to satisfy such claims in full, but it is thought — by the Red Cross and the Governments, in any event — that the proceeds of sale from the transfer of the Society's blood supply assets represent the best hope of maximizing the return on the Society's assets and thus of maximizing the funds available from it to meet its obligations to the Transfusion Claimants.

9 This umbrella approach — namely, that the blood supply operations must be transferred to a new authority, but that the proceeds generated from that transfer should provide the pool of funds from which the Transfusion Claimants can, and should, be satisfied, so that the Red Cross may avoid bankruptcy and continue its other humanitarian operations — is what led to the marriage of these CCAA proceedings and the transfer of responsibility for the Blood System. The Acquisition Agreement which has been carefully and hotly negotiated over the past 9 months, and the sale from the Red Cross to the new agencies is — at the insistence of the Governments — subject to the approval of the Court, and they are as well conditional upon the Red Cross making an application to restructure pursuant to the CCAA.

10 The Initial Order was made in these proceedings under the CCAA on July 20 th .

The Sale and Transfer Transaction

11 The Acquisition Agreement provides for the transfer of the operation of the Blood Program from the Red Cross to the Canadian Blood Service and Héma-Québéc, together with employees, donor and patient records and assets relating to the operation of the Program on September 1, 1998. Court approval of the Agreement, together with certain orders to ensure the transfer of clear title to the Purchasers, are conditions of closing.

12 The sale is expected to generate about $169 million in all, before various deductions. That sum is comprised of a purchase price for the blood supply assets of $132.9 million plus an estimated $36 million to be paid for inventory. Significant portions of these funds are to be held in escrow pending the resolution of different issues; but, in the end, after payment of the balance of the outstanding indebtedness to the T-D Bank (which has advanced a secured line of credit to fund the transfer and re-structuring) and the payment of certain creditors, it is anticipated that a pool of funds amounting to between $70 million and $100 million may be available to be applied against the Transfusion Claims.

13 In substance, the new agencies are to acquire all fixed assets, inventory, equipment, contracts and leases associated with the Red Cross Blood Program, including intellectual property, information systems, data, software, licences, operating procedures and the very important donor and patient records. There is no doubt that the sale represents the transfer of the bulk of the significant and valuable assets of the Red Cross.

14 A vesting order is sought as part of the relief to be granted. Such an order, if made, will have the effect of extinguishing realty encumbrances against and security interest in those assets. I am satisfied for these purposes that appropriate notification has been given to registered encumbrancers and other security interest holders to permit such an order to be made. I am also satisfied, for purposes of notification warranting a vesting order, that adequate notification of a direct and public nature has been given to all of those who may have a claim against the assets. The CCAA proceedings themselves, and the general natural of the Plan to be advanced by the Red Cross — including the prior sale of the blood supply assets — has received wide coverage in the media. Specific notification has been published in principal newspapers across the country. A document room containing relevant information regarding the proposed transaction, and relevant financial information, was set up in Toronto and most, if not all, claimants have taken advantage of access to that room. Richter & Partners were appointed by the Court to provide independent financial advice to the Transfusion Claimants, and they have done so. Accordingly, I am satisfied in terms of notification and service that the proper foundation for the granting of the Order sought has been laid.

15 What is proposed, to satisfy the need to protect encumbrancers and holders of personal security interests is,

a) that generally speaking, prior registered interests and encumbrances against the Red Cross's lands and buildings will not be affected-i.e., the transfer and sale will take place subject to those interests, or they will be paid off on closing; and,

b) that registered personal property interests will either be assumed by the Purchasers or paid off from the proceeds of closing in accordance with their legal entitlement.

Whether the Purchase Price is Fair and Reasonable

16 The central question for determination on this Motion is whether the proposed Purchase Price for the Red Cross's blood supply related assets is fair and reasonable in the circumstances, and a price that is as close to the maximum as is reasonably likely to be obtained for such assets. If the answer to this question is "Yes", then there can be little quarrel — it seems to me- with the conversion of those assets into cash and their replacement with that cash as the asset source available to satisfy the claims of creditors, including the Transfusion claimants. It matters not to creditors and Claimants whether the source of their recovery is a pool of cash or a pool of real/personal/intangible assets. Indeed, it may well be advantageous to have the assets already crystallised into a cash fund, readily available and earning interest. What is important is that the value of that recovery pool is as high as possible.

17 On behalf of the 1986-1990 Québec Hepatitis C Claimants Mr. Lavigne and Mr. Bennett argue, however, that the purchase price is *not* high enough. Mr. Lavigne has put forward a counter-proposal which he submits will enhance the value of the Red Cross's blood supply assets by giving greater play to the value of its exclusive licence to be the national supplier of blood, and which will accordingly result in a much greater return for Claimants. This proposal has been referred to as the "Lavigne Proposal" or the "No-Fault Plan of Arrangement". I shall return to it shortly; but first I propose to deal with the submissions of the Red Cross and of those who support its Motion for approval, that the proposed price is fair and reasonable. Those parties include the Governments, the proposed Purchasers — the Canadian Blood Service and Héma-Québec — and several (but not all) of the other Transfusion Claimant Groups.

18 As I have indicated, the gross purchase price under the Acquisition Agreement is $132.9 million, plus an additional amount to be paid for inventory on closing which will generate a total purchase price of approximately $169 million. Out of that amount, the Bank indebtedness is to be paid and the claims of certain other creditors defrayed. It is estimated that a fund of between $70 million and $100 million will be available to constitute the trust fund to be set aside to satisfy Transfusion Claims.

19 This price is based upon a Valuation prepared jointly by Deloitte & Touche (financial advisor to the Governments) and Ernst & Young (financial advisor to the Red Cross and the present Monitor appointed under the Initial CCAA Order). These two financial advisors retained and relied upon independent appraisal experts to appraise the realty (Royal LePage), the machinery and equipment and intangible assets (American Appraisal Canada Inc.) and the laboratories (Pellemon Inc.). The experience, expertise and qualifications of these various experts to conduct such appraisals cannot be questioned. At the same time, it must be acknowledged that neither Deloitte & Touche nor Ernst & Young are completely "independent" in this exercise, given the source of their retainers. It was at least partly for this reason that the Court was open to the suggestion that Richter & Partners be appointed to advise the 1986-1990 Ontario Class Action Claimants (and through them to provide independent advice and information to the other groups of Transfusion Claimants). The evidence and submissions indicate that Richter & Partners have met with the Monitor and with representatives of Deloitte & Touche, and that all enquiries have been responded to.

20 Richter & Partners were appointed at the instance of the 1986-1990 Ontario Hepatitis C Claimants Richter & Partners, with a mandate to share their information and recommendations with the other Groups of Transfusion Claimants. Mr. Pitch advises on behalf of that Group that as a result of their due diligence enquiries his clients are prepared to agree to the approval of the Acquisition Agreement, and, indeed urge that it be approved quickly. A significant number of the other Transfusion Claimant groups — but by no means all — have taken similar positions, although subject in some cases to certain caveats, none of which pertain to the adequacy of the purchase price. On behalf of the 1986-1990 Hemophiliac Claimants, for instance, Ms. Huff does not oppose the transfer approval, although she raises certain concerns about certain terms of the Acquisition Agreement which may impinge upon the amount of monies that will be available to Claimants on closing, and she would like to see these issues addressed in any Order, if approval is granted. Mr. Lemer, on behalf of the British Columbia 1986-1990 Hepatitis C Class Action Claimants, takes the same position as Ms. Huff, but advises that his clients' further due diligence has satisfied them that the price is fair and reasonable. While Mr. Kaufman, on behalf of Pre 86/Post 90 Hepatitis C Claimants, advances a number of jurisdictional arguments against approval, his clients do not otherwise oppose the transfer (but they would like certain caveats applied) and they do not question the price which has been negotiated for the Red Cross's blood supply assets. Mr. Kainer for the Service Employees Union (which represents approximately 1,000 Red Cross employees) also supports the Red Cross Motion, as does, very eloquently, Ms. Donna Ring who is counsel for Ms. Janet Conners and other secondarily infected spouses and children with HIV.

21 Thus, there is broad support amongst a large segment of the Transfusion Claimants for approval of the sale and transfer of the blood supply assets as proposed.

22 Some of these supporting Claimants, at least, have relied upon the due diligence information received through Richter & Partners, in assessing their rights and determining what position to take. This independent source of due diligence therefore provides some comfort as to the adequacy of the purchase price. It does not necessarily carry the day, however, if the Lavigne Proposal offers a solution that may reasonably practically generate a higher value for the blood supply assets in particular and the Red Cross assets in general. I turn to that Proposal now.

The Lavigne Proposal

23 Mr. Lavigne is Representative Counsel for the 1986-1990 Québec Hepatitis C Claimants. His cross-motion asks for various types of relief, including for the purposes of the main Motion,

> a) an order dismissing the Red Cross motion for court approval of the sale of the blood supply assets;
>
> b) an order directing the Monitor to review the feasibility of the Lavigne Proposal's plan of arrangement (the "No-Fault Plan of Arrangement") which has now been filed with the Court of behalf of his group of "creditors"; and,
>
> c) an order scheduling a meeting of creditors within 6 weeks of the end of this month for the purpose of voting on the No-Fault Plan of Arrangement.

24 This cross-motion is supported by a group of British Columbia Pre 86/Post 90 Hepatitis C Claimants who are formally represented at the moment by Mr. Kaufman but for whom Mr. Klein now seeks to be appointed Representative Counsel. It is also supported by Mr. Lauzon who seeks to be appointed Representative Counsel for a group of Québec Pre 86/Post 90 Hepatitis C Claimants. I shall return to these "Representation" Motions at the end of these Reasons. Suffice it to say at this stage that counsel strongly endorsed the Lavigne Proposal.

25 The Lavigne Proposal can be summarized in essence in the following four principals, namely:

1. Court approval of a no-fault plan of compensation for all Transfusion Claimants, known or unknown;

2. Immediate termination by the Court of the Master Agreement presently governing the relationship between the Red Cross and the Canadian Blood Agency, and the funding of the former, which Agreement requires a one-year notice period for termination;

3. Payment in full of the claims of all creditors of the Red Cross; and,

4. No disruption of the Canadian Blood Supply.

26 The key assumptions and premises underlying these notions are,

• that the Red Cross has a form of monopoly in the sense that it is the only blood supplier licensed by Government in Canada to supply blood to hospitals;

• that, accordingly, this license has "value", which has not been recognized in the Valuation prepared by Deloitte & Touche and by Ernst & Young, and which can be exploited and enhanced by the Red Cross continuing to operate the Blood Supply and charging hospitals directly on a fully funded cost recovery basis for its blood services;

• that Government will not remove this monopoly from the Red Cross for fear of disrupting the Blood Supply in Canada;

• that the Red Cross would be able to charge hospitals sufficient amounts not only to cover its costs of operation (without any public funding such as that now coming from the Canadian Blood Agency under the Master Agreement), but also to pay all of its creditors ***and*** to establish a fund which would allow for compensation over time to all of the Transfusion Claimants; and, finally,

• that the no-fault proposal is simply an introduction of the Krever Commission recommendations for a scheme of no-fault compensation for all transfusion claimants, for the funding of the blood supply program as through direct cost recovery from hospitals, and for the inclusion of a component for a compensation fund in the fee for service delivery charge.

27 In his careful argument in support of his proposal Mr. Lavigne was more inclined to couch his rationale for the No-fault Plan in political terms rather than in terms of the potential value created by the Red Cross monopoly licence and arising from the prospect of utilizing that monopoly licence to raise revenue on a fee-for-blood-service basis, thus leading — arguably — to an enhanced "value" of the blood supply operations and assets. He seemed to me to be suggesting, in essence, that because there are significant Transfusion Claims outstanding against the Red Cross, Government as the indirect purchaser of the assets should recognize this and incorporate into the purchase price an element reflecting the value of those claims. It was submitted that because the Red Cross has (or, at least, will have had) a monopoly licence regarding the supply of blood products in Canada, and because it *could* charge a fee-for-blood-service to hospitals for those services and products, and because other regimes in other countries employ such a fee for service system and build in an insurance or compensation element for claims, and because the Red Cross *might* be able to recover such an element in the regime he proposes for it, then the purchase price *must* reflect the value of those outstanding claims in some fashion. I am not able to understand, in market terms, however, why the value of a debtor's assets is necessarily reflective in any way of the value of the claims against those assets. In fact, it is the stuff of

the everyday insolvency world that exactly the opposite is the case. In my view, the argument is more appropriately put — for the purposes of the commercial and restructuring considerations which are what govern the Court's decisions in these types of CCAA proceedings — on the basis of the potential increase in value from the revenue generating capacity of the monopoly licence itself. In fairness, that is the way in which Mr. Lavigne's Proposal is developed and justified in the written materials filed.

28 After careful consideration of it, however, I have concluded that the Lavigne Proposal cannot withstand scrutiny, in the context of these present proceedings.

29 Farley Cohen — a forensic a principal in the expert forensic investigative and accounting firm of Linquist Avery Macdonald Baskerville Company — has testified that in his opinion the Red Cross operating licence "provides the potential opportunity and ability for the Red Cross to satisfy its current and future liabilities as discussed below". Mr. Cohen then proceeds in his affidavit to set out the basis and underlying assumptions for that opinion in the following paragraphs, which I quote in their entirety:

> 1. In my opinion, if the Red Cross can continue as a sole and exclusive operator of the Blood Supply Program and can amend its funding arrangements to provide for full cost recovery, including the cost of proven claims of Transfusion Claimants, and whereby the Red Cross would charge hospitals directly for the Blood Safety Program, **then there is a substantial value to the Red Cross to satisfy all the claims against it**.
>
> 2. **In my opinion, such value to the Red Cross is not reflected in the Joint Valuation Report**.
>
> 3. My opinion is based on the following assumptions: (i) the Federal Government, while having the power to issue additional licences to other Blood System operators, would not do so in the interest of public safety; (ii) the Red Cross can terminate the current funding arrangement pursuant to the terms of the Master Agreement; and (iii) the cost of blood charged to the hospitals would not be cost-prohibitive compared to alternative blood suppliers.

(highlighting in original)

30 On his cross-examination, Mr. Cohen acknowledged that he did not know whether his assumptions could come true or not. That difficulty, it seems to me, is an indicia of the central weakness in the Lavigne Proposal. The reality of the present situation is that all 13 Governments in Canada have determined unequivocally that the Red Cross will no longer be responsible for or involved in the operation of the national blood supply in this country. That is the evidentiary bedrock underlying these proceedings. If that is the case, there is simply no realistic likelihood that any of the assumptions made by Mr. Cohen will occur. His opinion is only as sound as the assumptions on which it is based.

31 Like all counsel — even those for the Transfusion Claimants who do not support his position — I commend Mr. Lavigne for his ingenuity and for his sincerity and perseverence in pursing his clients' general goals in relation to the blood supply program. However, after giving it careful consideration as I have said, I have come to the conclusion that the Lavigne Proposal — whatever commendation it my deserve in other contexts — does not offer a workable or practical alternative solution in the context of these CCAA proceedings. I question whether it can even be said to constitute a "Plan of Compromise and Arrangement" within the meaning of the CCAA, because it is not something which either the debtor (the Red Cross) or the creditors (the Transfusion Claimants amongst them) have control over to make happen. It is, in reality, a political and social solution which must be effected by Governments. It is not something which can be imposed by the Court in the context of a restructuring. Without deciding that issue, however, I am satisfied that the Proposal is not one which in the circumstances warrants the Court in exercising its discretion under sections 4 and 5 of the CCAA to call a meeting of creditors to vote on it.

32 Mr. Justice Krever recommended that the Red Cross not continue in the operation of the Blood Supply System and, while he did recommend the introduction of a no-fault scheme to compensate all blood victims, it was not a scheme that would be centred around the continued involvement of the Red Cross. It was a government established statutory no-fault scheme. He said (Final Report, Vol. 3, p. 1045):

> The provinces and territories of Canada should devise statutory no-fault schemes that compensate all blood-injured persons promptly and adequately, so they do not suffer impoverishment or illness without treatment. I therefore recommend that,

without delay, the provinces and territories devise statutory no-fault schemes for compensating persons who suffer serious adverse consequences as a result of the administration of blood components or blood products.

33 Governments — which are required to make difficult choices — have chosen, for their own particular reasons, not to go down this particular socio-political road. While this may continue to be a very live issue in the social and political arena, it is not one which, as I have said, is a solution that can be imposed by the Court in proceedings such as these.

34 I am satisfied, as well, that the Lavigne Proposal ought not to impede the present process on the basis that it is unworkable and impractical, in the present circumstances, and given the determined political decision to transfer the blood supply from the Red Cross to the new agencies, might possibly result in a disruption of the supply and raise concerns for the safety of the public if that were the case. The reasons why this is so, from an evidentiary perspective, are well articulated in the affidavit of the Secretary General of the Canadian Red Cross, Pierre Duplessis, in his affidavit sworn on August 17, 1998. I accept that evidence and the reasons articulated therein. In substance Dr. Duplessis states that the assumptions underlying the Lavigne Proposal are "unrealistic, impractical and unachievable for the Red Cross in the current environment" because,

> a) the political and factual reality is that Governments have clearly decided — following the recommendation of Mr. Justice Krever — that the Red Cross will not continue to be involved in the National Blood Program, and at least with respect to Québec have indicated that they are prepared to resort to their powers of expropriation if necessary to effect a transfer;
>
> b) the delays and confusion which would result from a postponement to test the Lavigne Proposal could have detrimental effects on the blood system itself and on employees, hospitals, and other health care providers involved in it;
>
> c) the Master Agreement between the Red Cross and the Canadian Blood Agency, under which the Society currently obtains its funding, cannot be cancelled except on one year's notice, and even if it could there would be great risks in denuding the Red Cross of all of its existing funding in exchange for the prospect of replacing that funding with fee for service revenues; and,
>
> d) it is very unlikely that over 900 hospitals across Canada — which have hitherto not paid for their blood supply, which have no budgets contemplating that they will do so, and which are underfunded in event — will be able to pay sufficient sums to enable the Red Cross not only to cover its operating costs and to pay current bills, but also to repay the present Bank indebtedness of approximately $35 million in full, and to repay existing unsecured creditors in full, ***and*** to generate a compensation fund that will pay existing Transfusion Claimants (it is suggested) in full for their $8 billion in claims.

35 Dr. Duplessis summarizes the risks inherent in further delays in the following passages from paragraph 17 of his affidavit sworn on August 17, 1998:

> The Lavigne Proposal that the purchase price could be renegotiated to a higher price because of Red Cross' ability to operate on the terms the Lavigne Proposal envisions is not realistic, because Red Cross does not have the ability to operate on those terms. Accordingly, there is no reason to expect that CBS and H-Q would pay a higher amount than they have already agreed to pay under the Acquisition Agreement. Indeed, there is a serious risk that delays or attempts to renegotiate would result in lower amounts being paid. Delaying approval of the Acquisition Agreement to permit an experiment with the Lavigne Proposal exposes Red Cross and its stakeholders, including all Transfusion Claimants, to the following risks:
>
> (a) continued losses in operating the National Blood Program which will reduce the amounts ultimately available to all stakeholders;
>
> (b) Red Cross' ability to continue to operate its other activities being jeopardized;

(c) the Bank refusing to continue to support even the current level of funding and demanding repayment, thereby jeopardizing Red Cross and all of Red Cross' activities including the National Blood Program;

(d) CBS and H-Q becoming unprepared to complete an acquisition on the same financial terms given, among other things, the costs which they will incur in adjusting for later transfer dates, raising the risks of exproporiation or some other, less favourable taking of Red Cross' assets, or the Governments simply proceeding to set up the means to operate the National Blood Program without paying the Red Cross for its assets.

36 These conclusions, and the evidentiary base underlying them, are in my view irrefutable in the context of these proceedings.

37 Those supporting the Lavigne Proposal argued vigorously that approval of the proposed sale transaction in advance of a creditors' vote on the Red Cross Plan of Arrangment (which has not yet been filed) would strip the Lavigne Proposal of its underpinnings and, accordingly, would deprive those "creditor" Transfusion Claimants from their statutory right under the Act to put forward a Plan and to have a vote on their proposed Plan. In my opinion, however, Mr. Zarnett's response to that submission is the correct one in law. Sections 4 and 5 of the CCAA do not give the creditors *a right* to a meeting or a right to put forward a Plan and to insist on that Plan being put to a vote; they have *a right to request the Court to order a meeting*, and the Court will do so if it is in the best interests of the debtor company and the stakeholders to do so. In this case I accept the submission that the Court ought not to order a meeting for consideration of the Lavigne Proposal because the reality is that the Proposal is unworkable and unrealistic in the circumstances and I see nothing to be gained by the creditors being called to consider it. In addition, as I have pointed out earlier in these Reasons, a large number of the creditors and of the Transfusion Claimants oppose such a development. The existence of a statutory provision permitting creditors to apply for an order for the calling of a meeting does not detract from the Court's power to approve a sale of assets, assuming that the Court otherwise has that power in the circumstances.

38 The only alternative to the sale and transfer, on the one hand, and the Lavigne Proposal, on the other hand, is a liquidation scenario for the Red Cross, and a cessation of its operations altogether. This is not in the interests of anyone, if it can reasonably be avoided. The opinion of the valuation experts is that on a liquidation basis, rather than on a "going concern" basis, as is contemplated in the sale transaction, the value of the Red Cross blood supply operations and assets varies between the mid — $30 million and about $74 million. This is quite considerable less than the $169 million (+/-) which will be generated by the sale transaction.

39 Having rejected the Lavigne Proposal in this context, it follows from what I have earlier said that I conclude the purchase price under the Acquisition Agreement is fair and reasonable, and a price that is as close to the maximum as is reasonably likely to be obtained for the assets.

Jurisdiction Issue

40 The issue of whether the Court has jurisdiction to make an order approving the sale of substantial assets of the debtor company before a Plan has been put forward and placed before the creditors for approval, has been raised by Mr. Bennett. I turn now to a consideration of that question.

41 Mr. Bennett argues that the Court does not have the jurisdiction under the CCAA to make an order approving the sale of substantial assets by the Applicant Company before a Plan has even been filed and the creditors have had an opportunity to consider and vote on it. He submits that section 11 of the Act permits the Court to extend to a debtor the protection of the Court pending a restructuring attempt but only in the form of a stay of proceedings against the debtor or in the form of an order restraining or prohibiting new proceedings. There is no jurisdiction to approve a sale of assets in advance he submits, or otherwise than in the context of the sanctioning of a Plan already approved by the creditors.

42 While Mr. Kaufman does not take the same approach to a jurisdictional argument, he submits nonetheless that although he does not oppose the transfer and approval of the sale, the Court cannot grant its approval at this stage if it involves "sanitizing" the transaction. By this, as I understand it, he means that the Court can "permit" the sale to go through — and presumably

the purchase price to be paid — but that it cannot shield the assets conveyed from claims that may subsequently arise-such as fraudulent preference claims or oppression remedy claims in relation to the transaction. Apart from the fact that there is no evidence of the existence of any such claims, it seems to me that the argument is not one of "jurisdiction" but rather one of "appropriateness". The submission is that the assets should not be freed up from further claims until at least the Red Cross has filed its Plan and the creditors have had a chance to vote on it. In other words, the approval of the sale transaction and the transfer of the blood supply assets and operations should have been made a part and parcel of the Plan of Arrangement put forward by the debtor, and the question of whether or not it is appropriate and supportable in that context debated and fought out on the voting floor, and not separately before-the-fact. These sentiments were echoed by Mr. Klein and by Mr. Thompson as well. In my view, however, the assets either have to be sold free and clear of claims against them-for a fair and reasonable price — or not sold. A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back. In the context of the transfer of the Canadian blood supply operations, the prospect of such a claw back of assets sold, at a later time, has very troubling implications for the integrity and safety of that system. I do not think, firstly, that the argument is a jurisdictional one, and secondly, that it can prevail in any event.

43 I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan": *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), per Farley J., at p. 110.

44 As Mr. Zarnett pointed out, paragraph 20 of the Initial Order granted in these proceedings on July 20, 1998, makes it a condition of the protection and stay given to the Red Cross that it not be permitted to sale or dispose of assets valued at more than $1 million without the approval of the Court. Clearly this is a condition which the Court has the jurisdiction to impose under section 11 of the Act. It is a necessary conjunction to such a condition that the debtor be entitled to come back to the Court and seek approval of a sale of such assets, if it can show it is in the best interests of the Company and its creditors as a whole that such approval be given. That is what it has done.

45 It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> (emphasis added)

46 In the spirit of that approach, and having regard to the circumstances of this case. I am satisfied not only that the Court has the jurisdiction to make the approval and related orders sought, but also that it should do so. There is no realistic alternative to the sale and transfer that is proposed, and the alternative is a liquidation/bankruptcy scenario which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To fore go that purchase price — supported as it is by reliable expert evidence — would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.

47 While the authorities as to exactly what considerations a court should have in mind in approving a transaction such as this are scarce, I agree with Mr. Zarnett that an appropriate analogy may be found in cases dealing with the approval of a sale by a court-appointed receiver. In those circumstances, as the Ontario Court of Appeal has indicated in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at p. 6, the Court's duties are,

> (i) to consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) to consider the interests of the parties;
>
> (iii) to consider the efficacy and integrity of the process by which offers are obtained; and,
>
> (iv) to consider whether there has been unfairness in the working out of the process.

48 I am satisfied on all such counts in the circumstances of this case.

49 Some argument was directed towards the matter of an order under the *Bulk Sales Act*. Because of the nature and extent of the Red Cross assets being disposed of, the provisions of that Act must either be complied with, or an exemption from compliance obtained under s. 3 thereof. The circumstances warrant the granting of such an exemption in my view. While there were submissions about whether or not the sale would impair the Society's ability to pay its creditors in full. I do not believe that the sale will *impair* that ability. In fact, it may well enhance it. Even if one accepts the argument that the emphasis should be placed upon the language regarding payment "in full" rather than on "impair", the case qualifies for an exemption. It is conceded that the Transfusion claimants do not qualify as "creditors" as that term is defined under the *Bulk Sales Act*; and if the claims of the Transfusion Claimants are removed from the equation, it seems evident that other creditors could be paid from the proceeds in full.

Conclusion and Treatment of Other Motions

50 I conclude that the Red Cross is entitled to the relief it seeks at this stage, and orders will go accordingly. In the end, I come to these conclusions having regard in particular to the public interest imperative which requires a Canadian Blood Supply with integrity and a seamless, effective and relatively early transfer of blood supply operations to the new agencies; having regard to the interests in the Red Cross in being able to put forward a Plan that may enable it to avoid bankruptcy and be able to continue on with its non-blood supply humanitarian efforts; and having regard to the interests of the Transfusion Claimants in seeing the value of the blood supply assets maximized.

51 Accordingly an order is granted — subject to the caveat following — approving the sale and authorizing and approving the transactions contemplated in the Acquisition Agreement, granting a vesting order, and declaring that the *Bulk Sales Act* does not apply to the sale, together with the other related relief claimed in paragraphs (a) through (g) of the Red Cross's Notice of Motion herein. The caveat is that the final terms and settlement of the Order are to be negotiated and approved by the Court before the Order is issued. If the parties cannot agree on the manner in which the "Agreement Content" issues raised by Ms. Huff and Mr. Kaufman in their joint memorandum of comments submitted in argument yesterday, I will hear submissions to resolve those issues.

Other Motions

52 The Motions by Mr. Klein and by Mr. Lauzon to be appointed Representative Counsel for the British Columbia and Québec Pre86/Post 90 Hepatitis C Claimants, respectively, are granted. It is true that Mr. Klein had earlier authorized Mr. Kaufman to accept the appointment on behalf of his British Columbia group of clients, but nonetheless it may be — because of differing settlement proposals emanating to differing groups in differing Provinces — that there are differences in interests between these groups, as well as differences in perspectives in the Canadian way. As I commented earlier, in making the original order appointing Representative Counsel, the Court endeavours to conduct a process which is both fair and *perceived* to be fair. Having regard to the nature of the claims, the circumstances in which the injuries and diseases inflicting the Transfusion Claimants have been sustained, and the place in Canadian Society at the moment for those concerns, it seems to me that those particular claimants, in those particular Provinces, are entitled if they wish to have their views put forward by those counsel who are already and normally representing them in their respective class proceedings.

53 I accept the concerns expressed by Mr. Zarnett on behalf of the Red Cross, and by Mr. Robertson on behalf of the Bank, about the impact of funding on the Society's cash flow and position. In my earlier endorsement dealing with the appointment of Representative Counsel and funding, I alluded to the fact that if additional funding was required to defray these costs those in a position to provide such funding may have to do so. The reference, of course, was to the Governments and the Purchasers. It is the quite legitimate but nonetheless operative concerns of the Governments to ensure the effective and safe transfer of the blood supply operations to the new agencies which are driving much of what is happening here. Since the previous judicial hint was not responded to, I propose to make it a specific term and condition of the approval Order that the Purchasers, or the Governments, establish a fund — not to exceed $2,000,000 at the present time without further order — to pay the professional costs incurred by Representative Counsel and by Richter & Partners.

54 The other Motions which were pending at the outset of yesterday's Hearing are adjourned to another date to be fixed by the Commercial List Registrar.

55 Orders are to go in accordance with the foregoing.

Motion granted; cross-motion dismissed.

Footnotes

* Additional reasons at (1998), 5 C.B.R. (4th) 319 (Ont. Gen. Div. [Commercial List]); further additional reasons at (1998), 5 C.B.R. (4th) 321 (Ont. Gen. Div. [Commercial List]).

tab 21

Rescue!

The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

University of British Columbia Faculty of Law and
Peter Wall Institute for Advanced Studies

Second edition

2013

CARSWELL®

are frequently far greater. To an extent, senior creditors already adjust for the cost of firm financial distress in their credit decisions, including costs associated with court-supervised workouts. They also have the bargaining power during the *CCAA* process to win price adjustments in the cost of future financing that account for recognition of stakeholder or public interest or compromise of their claims. Moreover, there are more general price adjustments in the market where there is a risk of firm failure and secured creditors have the economic bargaining power to make price adjustments to spread risk. However, there are also cases where secured creditors are not able to make price adjustments, and where their support of a plan is contingent on the plan reducing their going-forward exposure. While the secured creditors may bear a portion of the *CCAA* process costs, they will have first call on any upside benefits to be extracted from a successful workout.

Consideration of the public interest is one aspect of the court's assessment of the viability and fairness of the proposed plan within the existing statutory scheme of priorities. The court has held that there is a broader public dimension that must be considered and weighed in the balance, as well as the interests of those most directly affected.[207]

The *Canadian Red Cross Society CCAA* proceeding illustrates that what is in the public interest in *CCAA* proceedings is not always apparent. The case involved the insolvency of the Canadian Red Cross Society after thousands of transfusion patients received tainted blood, given a decision by the debtor Red Cross not to test for particular types of contaminated blood, resulting in more than 30,000 cases of harmed transfusion recipients who became claimants. In considering a motion to adjourn a proceeding to approve a proposed asset sale that divested Red Cross of the national blood program where tight timing was critical, the Court, in deciding the issue, was required to balance multiple interests, those of the creditors, and federal, provincial and territorial governments. It was clearly in the public interest to "ensure the seamless continuation of the delivery of safe blood products across Canada" and the preservation of the human capital involved in that delivery.[208] However, the Court also took account of the public and private interest in allowing the transfusion claimants, as creditors, to be meaningfully

---

[207] *Re Skydome Corp.* (27 November 1998), Blair J. (Ont. Gen. Div.). Elsewhere, I have analyzed the "public interest" as a "short form" for the complex balancing of diverse interests in which the court engages in determining disputes that arise during a *CCAA* proceeding. If investments are properly valued, the "redistributive outcome" is really one of according value to human capital and other investments that should have been accorded a value much earlier in the process. Then any redistributive outcomes from recognizing those interests are really a tempering of the redistributive effects of the current regime, where value flows to capital claimants to the detriment of other kinds of investors. See Janis P. Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003).

[208] *In the Matter of the Companies' Creditors Arrangement Act, Canadian Red Cross Society/La scoieté canadienne de la croix-rouge,* (Ont. S.C.J.), Court File No. 98-CL-002970, Endorsement (31 July 1998), Blair J. at 2.

involved in the process. The Court noted that the continued viability and safety of the blood system was absolutely essential and the failure to proceed created a serious risk of firm failure and loss of the service of key employees. On the other hand, to deny the adjournment would result in three classes of transfusion claimants being deprived of a reasonable opportunity to assess whether the asset sale would provide a maximization of returns on Red Cross' blood related assets.

The Court in *Canadian Red Cross Society* held that the *CCAA* process and approval of the sale of assets must be seen to be fair and reasonable to the transfusion claimants whose interests lie at the heart of the process. The interests of the transfusion claimants, although a contingent interest in the sense of the type and quantum of claims, were nevertheless recognized as valid. Here, the Court noted that the people whose claims from blood contamination injuries resulted in the *CCAA* application, and for whose benefit the result of the sale process is aimed, were left out of the process until after the *CCAA* proceedings were commenced.[209] As a consequence, the Court granted an adjournment of two weeks to allow representative counsel a reasonable opportunity to assess the proposed asset sale. The Court's decision represented not only a balancing of the interests and prejudices at that stage of the proceeding, but also sent a message to Red Cross that the process must necessarily involve adequate notice and timely disclosure in order to make the participation of the contingent creditors and other stakeholders meaningful.

The court's concern for the public interest and the diverse interests implicated in insolvency was recognized in *Re Curragh Inc.*, which was the first time that a Canadian court granted substantive rights to stakeholders beyond the value of their fixed capital claims.[210] The Court granted participation rights and substantive remedies to reflect the interests of a First Nation Council, and to the territorial government in a representative capacity on behalf of Yukon miners. The Court in *Curragh* also recognized the Ross River First Nation as a party, the first time that a First Nation had been recognized as a party in a commercial restructuring proceeding. The Ross River Dena Nation had three kinds of interests. It had relatively minor fixed capital claims owed to its economic development corporation, the Ross River Development Corporation (RRDC). The Ross River Dena Nation was also seeking to enforce First Nation land claims against the corporation, where it was asserting title to Curragh's lands. Finally, as part of the community affected by the social and economic losses from the firm's distress, it had a broader interest in the outcome of the proceedings. While the Court declined to hear the Nation's argument regarding land claims, treaty rights and the right to mine, it held that

---

[209] *Ibid.*

[210] *Re Curragh Inc.*, 1994 CarswellOnt 2415 (Ont. Gen. Div. [Commercial List]). Frederick Myers and Edward Sellers, "Recognition of Social Stakeholders in Canadian Insolvency Proceedings" (1999) 11 Commercial Insolvency Reporter 6 at 68.

tab 22

2015 BCSC 656
British Columbia Supreme Court

TLC The Land Conservancy of British Columbia, Inc. No. S36826, Re

2015 CarswellBC 1089, 2015 BCSC 656, [2015] B.C.W.L.D. 3910, 24 C.B.R. (6th) 255, 253 A.C.W.S. (3d) 26

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

In the Matter of TLC The Land Conservancy of British Columbia, Inc. No. S36826, and The TLC Land Conservancy (Enterprises) Ltd., Petitioners

Fitzpatrick J.

Heard: April 2, 2015
Judgment: April 27, 2015
Docket: Vancouver S137436

Counsel: Mary I.A. Buttery, H. Lance Williams for Petitioners
Jonathan L. Williams for Monitor
Francesca V. Marzari for District of Tofino
Bryan Hicks for Carlyon Holdings Ltd.
Greg Gehlen for Habitat Conservation Trust Foundation
Patrick Canning for Ecoforesty Institute Society
John van Cuylenborg for John and Carmel Thomson

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval
Petitioner TLC was founded in 1996 as non-profit charitable land trust with stated goal of protecting lands with ecological, agricultural or cultural importance — TLC acquired various properties and monitored conservation covenants on others and it funded activities through variety of sources but by October 2013, it had insufficient funds to continue — TLC's ability to deal with many of its properties was hampered by its own bylaws prohibiting mortgage or sale except in limited circumstances — TLC applied for protection under Companies' Creditors Arrangement Act — On March 14, 2014, court granted claims process order which was successfully implemented — By February 2015, TLC owned properties acquired at cost of $46.5 million, but with 2014 assessed value of $31.96 million — Secured creditors were owed $4.5 million — Unsecured creditors were owed $3.6 million — Following meeting at which many creditors expressed willingness to sacrifice portion of financial recovery to assist TLC in achieving goals, it created plan of compromise and arrangement that provided for transfer of all properties to third parties or like-minded organizations, leaving it to continue to monitor conservation covenants and intervene in disposition of important conservation properties where appropriate — Through plan, TLC expected to recover $6.8 million from divesture of seven core properties, hoped to recover $2.2 million from four additional properties and was less certain about potential for recovery from seven impeded properties — It anticipated court approval would be required for any disposition involving

trust or inalienability, and that plan would be completed in three phases over 18 months with secured claims paid in first and unsecured claims paid in part in second and completely in third — Plan allowed for possibility some creditors might take income tax receipt in return for forgiving claim, freeing up additional funds — Fourteen of 30 secured creditors having 96.45 per cent of claims voted in favour of plan — Ninety-three of 152 unsecured creditors having 99.54 per cent of claims voted in favour of plan — Petitioner brought application for court approval — Application granted — Monitor supported plan and confirmed TLC had, to best of its knowledge, complied with all requirements under Act — There was nothing to suggest TLC had done anything contrary to Act — Plan was fair and reasonable — Overwhelming approval of creditors' rendered other factors less relevant — Circumstances unique in that broader concerns outweighed purely financial considerations — Plan would serve broader community interests and should be implemented as proposed.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

AbitibiBowater Inc., Re (2010), 2010 CarswellQue 10118, 2010 QCCS 4450, 72 C.B.R. (5th) 80 (C.S. Que.) — referred to

Bul River Mineral Corp., Re (2015), 22 C.B.R. (6th) 301, 2015 CarswellBC 156, 2015 BCSC 113 (B.C. S.C.) — referred to

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — followed

Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, 1989 CarswellBC 334 (B.C. C.A.) — followed

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

TLC The Land Conservancy of British Columbia, Inc. No. S36826, Re (2014), 2014 BCSC 97, 2014 CarswellBC 160, 96 E.T.R. (3d) 17, [2014] 7 W.W.R. 122, 58 B.C.L.R. (5th) 321 (B.C. S.C.) — followed

TLC The Land Conservancy of British Columbia Inc. No. S36826, Re (2014), 65 B.C.L.R. (5th) 284, 2014 BCCA 473, 2014 CarswellBC 3568, 2 E.T.R. (4th) 52, 379 D.L.R. (4th) 101 (B.C. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 6(1)(a) — considered

Society Act, R.S.B.C. 1996, c. 433

Generally — referred to

APPLICATION by petitioners for order approving plan of compromise and arrangement under *Companies' Creditors Arrangements Act*.

***Fitzpatrick J.*:**

Introduction

1 In October 2013, the petitioners (who I will collectively call "TLC"), filed for protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 Over the last year and-a-half, TLC's restructuring efforts have been directed toward the competing goals of repaying its creditors and meeting its fundamental mandate of preserving and protecting important heritage and ecologically-sensitive

properties. Through the substantial efforts of TLC, its advisors and creditors, and the broader stakeholder community, these goals have now been happily aligned such that the creditors have approved a plan of compromise and arrangement dated February 23, 2015 (the "Plan").

3 The Plan is, to some extent, simply a waypoint in the ongoing process of TLC to deal with the properties under its control and administration. There is considerable uncertainty and risk remaining in terms of the outcome of that process. In any event, TLC now applies for an order sanctioning the Plan and directing implementation of it.

4 At the conclusion of the hearing, the order sought was granted with reasons to follow. These are those reasons.

Background

5 The background of TLC and the early days of these *CCAA* proceedings were summarized in my earlier reasons indexed at *TLC The Land Conservancy of British Columbia, Inc. No. S36826, Re*, 2014 BCSC 97 (B.C. S.C.) at paras. 1-22 (the "Reasons"); rev'd in part *TLC The Land Conservancy of British Columbia Inc. No. S36826, Re*, 2014 BCCA 473 (B.C. C.A.) (the "Appeal Reasons").

6 It is helpful, however, for the purpose of this application to reproduce the salient portions of that background.

7 In 1996, TLC was registered as a society pursuant to the *Society Act*, R.S.B.C. 1996, c. 433. It is a non-profit charitable land trust, with the stated goal to protect certain lands with ecological, agricultural or cultural importance. Its activities are part of the broader land conservancy movement in Canada.

8 Article 2 of TLC's Constitution sets out its purposes:

> 2. The purposes of the society are:
>
> > (a) to contribute to and improve the education, health and welfare of the general public and to benefit the community as a whole by the promotion and encouragement of the protection, preservation, restoration, beneficial use and management of primarily;
> >
> > > (1) plants, animals and natural communities that represent diversity of life on Earth by protecting the lands and waters they need to survive, and secondarily;
> > >
> > > (2) areas of scientific, historical, cultural, scenic and compatible outdoor recreational value;
> >
> > (b) to promote such charitable activities or endeavors, including the acquisition, management and disposal of land and interests in land, as may in the opinion of the Society board of directors appear to contribute to the above objectives;
> >
> > (c) to encourage co-operation in, support for and research into, and education regarding all matters pertaining to the fulfillment of the above objectives;
> >
> > (d) to do all such other things as are incidental or ancillary to the attainment of the purposes and the exercise of the powers of [TLC].

9 At the time of the *CCAA* filing, TLC was holding various properties in addition to monitoring various conservation covenants on properties to ensure compliance with those covenants. TLC's financial needs were funded from a variety of sources, including: private or community foundations, individual donations, membership dues, other land trusts, corporate donations, gaming commission money, government grants, community collectives and event and direct product sales. In some cases, TLC also obtained mortgage funding to acquire properties.

10 The *CCAA* filing was necessitated when TLC found itself without adequate funding for its activities. To put it bluntly, TLC's desire to protect these properties appears to have overshadowed the need to see that funding was secured to do so.

11 While TLC sought to deal with some of its properties, both before and after the filing, in some instances it was restricted from doing so by its own bylaws. As I described in the Reasons:

> [12] TLC's problems were compounded by various restrictions as to how they could deal with the various properties. TLC's Bylaws set out certain powers and actions the TLC Board of directors may exercise in respect of property owned by TLC. In particular, the Bylaws contemplated that properties could be designated as "inalienable" and that once designated, TLC was prohibited from mortgaging or selling that property save in certain limited circumstances. Over half of the 50 properties were so designated. These provisions were designed to enhance the permanence of these conservation efforts but they have also largely hamstrung TLC in finding a solution to its financial woes.

12 On October 7, 2013, TLC sought creditor protection pursuant to the *CCAA*. At that time, TLC owed in excess of $7.5 million to its secured and unsecured creditors. The value of TLC's properties exceeded $43.7 million.

13 The filing was unique in that TLC's circumstances were materially different than those of most insolvent entities that are attempting to deal with their creditors so as to stay in business. TLC's stated intention was to restructure its operations, assets and affairs to enable it to continue its conservation efforts and fulfill TLC's general purposes as a land trust in British Columbia. The restructuring was intended to be accomplished through a reduction in operating costs, retirement or restructuring of its debt, growing its membership and funding and, perhaps most importantly, adopting a more entrepreneurial model that would see a more secure basis for its funding. Critical to the plan was the sale or transfer of its land holdings, to the extent possible, in order to eliminate debt and fund its ongoing operations.

14 The uniqueness of TLC's restructuring proceedings also arose from the stance of most of its creditors, many of which are TLC members or benefactors. Many of TLC's creditors were supporters of its efforts and that support, in some instances being significant, continued throughout the course of the restructuring.

15 Despite that support, the course of the restructuring has not been a smooth one. TLC's efforts to deal with a house in West Vancouver designed by Dr. Bertram Charles Binning, known as the "Binning House", met with defeat at the hands of the University of British Columbia (see the Appeal Reasons). While some properties were disposed of, many others remained, which required TLC and others to address various issues. Those issues included whether dispositions were restricted based on TLC's bylaws or restricted based on trust requirements. On the latter point, the Attorney General of British Columbia has been and remains actively involved in monitoring these proceedings to identify any trust issues for the court.

16 Increasingly, TLC realized that if it had any chance of successfully restructuring, so that it could continue to pursue its good works, it needed an overall plan in terms of dealing with its properties. In addition, that plan had to meet the twin goals of respecting its mandate of preserving and protecting the properties that the public expected or required and also providing some recovery to its creditors.

17 The ability of TLC to continue in these proceedings has been possible only with significant financial and other support from various stakeholders. Interim financing was provided by Carlyon Holdings Ltd. TLC has also been supported in a broader sense by the community at large, including special interest groups who are interested in particular properties held by TLC and, of course, the public and benefactors who continue to make donations to the cause. Finally, I would be remiss in not mentioning that the professionals assisting TLC in its restructuring efforts, including its counsel, Wolrige Mahon Limited (the "Monitor"), and the Monitor's counsel, have largely gone unpaid since the filing so as to assist TLC's in its cash needs.

18 On March 4, 2014, the court granted a claims process order which has been successfully implemented.

19 As of February 2015, TLC continued to own various properties which had been acquired at a cost of $46.5 million. The 2014 assessed value of those properties was $31.96 million. However, as the Monitor notes, given the potential restrictions on disposition, or opposition from special interest groups that TLC faces, the applicability of those values, or even that of appraisals, is highly questionable.

20 In order to move forward with the finalization of a restructuring plan, TLC embarked on a process to test the willingness of its creditors to perhaps sacrifice some of their financial recovery in aid of assisting TLC in achieving its overall goals. TLC convened an information meeting of its creditors on Vancouver Island in early January 2015. Significant support for TLC was evident from those in attendance at that meeting. Later still, TLC did a "straw poll" of its creditors to gauge the level of their willingness to support TLC and that poll also indicated support of TLC.

21 With that positive support in hand, TLC set about crafting a plan that would see TLC's creditors possibly receiving less than they might otherwise receive in a liquidation or bankruptcy, but would enable TLC to survive and continue its efforts while adhering to its governing principles of land conservancy.

The Plan and the Meeting

The Plan

22 The Monitor has summarized TLC's stated purpose and effect of the Plan as being:

> [P]rotecting the Properties under TLC's stewardship to the greatest extent possible, whilst recovering funds to pay all creditors to the fullest extent possible.

while having the following objectives:

> Making an equitable repayment to creditors via the transfer of the Properties while preserving the charitable purposes for which they were protected;
>
> Reducing the financial obligations of TLC associated with ownership/stewardship of the Properties in order that it may operate with long-term viability;
>
> Causing the least harm to the Land Trust Movement generally while restructuring under the *CCAA*.

23 The overall objective of the plan is, therefore, to transfer all of the properties held to third parties or like-minded agencies of organizations, while leaving TLC to continue its mandate of monitoring and upholding the conservation covenants and intervening in the dispositions of important conservation properties as appropriate.

24 There are two classes of creditors, being the "Secured Class" and the "Unsecured Class".

25 The Secured Class includes the interim financing (approximately $1.8 million as of December 2014), and the professional fees secured under court-ordered charges (approximately $1.2 million as of December 2014). There are other secured charges totalling approximately $1.5 million (including property taxes). The Plan contemplates that the Secured Class will be repaid in full, have their secured debt assumed by a third party, or receive the mortgaged property in settlement of their secured debt.

26 Approximately $3.6 million is owed to the Unsecured Class. This class includes trade creditors, being arms-length suppliers of goods, services and labour (including claims of former employees), who are owed approximately $1.6 million as well as non-trade creditors, being holders of promissory notes, many of whom are TLC members or benefactors who are owed approximately $2 million. The Plan contemplates an initial distribution to the Unsecured Class by distributing an amount that is the lesser of the total amount claimed or $5,000 (estimated distribution of $378,000).

27 Within the Plan, TLC has grouped the properties into three categories, defined as the "Core Properties", the "Additional Properties" and the "Impeded Properties".

28 The Core Properties consist of seven properties where anticipated recoveries are described by the Monitor as having a "fairly high degree of certainty" in terms of TLC's stated intentions in relation to those properties. The Plan contemplates TLC divesting itself of all Core Properties and generating $6.8 million from a combination of sales for cash or transfers for debt assumption, to preferred purchasers, or cash from the transfer of densities to developers.

29 One of the properties in this category includes a portion (29%) of TLC's 35% interest in five contiguous parcels of undeveloped real estate comprising approximately 188 acres in the district of Saanich in Victoria, British Columbia (known as "Maltby Lake"). On April 2, 2015, TLC applied for, and the court granted, an approval and vesting order that would see a transfer of this interest to John and Carmel Thomson for the sum of $750,000.

30 In addition, TLC has entered into an agreement with the Nature Conservancy of Canada and the Nature Trust of British Columbia to purchase 28 other ecologically-sensitive properties, being part of the Core Properties, for $1.5 million.

31 The Additional Properties consist of or relate to four specific properties. The Plan contemplates that TLC will recover its legal and other costs relating to Binning House and the litigation relating to Binning House, and that it will divest itself of the three other properties. TLC anticipates generating $2.2 million from a combination of sales for cash or transfers for debt assumption to preferred purchasers, together with the anticipated recovery of costs relating to Binning House. The anticipated level of recovery in relation to the Additional Properties is less certain than that of the Core Properties.

32 For example, one of the Additional Properties consists of 77 acres of land, a timber licence and improvements in Nanaimo, British Columbia ("Wildwood Forest"), which was bequeathed to TLC by Merv Wilkinson with the intention of preserving the forestry practice of sustainable eco-forestry. I am advised that trust issues arise with respect to Wildwood Forest. In addition, this is one of the properties that have been declared by TLC to be inalienable, which may factor into how TLC deals with Wildwood Forest in the future.

33 Finally, the Impeded Properties present the greatest challenge to TLC in that the Plan describes that there are "significant impediments to deriving value from potential sale or transfer of them within the timeframe considered given the protection afforded to the properties". The Impeded Properties consist of seven properties. By the date of the application, two of those properties had been resolved by agreements that provide for the transfer of them to the relevant Regional Districts where they are located. The other properties are to be retained for the time being, or later transferred to suitable charitable organizations, if such an opportunity should arise in the future.

34 The Plan provides for an 18-month implementation period with distributions to creditors in three tranches.

35 The first tranche of the Plan is projected to be completed within six months of court approval of the Plan, whereby all of the claims in the Secured Class are to be satisfied. As well, approximately $760,000 is anticipated to become available for distribution to the Unsecured Class, with the funds coming from TLC's surplus cash on hand, cash from TLC's projected revenue stream and the proceeds of sale, debt assumption, debt forgiveness, and donations arising from the disposition of the Core Properties and some recovery from the Additional Properties.

36 The second tranche of the Plan is projected to be completed within 12 months of court approval, whereby approximately $1.61 million is to be generated from the disposition or transfer of the remaining Additional Properties, with all funds being distributed to the Unsecured Class. The Monitor notes that these transactions are "uncertain as to value and timing".

37 The third tranche of the Plan, and the Plan itself, is projected to be completed within 18 months of court approval. In this tranche, it is projected that approximately $2.5 million will be generated from density transfers associated with certain Core Properties. It is possible that, in this tranche, sufficient funds will be available to be distributed to complete repayment in full of the Unsecured Class (approximately $1.1 million payment). However, the Monitor notes that these transactions have a much higher degree of uncertainty.

38 As I have stated above, there is increasing uncertainty relating to whether TLC will be able to achieve its stated goals in respect of the various properties. In its 13th report, dated February 19, 2015, the Monitor stated, however, the Plan provides for a deadline of June 30, 2016, which will provide TLC an opportunity to file a revised plan after that date:

> In the Monitor's view, while the overall eighteen month projected timeline for completion of the Plan may not be unreasonable, it is subject to significant uncertainty and 3rd party actions outside the control of TLC. To mitigate these

uncertainties, the Plan contains a self-imposed deadline of June 30, 2016 for completion of the Tranche 3 density transfers. If this deadline is not met, the Plan contemplates that TLC will seek input from creditors and the Court concerning the filing of a revised Plan by July 30, 2016.

39 Given the substantial financial support that it has received from its creditors in the past, the Plan also allows for the potential of creditors electing to take an income tax receipt in return for forgiving a claim, thereby increasing the return otherwise available to remaining creditors.

40 Given that the properties will be addressed in the future, there has been considerable discussion between TLC, creditors and interested parties concerning what notice will be made in respect of proposed transactions where there may be trust or inalienability issues. Counsel for Carlyon Holdings Ltd, the District of Tofino, the Ecoforestry Institute Society and the Habitat Conservation Trust Foundation have spoken to that issue in light of their concerns, and no doubt others have similar concerns. In light of these concerns, the Plan requires that TLC seek court approval of any proposed disposition in three separate circumstances:

a) where the Attorney General believes that there should be a determination as to a potential trust;

b) where the property has been declared to be inalienable in accordance with the bylaws (although TLC may address that issue with its members and in accordance with its Constitution); and

c) where TLC seeks to vest an encumbrance off the title.

The Meeting

41 On February 23, 2015, the court granted a meeting and process order authorizing TLC to file the Plan and convene, hold and conduct meetings of creditors to vote in respect of the Plan. That meeting took place in Victoria, British Columbia, on March 30, 2015.

42 At the meeting, the Plan was considered by the Secured Class and Unsecured Class. I am advised that the Monitor's 13 th report was presented to the creditors prior to the votes being taken.

43 The Plan was overwhelmingly approved by both classes. Of the 30 secured creditors, 15 voted. Fourteen secured creditors, having 96.45% of the dollar value of the claims voted, were in favour of the Plan. Of the 152 unsecured creditors, 94 voted. Ninety-three unsecured creditors, having 99.54% of the dollar value of the claims voted, were in favour of the Plan.

44 Accordingly, TLC overwhelmingly achieved the requisite double majority vote.

Discussion

45 The statutory authority upon which the Plan may be sanctioned is s. 6(1) of the *CCAA:*

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company[.]

46 Even if the requisite double majority vote is obtained, the court retains a statutory discretion as to whether the plan of arrangement will be sanctioned.

47 In *Northland Properties Ltd., Re* (1989), 34 B.C.L.R. (2d) 122 (B.C. C.A.), at 127 , the court restated the well-known principles to be considered on this application:

> (1) There must be strict compliance with all statutory requirements ...;
>
> (2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.; [and]
>
> (3) The plan must be fair and reasonable.

48 These continue to be the relevant considerations and they are applied across Canada. See *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]), at para. 14; *Bul River Mineral Corp., Re*, 2015 BCSC 113 (B.C. S.C.), at para. 40.

Has TLC Complied with Statutory Requirements?

49 The Monitor supports the Plan and submits that, to the best of its knowledge, TLC has complied with all requirements of the *CCAA*, including the requirements under the meeting and process order. The evidence of one of TLC's directors, John Shields, is to similar effect.

50 Accordingly, I conclude that TLC has satisfied all statutory requirements arising under the *CCAA*.

Has TLC Acted Contrary to the CCAA?

51 Madam Justice Pepall (as she then was). observed in *Canwest* that, in making a determination as to whether any unauthorized steps have been taken by the petitioners, the court should rely on the evidence put forward by the parties and the reports of the monitor: para. 17.

52 Again, Mr. Shields confirms that TLC has complied with the *CCAA* and all orders granted in these proceedings and has been acting, and continues to act, in good faith and with due diligence. The Monitor does not dispute that TLC has not breached any order granted in these proceedings nor done or purported to do anything that is not authorized by the *CCAA*.

53 Further, there is full confidence by most stakeholders, as particularly evidenced by the positive creditor vote, that TLC will continue to act in good faith and with due diligence in respect of the implementation of the Plan. Any concerns are largely addressed by the requirements in both the Plan and the sanction order that TLC provide regular reports on its progress and that, in certain circumstances, the Monitor may become involved in reviewing TLC's progress in implementing the Plan.

54 I conclude that this requirement is satisfied.

Is the Plan Fair and Reasonable?

55 The exercise of the court's discretion, when considering whether the plan fairly balances the interests of all stakeholders, should be "informed by the objectives of the *CCAA*, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons": *Canwest* at para. 20.

56 Relevant factors to be considered are set out in *Canwest* at para. 21 and include:

> a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
>
> b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
>
> c) alternatives available to the plan and bankruptcy;

d) oppression of the rights of creditors;

e) unfairness to shareholders; and

f) the public interest.

57 I have already outlined the voting on the Plan which was overwhelmingly in favour of it. As such, the vote stands as a significant factor in this analysis: *Northland Properties* at paras. 127-128; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.), at 506 ; *AbitibiBowater Inc., Re*, 2010 QCCS 4450 (C.S. Que.) , at para. 35, (2010), 72 C.B.R. (5th) 80 (C.S. Que.). No creditor or other stakeholder now opposes the Plan as being unfair or unreasonable.

58 The endorsement of the Plan as fair and reasonable, by the substantial majority of creditors, remains important. This is so given the unique circumstances here where commercial considerations have clearly been overtaken by the broader wish to ensure that TLC remains a viable entity able to deal with its properties responsibly and in accordance with its mandate, and that even after completion of the property dispositions, TLC remains a viable member of the land conservation movement. Despite the considerable uncertainties as to whether TLC will be able to monetize its remaining interests and repay its debts, in whole or in part, the creditors are overwhelmingly in support.

59 For this reason, the factors relating to alternatives, and what might be recovered in a bankruptcy and liquidation, are of less relevance here to the extent that one might even accurately assess what that might be in this case.

60 The Monitor stated in its 13th report:

> Given TLC's unique characteristics and circumstances, and subject to the assumptions, uncertainties and risks identified by the Monitor in this Report, the Monitor considers the Plan to be fair and reasonable.

61 I have no hesitation in concluding that the sanction of the Plan serves the objectives that underlie the *CCAA*. Indeed, the result here is what Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services Inc.], at para. 14, described as the "second most desirable outcome" in terms of a compromise being accepted by the creditors by which the debtor company "emerges from the *CCAA* proceedings as a going concern." As submitted by TLC's counsel, the comments of the court in *Century Services* are apposite:

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

62 TLC has certainly achieved common ground with the vast majority of its creditors.

63 It is often the case that, in sanctioning a plan, the court must consider what the court in *Canwest* referred to as the "broader constituency of affected persons". Similarly, the court in *Century Services* stated:

> 60 ... In addition, court 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[.]

64 It is not often the case that the court is aware of the specifics as to how these "broader public interests" are affected by the *CCAA* proceedings or any proposed plan of arrangement. Usually, the major participants are the debtor and certain creditors.

Certainly, it is evident here that TLC's directors and employees have worked tirelessly, sometimes in difficult circumstances, to move this matter forward to this point. Their passion and commitment to the land conversancy movement has been plain to see.

65 This is not one of those cases where the Court has to speculate about what those broader interests might entail. It is beyond dispute that in TLC's case, such broader interests were engaged and the Court has heard directly from many of those interests on the important issues raised during the course of these proceedings. The involvement of the Ecoforestry Institute Society and the Habitat Conservation Trust Foundation are but an example of community involvement in TLC's restructuring efforts. The Plan clearly discloses that many other community groups and societies were and remain involved in assisting in TLC's efforts while ensuring that TLC respects any trust requirements or other restrictions in relation to the properties. A key part of that involvement is the significant offer from the Nature Conservancy of Canada and the Nature Trust of British Columbia, whose mandate is the same or similar to that of TLC, but who are better situated to address the ongoing protection of the 28 important properties that they will receive.

66 Further, although technically creditors of TLC (regarding property taxes), many local government authorities, such as the City of Victoria, the Capital Regional District, the Cowichan Valley Regional District and the District of Tofino, remain involved in ensuring the protection and preservation of important ecological, heritage and cultural properties within their communities for the benefit of the public.

67 There are many other stakeholders or interested parties which I have not named, but which have been involved in this successful restructuring.

68 All of these stakeholders, including the creditors, have contributed and assisted, no doubt in varying degrees, in TLC's efforts and to its success in developing the Plan. The success achieved to date and any future success, as contemplated by the Plan, will not only be the success of TLC, but the success of them all.

69 I find that the Plan is fair and reasonable.

Conclusion and Disposition

70 In conclusion, I am satisfied that TLC is in compliance with the requirements of the *CCAA*, and that the petitioners have not acted contrary to the *CCAA* or any court orders granted in these proceedings. Finally, I am satisfied that the Plan is fair and reasonable.

71 The order is granted sanctioning the Plan on the terms sought.

Application granted.

End of Document

tab 23

2015 QCCS 1920
Cour supérieure du Québec

Bloom Lake, g.p.l., Re

2015 CarswellQue 4072, 2015 QCCS 1920, 27 C.B.R. (6th) 1, J.E. 2015-830, EYB 2015-251727

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 and Bloom lake railway company limited, Mises en cause, and FTI Consulting Cananda Inc., Monitor, and 9201955 Canada inc., Mise en cause, and Eabametoong first nation, Ginoogaming first nation, Constance Lake first nation and Long Lake # 58 first nation, Aroland first nation and Marten Falls first nation, Objectors, and 8901341 Canada inc. and Canadian Development And Marketing Corporation, Interveners

Hamilton J.C.S.

Heard: 24 april 2015
Judgment: 27 april 2015
Docket: C.S. Qué. Montréal 500-11-048114-157

Counsel: Me Bernard Boucher, Me Sébastien Guy, Me Steven J. Weisz for Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited, Cliffs Quebec Iron Mining ULC, The Bloom Lake Iron Ore Mine Limited Partnership, Bloom Lake Railway Company Limited
Me Sylvain Rigaud, Me Chrystal Ashby for FTI Consulting Canada Inc.
Me Jean-Yves Simard, Me Sean Zweig for 9201955 Canada Inc.
Me Stéphane Hébert, Me Maurice Fleming for Eabametoong First Nation Ginoogaming First Nation, Constance Lake First Nation and Long Lake # 58 First Nation, Aroland First Nation, Marten Falls First Nation
Me Sandra Abitan, Me Éric Préfontaine, Me Julien Morissette for 8901341 Canada inc. Canadian Development and Marketing Corporation

Subject: Civil Practice and Procedure; Insolvency; Public
Related Abridgment Classifications
Aboriginal and Indigenous law
XII Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous
Civil practice and procedure
III Parties
III.4 Standing
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Sellers, who were parent company and affiliates of petitioners, sought to sell interests in chromite mining projects in Ring of Fire mining district — Sellers executed initial Share Purchase Agreement (SPA) with N, which made provision for "superior proposal" mechanism allowing sellers to accept unsolicited, superior offer from third party — Petitioners commenced motion for issuance of approval and vesting order with respect to initial SPA — C made unsolicited, superior offer — Sellers developed

supplemental bid process giving C and N chance to submit their best and final offers — Sellers ultimately accepted N's higher bidding offer and entered into revised SPA with N — Petitioners amended their motion to seek issuance of approval and vesting order with respect to revised SPA — Ruling was made on petitioners' amended motion — Motion was granted — Sale process was fair, reasonable and efficient within s. 36(3)(a) of Companies' Creditors Arrangement Act — There was no legal requirement that sale process be approved in advance — Sellers had no obligation to accept C's unsolicited and superior offer and to terminate initial SPA — Initial SPA permitted sellers to terminate it, but did not require them to do so — Sellers' supplemental bid process was very reasonable and fair, and in best interests of creditors — N submitted its offer in compliance with rules, and there was no fundamental flaw in process such as parties having unequal access to information or one party seeking to amend its offer after it had knowledge of other offers.

Aboriginal and indigenous law --- Miscellaneous

Sellers, who were parent company and affiliates of petitioners, sought to sell interests in chromite mining projects in Ring of Fire mining district — Sellers executed initial Share Purchase Agreement (SPA) with N, which made provision for "superior proposal" mechanism allowing sellers to accept unsolicited, superior offer from third party — Petitioners commenced motion for issuance of approval and vesting order with respect to initial SPA — First Nations bands filed objection to motion — Following C's unsolicited superior offer and supplemental bidding process, sellers accepted N's highest bidding offer and entered into revised SPA with N — Petitioners amended their motion to seek issuance of approval and vesting order with respect to revised SPA, but First Nations bands maintained their objection — Ruling was made on petitioners' amended motion — Motion was granted — It was not clear to what extent First Nations bands had knowledge of sale process and could have participated — There was no evidence to suggest that bands on their own could have made serious offer, or that they would have partnered with party that was not already identified and included in process — It was pure speculation whether First Nations would have presented offer in excess of N's offer — Sale of shares from one private party to another did not trigger duty to consult First Nations — It was difficult to see how granting of two or three percent royalty impacted rights of First Nations bands.

Civil practice and procedure --- Parties — Standing

Parties had standing and their objections were not dismissed due to lack of interest or standing.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Vendeurs, qui représentaient la société mère et les filiales des pétitionnaires, voulaient vendre leurs intérêts dans les projets miniers de chromite dans le district minier du Cercle de Feu — Vendeurs ont signé avec N une convention d'achat d'actions prévoyant un mécanisme de [TRADUCTION] « propositions supérieures » qui permettait aux vendeurs d'accepter des offres supérieures non-sollicitées — Pétitionnaires ont déposé une requête en vue d'obtenir une ordonnance d'approbation et d'acquisition portant sur la convention — C a fait une offre supérieure non-sollicitée — Vendeurs ont élaboré un processus de soumissions supplémentaire permettant à C et N de présenter leurs meilleures offres finales — Vendeurs ont accepté l'offre supérieure de N et ont signé une convention d'achat d'actions révisée avec N — Pétitionnaires ont déposé une requête modifiée en vue de l'émission d'une ordonnance d'approbation et d'acquisition portant sur la convention révisée — Décision a été rendue à la suite du dépôt de la requête modifiée par les pétitionnaires — Requête a été accordée — Processus de vente a été équitable, raisonnable et efficace au regard de l'art. 36(3)a) de la Loi sur les arrangements avec les créanciers des compagnies — Il n'existait aucune obligation juridique de faire approuver la vente à l'avance — Vendeurs n'avaient pas l'obligation d'accepter l'offre supérieure non-sollicitée de C et de mettre fin à la convention initiale — Convention initiale autorisait les vendeurs à y mettre fin, mais ne l'exigeait pas — Processus de soumissions supplémentaire des vendeurs était très raisonnable et équitable, et dans le meilleur intérêt des créanciers — N a présenté son offre en conformité avec les règles, donc il n'y avait pas d'erreur fondamentale dans le processus qui aurait eu pour effet de rendre inégal l'accès des parties à l'information ou qui aurait fait en sorte qu'une partie modifie son offre après avoir eu connaissance d'autres offres.

Droit autochtone --- Divers

Vendeurs, qui représentaient la société mère et les filiales des pétitionnaires, voulaient vendre leurs intérêts dans les projets miniers de chromite dans le district minier du Cercle de Feu — Vendeurs ont signé avec N une convention d'achat d'actions prévoyant un mécanisme de [TRADUCTION] « propositions supérieures » qui permettait aux vendeurs d'accepter des offres supérieures non-sollicitées — Pétitionnaires ont déposé une requête en vue d'obtenir une ordonnance d'approbation et d'acquisition portant sur la convention — Bandes de Premières Nations ont soulevé une objection à l'encontre de la requête — Suite à l'offre supérieure et non-sollicitée de C et au processus de soumissions supplémentaire, vendeurs ont accepté l'offre supérieure de N et ont signé une convention d'achat d'actions révisée avec N — Vendeurs ont accepté l'offre supérieure de N et

ont signé une convention d'achat d'actions révisée avec N — Pétitionnaires ont déposé une requête modifiée en vue de l'émission d'une ordonnance d'approbation et d'acquisition portant sur la convention révisée, mais les bandes de Premières Nations ont maintenu leur objection — Décision a été rendue à la suite du dépôt de la requête modifiée par les pétitionnaires — Requête a été accordée — On ignorait ce que les bandes de Premières Nations savaient du processus de vente et dans quelle mesure elles auraient pu y participer — Il n'existait aucun élément de preuve laissant croire que les bandes auraient pu, d'elles-mêmes, faire une offre sérieuse ou qu'elles auraient pu s'entendre avec une partie au processus qui n'était pas déjà identifiée — Hypothèse selon laquelle les Premières Nations auraient pu présenter une offre supérieure à l'offre de N relevait de la pure spéculation — Vente d'actions d'une partie privée à une autre partie privée n'a pas déclenché l'obligation de consulter les Premières Nations — Il était difficile d'imaginer comment l'octroi de deux ou trois points de pourcentage en termes de redevances pouvait avoir un impact sur les droits des bandes de Premières Nations.

Procédure civile --- Parties — Intérêt pour agir

Objections des parties n'ont pas été rejetées en raison de leur manque d'intérêt ou d'intérêt pour agir.

Table of Authorities

Cases considered by *Hamilton J.C.S.*:

AbitibiBowater Inc., Re (2009), 2009 QCCS 6460, 2009 CarswellQue 14189 (C.S. Que.) — followed

AbitibiBowater Inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — considered

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — considered

Aveos Fleet Performance Inc./Aveos performance aéronautique inc., Re (2012), 2012 QCCS 4074, 2012 CarswellQue 8620 (C.S. Que.) — considered

BDC Venture Capital Inc. v. Natural Convergence Inc. (2009), 2009 ONCA 665, 2009 CarswellOnt 5535, 57 C.B.R. (5th) 186 (Ont. C.A.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 753, [2004] R.J.Q. 965, 5 C.B.R. (5th) 197 (C.S. Que.) — referred to

Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

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

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 2010 SCC 43, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* [2010] 2 S.C.R. 650, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* 225 C.R.R. (2d) 75 (S.C.C.) — followed

Consumers Packaging Inc., Re (2001), 2001 CarswellOnt 3482, 27 C.B.R. (4th) 197, 150 O.A.C. 384, 12 C.P.C. (5th) 208, [2001] O.T.C. 459 (Ont. C.A.) — referred to

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 2004 SCC 73, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, 2004 CSC 73 (S.C.C.) — followed

Skeena Cellulose Inc., Re (2002), 2002 BCSC 597, 2002 CarswellBC 1021, 34 C.B.R. (4th) 298 (B.C. S.C. [In Chambers]) — considered

Skydome Corp., Re (1998), 1998 CarswellOnt 5922, 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

Terrace Bay Pulp Inc., Re (2012), 2012 ONSC 4247, 2012 CarswellOnt 9470, 92 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — considered

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4915, 2010 CarswellQue 10954, 72 C.B.R. (5th) 49 (C.S. Que.) — followed

White Birch Paper Holding Co., Re (2011), 2011 QCCS 7304, 2011 CarswellQue 15194 (C.S. Que.) — considered

White Birch Paper Holding Co., Re (2010), 2010 QCCA 1950, 2010 CarswellQue 11534, 72 C.B.R. (5th) 74 (C.A. Que.) — referred to

Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

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

Generally — referred to

s. 36 — considered

s. 36(1) — considered

s. 36(3) — considered

s. 36(3)(a) — considered

s. 36(6) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

RULING on petitioners' amended motion for issuance of approval and vesting order with respect to revised share purchase agreement.

***Hamilton J.C.S.*:**

1 The Petitioners have made an Amended Motion for the Issuance of an Approval and Vesting Order with respect to the Sale of the Chromite Shares (#82 on the plumitif; the original motion was #65). Objections were filed by (1) six First Nation bands (#85, as amended at the hearing) and (2) 8901341 Canada Inc. and Canadian Development and Marketing Corporation (together, CDM) (#87).

CONTEXT

2 On January 27, 2015, Mr. Justice Castonguay issued an Initial Order placing the Petitioners and the Mises-en-cause under the protection of the *Companies' Creditors Arrangement Act*. [1] The ultimate parent of the Petitioners and the Mises-en-cause is Cliffs Natural Resources Inc. (Cliffs), which is neither a Petitioner nor a Mise-en-cause.

3 The Petitioner Cliffs Québec Iron Mining ULC (CQIM) owns, through two subsidiaries, a 100% interest in the Black Thor and Black Label chromite mining projects and a 70% interest in the Big Daddy chromite mining project. All three projects form part of the Ring of Fire, a mining district in northern Ontario.

4 Other entities related to Cliffs but which are not parties to the CCAA proceedings own other mining interests in the Ring of Fire.

5 The proposed transaction with respect to which the Petitioners are seeking an approval and vesting order involves the sale of those various interests, including in particular the sale of CQIM's shares in the subsidiaries described above.

6 Cliffs and its affiliates paid approximately US$350 million to acquire their interests in the Ring of Fire projects, and invested a further US$200 million in developing these projects.

7 By 2013, Cliffs had suspended all activities related to the Ring of Fire and began making general inquiries with potential interested parties with a view to selling its interests in the Ring of Fire. No material interest resulted from these efforts.

8 By September 2014, Cliffs's desire to sell its interests in the Ring of Fire was publicly known. [2] It hired Moelis & Company LLC to assist with the sale process for various assets including the Ring of Fire in October 2014. [3]

9 The sale process will be described in greater detail below. It resulted in the execution of a letter of intent with Noront on February 13, 2015. [4]

10 While the sellers were negotiating the Share Purchase Agreement with Noront, CDM sent an unsolicited letter of intent to acquire the Ring of Fire interests on March 14, 2015. [5] That letter of intent was analyzed by the sellers, Moelis and the Monitor and was rejected. [6] Two revised letters of intent followed and were also rejected. [7]

11 The sellers executed the initial Share Purchase Agreement with Noront on March 22, 2015, which provided for a price of US $20 million. [8] Noront issued a press release describing the transaction on March 23, 2015. [9]

12 The initial SPA provided in Section 7.1 a "Superior Proposal" mechanism that allowed the sellers to accept an unsolicited and superior offer from a third party.

13 On April 2, 2015, the Petitioners made a motion for the issuance of an approval and vesting order with respect to the initial SPA. Four First Nations bands who live and exercise their Aboriginal and treaty rights in and on the land and territories surrounding the Ring of Fire filed an objection to the motion. CDM did not. Instead, on April 13, 2015, CDM made an unsolicited offer for the interests in the Ring of Fire which included a purchase price of US $23 million. [10]

14 CDM's offer was considered by the sellers, Moelis and the Monitor to be a "Superior Proposal" as defined in Section 7.1 of the initial SPA. As a result, they advised Noront, [11] which expressed an interest in making a new offer.

15 The sellers, after consulting Moelis and the Monitor, developed the Supplemental Bid Process to give each party the chance to submit its best and final offer. [12]

16 Both Noront and CDM participated in the Supplemental Bid Process and submitted new offers, with Noront's offer at US $27.5 million and CDM's at US $25.275 million. [13]

17 The sellers accepted the Noront offer and entered into a revised SPA with Noront on April 17, 2015. [14] The Petitioners then amended their motion to allege the additional facts since April 2, 2015 and to seek the issuance of an approval and vesting order with respect to the revised SPA.

18 The First Nation bands maintained their objection (#85) [15] and CDM filed a Declaration of Intervention and Contestation with respect to the amended motion (#87).

POSITION OF THE PARTIES

19 The Petitioners argue that the revised SPA should be approved because:

1. the marketing and sales process was fair, reasonable, transparent and efficient;

2. the price offered by Noront was the highest binding offer received in the process;

3. CQIM exercised its commercial and business judgment with assistance from Moelis;

4. the Monitor assisted and advised CQIM throughout the process and recommends the approval of the motion.

20 Moreover, they argue that no creditor has opposed the motion, and that the First Nations bands and CDM do not have legal standing to oppose the motion.

21 The Monitor and Noront supported the position put forward by the Petitioners.

22 The First Nations bands argued the following points:

1. they have a legitimate interest and standing to contest the motion as an "other interested party" under Section 36 of the CCAA, because they have Aboriginal and treaty rights that are affected by the change in control of the Ring of Fire interests;

2. there was a duty on the part of the sellers and their advisers to consult with and advise the First Nations bands about the sale process. Instead, the First Nations bands were ignored and did not even learn of the existence of the sale process until March 23, 2015;

3. the sale process was not open, fair or transparent and did not recognize the rights of the First Nations bands;

4. there was no sales process order; and

5. there is no urgency and they should be given the opportunity to present an offer.

23 Finally, CDM argued as follows:

1. the sellers were required to accept the "Superior Proposal" made by CDM on April 13, 2015;

2. the Supplemental Bid Process did not treat the two parties fairly;

3. the Monitor's support of the process is not determinative;

4. it had the necessary interest to intervene in the CCAA proceedings and contest the motion.

ISSUES

24 The Court will analyze the following issues:

1. Was the sale process "fair, reasonable, transparent and efficient"?

In the context of the analysis of this issue, the Court will consider various sub-issues, including the business judgement rule, the importance of the Monitor's recommendation, and the interpretation of Section 7.1 of the initial SPA.

2. Do the First Nations bands have other grounds on which to object to the proposed transaction?

3. Do the First Nations bands and CDM have legal standing to raise there issues?

ANALYSIS

Was the sale process "fair, reasonable, transparent and efficient"?

25 Section 36 of the CCAA provides in part as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> . . .
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> . . .

26 The criteria in Section 36(3) of the CCAA have been held not to be cumulative or exhaustive. The Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable:

> [48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.
>
> [49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA. [16]

27 Further, in the context of one of the asset sales in *AbitibiBowater*, Mr. Justice Gascon, then of this Court, adopted the following list of relevant factors:

> [36] The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally.
>
> [37] In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:
>
> • have sufficient efforts to get the best price been made and have the parties acted providently;

- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the working out process.

[38] These principles were enunciated in *Royal Bank v. Soundair Corp.* They are equally applicable in a CCAA sale situation. [17]

28 The Court must give due consideration to two further elements in assessing whether the sale should be approved under Section 36 CCAA:

1. the business judgment rule:

[70] That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.

[71] A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should. [18]

2. the weight to be given to the recommendation of the Monitor:

The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders. [19]

29 Debtors often ask the Court to authorize the sale process in advance. This has the advantage of ensuring that the process is clear and of reducing the likelihood of a subsequent challenge. In the present matter, the Petitioners did seek the Court's authorization with respect to a sale process for their other assets, but they did not seek the Court's authorization with respect to the sale process for the Ring of Fire interests because that sale process was already well under way before the CCAA filing. There is no legal requirement that the sale process be approved in advance, but it creates the potential for the process being challenged after the fact, as in this case.

30 The Court will therefore review the sale process in light of these factors.

(1) From October 2014 to the execution of the Noront letter of intent on February 13, 2015

31 The sale process began in earnest in October 2014 when Cliffs engaged Moelis.

32 Moelis identified a group of eighteen potential buyers and strategic partners, with the assistance of CQIM and Cliffs. The group included traders, resource buyers, financial sector participants, local strategic partners, and market participants, as well as parties who had previously expressed an interest in the Ring of Fire.

33 Moelis began contacting the potential interested parties to solicit interest in purchasing the Ring of Fire project. It sent a form of non-disclosure agreement to fifteen parties. Fourteen executed the agreement and were given access to certain confidential information.

34 Negotiations ensued with seven of the interested parties, and six were given access to the data room that was established in November 2014.

35 By January 21, 2015, non-binding letters of intent were received from Noront and from a third party. There were also two verbal expressions of interest, but neither resulted in a letter of intent.

36 The Noront letter of intent was determined by the sellers in consultation with Moelis and the Monitor to be the better offer. Moelis then contacted all parties who had indicated a preliminary level of interest to give them the opportunity to submit a letter of intent in a price range superior to the Noront letter of intent, but no such letter was received.

37 Negotiations continued with Noront and a letter of intent was executed with Noront on February 13, 2015. [20]

38 With respect to this portion of the process, CDM does not raise any issue but the First Nations bands complain that they were not included in the list of potential interested parties and were not otherwise consulted.

39 The Court will discuss the special status of the First Nations bands in the next section of this judgment. At this stage, it is sufficient to note that the sale process must be reasonable, but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that the sellers, with Moelis and the Monitor, took reasonable steps. [21] The Court is satisfied that this test was met.

(2) From letter of intent to initial SPA

40 Between February 13, 2015 and March 22, 2015, the sellers negotiated the SPA with Noront and signed the initial SPA. In that same period, CDM expressed an interest in the Ring of Fire interests and sent three separate offers, all of which were refused by the sellers.

41 CDM does not contest the reasonability of the sellers' actions in this period. In fact, CDM did not contest the original motion to approve the initial SPA, but chose instead to make a new offer.

(3) The initial SPA and the "Superior Proposal"

42 The initial SPA with Noront dated March 22, 2015 provided for a purchase price of US $20 million.

43 Section 7.1 of the initial SPA allowed the sellers to pursue a "Superior Proposal", defined as an unsolicited offer from a third party which appeared to be more favourable to the sellers. In that eventuality, the sellers had the right to terminate the initial SPA upon reimbursing Noront's expenses up to $250,000.

44 CDM made a new offer on April 13, 2015. [22] The sellers, in consultation with their advisers and the Monitor, concluded that it was a Superior Proposal.

45 CDM argues that in those circumstances, the sellers had the obligation to terminate the initial SPA and to accept the CDM offer.

46 The Court does not agree.

47 On its face, the language in Section 7.1 is permissive and not mandatory. It says that the sellers "may" terminate the initial SPA and enter into an agreement with the new offeror. It does not require them to do so.

48 CDM argued that Section 7.1 does not provide for a right to match, which is found in other agreements of this nature. That may be true, but a right to match is different. Specific language would be necessary to contractually require the sellers to accept an offer from Noront that matched the new offer. No language was required to give Noront the right to make a new offer. Further, specific language would be required to remove the possibility of Noront making a new offer. There is no such language. It would be surprising to find such language: why would Noront give up the right to make another offer, and why would the sellers prevent Noront from making another offer? Any such language would be to the detriment of the two contracting parties

and for the exclusive benefit of an unknown third party. As the Monitor pointed out, Section 12.2 of the initial SPA specifies that the SPA is for the sole benefit of the parties and is not intended to give any rights, benefits or remedies to a third party.

49 As a result, the sellers had no obligation to accept the April 13 offer from CDM.

(4) The Supplemental Bid Process

50 Once the sellers, their advisers and the Monitor determined that the April 13 offer from CDM was a Superior Proposal, they had to decide how to manage the process. They had two interested parties and they decided to give them both the chance to make their best and final offer through a process that they created for the purpose, which is referred to as the Supplemental Bid Process. This was a very reasonable decision, in the best interests of the creditors, although probably not one that either offeror was very happy with.

51 The sellers, their advisers and the Monitor established a series of rules, and they sent the rules to the two offerors at the same time:

> 1. Each of the Bidders' best and final offer is to be delivered in the form of an executed Share Purchase Agreement (the "Final Bid"), together with a blackline mark-up against the March 22 SPA to show proposed changes.
>
> 2. Final Bids can remove section 7.1(d) and the related provisions of the March 22 SPA.
>
> 3. Final bids are to be received by Moelis by no later than 5:00 p.m. (Toronto time) on Wednesday, April 15, 2015 in accordance with paragraph 7 below.
>
> 4. Final Bids may be accompanied by a cover letter setting any additional considerations that the Bidder wishes to be considered in connection with its Final Bid but such cover letter should not amend or modify any of the terms and conditions contained in the executed SPA.
>
> 5. Final Bids will be reviewed by the Sellers in consultation with moelis and the Monitor. A determination of the Superior Proposal will be made as soon as practicable and communicated to the Bidders.
>
> 6. Any clarifications or other communications with respect to this process should be made in writing to the Sale Advisor, with a copy to the Monitor.
>
> 7. Final Bids are to be submitted to the Sale Advisor c/o Carlo De Giroloamo by email at **carlo.degirolamo@moelis.com**.
>
> 8. All initially capitalized terms used herein unless otherwise defined shall have the meanings given to them in the March 22 SPA. [23]

52 They declined a request from Noront to modify the rules. [24]

53 Both Noront and CDM decided to participate in the Supplemental Bid Process and both submitted offers.

54 All parties agree that the CDM offer was in compliance with the rules of the Supplemental Bid Process.

55 Noront's offer was received at 5:00 p.m. on April 15. [25] CDM argues that the offer was not in compliance with the rules:

- The cover email states that final approvals are still required (presumably from Franco-Nevada which was advancing the funds for the transaction and Resource Capital Fund (RCF) which was the principal lender to Noront) and that Noront expected to receive them within the next hour;
- The cover letter was not signed;

- The cover letter stated that the revised offer was effective only if the sellers received another offer; and

- The email did not include an executed SPA, but only a blackline mark-up of the SPA.

56 Subsequent to 5:00 p.m., Noront completed the requirements:

- At 5:34 p.m., Noront sent a signed cover letter. A paragraph was added to explain that "certain representations and warranties and conditions to the advance of the loan with Franco-Nevada have been reduced in order to provide certainty on Noront's financing" and that the signature pages for the SPA and the fully executed loan agreement would be sent separately; [26]

- At 8:50 p.m., Noront's counsel sent the executed SPA and the amended and restated loan agreement. The executed SPA included some changes described as "cleanup" and "not substantive" since 5:00 p.m. Among those changes, Noront deleted RCF from Exhibit C (Required Consents), suggesting that it had obtained that consent; [27]

- At 10:00 p.m., Moelis asked Noront for confirmation of the RCF consent and an executed copy of it, an explanation for the source of the additional funds, and clarification of the deadline for the vesting order; [28]

- At 10:35 p.m., Noront provided the executed RCF consent and an explanation of the funding; [29] and

- At 1:25 p.m. on April 16, Noront agreed to extend the date for the vesting order from April 20 to April 27. [30]

57 The Noront offer was the higher of the two offers in terms of the purchase price. The issue is whether these issues are such as to invalidate the process such that the Court should require the sellers to start over.

58 The Court considers that these issues are relatively minor and that they do not invalidate the process:

- Noront submitted its offer on time;

- The offer was not amended in any substantive way after 5:00 p.m. In particular, the purchase price was not amended;

- The lack of a signature on the cover letter was irrelevant;

- The condition that the revised offer was effective only if the sellers received another offer had already been fulfilled before Noront submitted its offer. Noront did not know this, but the sellers, Moelis and the Monitor did;

- The missing third party consents were not within Noront's control. Noront said at 5:00 p.m. that it expected to receive them within the next hour. In fact, it provided the consents to Moelis at 8:50 p.m.;

- The executed SPA was provided at 8:50 p.m. The delay appears to be related to the missing consents. There is no evidence that Noront was using this as a means to preserve an out from the offer; and

- The questions with respect to the source of the funding and the date were clarifications requested by Moelis for its evaluation of the offer and were not elements missing from the offer.

59 This is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process was fair. It was not perfect, but the Courts do not require perfection.

(5) Conclusion

60 As a result, the Court concludes that the sale process was reasonable within Section 36(3)(a) of the CCAA. Moreover, the other factors in Section 36(3) favour the approval of the sale:

- The monitor approved the process and was involved throughout;
- The monitor filed a report with the Court in which he recommends the approval of the sale;
- The creditors were not consulted, but the motion and amended motion were served on the service list and no creditor has objected to the sale;
- The consideration appears to be fair, given that it is the result of a reasonable process. The Court gives weight to the business judgment of the sellers and their advisers.

61 For all of these reasons, the Court dismisses CDM's contestation of the motion.

62 There remain the issues raised by the First Nations bands.

2. Do the First Nations bands have other grounds on which to object to the transaction?

63 The First Nations bands raise issues of two natures.

64 First, they argue that they were denied the opportunity to participate in the sale process and they ask for time to examine the possibility of presenting an offer for the Ring of Fire interests.

65 Second, they argue that the transaction has an impact on their Aboriginal and treaty rights protected under Section 35 of the *Constitution Act, 1982*.

66 The Court has already concluded that the process of identifying potential buyers and strategic partners was reasonable.

67 Further, it is not clear to what extent the First Nations bands had knowledge of the sale process and could have participated. The September 17, 2014 newspaper article says that Cliffs is exploring alternatives including the possibility of selling its Ring of Fire interests.[31] That article refers to a letter which was sent to the First Nations bands in the area which again would have referred to a possible sale.

68 At the very latest, they knew about the potential sale when a press release was published on March 23, 2015.

69 Moreover, in its materials, CDM alleged that its final offer on April 15 "had the support of two of the most impacted First Nations communities",[32] which suggests that the First Nations bands had at lest some involvement in the sale process.

70 Nevertheless, the interest of the First Nations bands remains at a very preliminary level. Although the First Nations bands say that they have hired a financial adviser and that they want a delay to analyze the possibility of making an offer for the Ring of Fire interests, whether on their own or with a partner, there is no evidence to suggest that the bands on their own would make a serious offer, or that they would partner with a party that was not already identified by Moelis and included in the process. It is pure speculation as to whether they will ever present an offer in excess of the Noront offer. The Courts have rejected firm offers for greater amounts received after the sale process has concluded.[33] The Courts should also refuse to stop the sale process because a party arriving late might be interested in presenting an offer which might be better than the offer on the table.

71 The First Nations bands also plead that they have a special interest in this transaction because they live and exercise their Aboriginal and treaty rights guaranteed by the Constitution on the land and territories surrounding the Ring of Fire.

72 For the purposes of this motion, the Court will assume that to be true. It is nevertheless unclear to what extent a change of control of the corporations which own the interests in the Ring of Fire project impacts on those rights. The identity of the

shareholders of the corporations does not change the rights of the First Nations bands or the obligations of the corporations in relation to the development of the project.

73 The First Nations bands pointed to two specific issues.

74 First, they argued that there was a duty to consult which was not respected. It is clear that as a matter of constitutional law, there is a duty to consult. It is equally clear that this duty lies on the Crown, not on private parties. [34] As a result, the Crown has a duty to consult when it acts, including when it sells shares in a corporation with interests that impact on the rights of the First Nations. [35] However, a sale of shares from one private party to another does not trigger the duty to consult. The First Nations bands also produced the Regional Framework Agreement between nine First Nation bands in the Ring of Fire area, including the six objectors, and the Ontario Crown. [36] Cliffs was not a party to this agreement, and the sale of the sellers' interests in the Ring of Fire project does not affect any party's rights and obligations under the agreement. It is indeed unfortunate that the First Nations bands were not included in the sale process, because they will have an important role to play in the development of the Ring of Fire. But the failure to include them was not a breach of the duty to consult or of the Regional Framework Agreement.

75 Second, the First Nations bands gave as an example of how the proposed transaction might prejudice their rights a royalty arrangement which Noront appears to have entered into with Franco-Nevada as part of the financing for the proposed transaction. The press release announcing the initial transaction on March 23, 2015 provided:

> Franco-Nevada will receive a 3% royalty over the Black Thor chromite deposit and a 2% royalty over all of Noront's property in the region with the exception of Eagle's Nest, which is excluded. [37]

76 Assuming that the financing arrangements for the final transaction include a similar provision, which seems likely, the Court is unconvinced that it should refuse the approval of the transaction for this reason.

77 It is difficult to see how granting a 2 or 3% royalty impacts the rights of the First Nations bands, unless it is their position that they are entitled to a royalty of more than 97%. They did not advance such an argument during the hearing.

78 Further, the Court is not being asked to approve the financing arrangements between Noront and Franco-Nevada. If there is something in those financing arrangements that infringes on the rights of the First Nations bands, their rights and their remedies are not affected by the order that the Court is being asked to issue today.

79 For all of these reasons, the Court dismisses the objection made by the First Nations bands.

3. Interest or Standing

80 For the reasons set out above, the Court will dismiss CDM's contestation and the objection made by the First Nations bands. In principle, it is not necessary to deal with the issue of interest or standing. Also, given that the Court was given only a short delay to draft this judgment, it might not be wise to get too far into the issue.

81 However, all parties pleaded the question at length and the Court will therefore deal with it.

82 The Ontario authorities supporting the position that the "bitter bidder" has no interest or standing to challenge the approval motion are clear [38] and they have been followed in Québec. [39]

83 However, the issues which the Court must consider before approving a sale include the reasonableness of the sale process, which involves questions of the fairness and the integrity of the process.

84 A losing bidder is not seeking to promote the best interests of the creditors, but is looking to promote its own interest. It will seek to raise these issues, not because it has any particular interest in fairness or integrity, but because it lost and it wants a second kick at the proverbial can. The narrow technical ground on which the losing bidder is found to have no interest is

that it has no legal or proprietary right in the property being sold. [40] The underlying policy reason is that the losing bidder is a distraction, with the potential for delay and additional expense.

85 However, if the losing bidder is excluded from the process, who will raise the issues of fairness and integrity? The creditors will not do so, because their interest is limited to getting the best price. Where there is a subsequent higher bid, their interest will be in direct conflict with the integrity of the sale process.

86 Perhaps the way to reconcile all of this is to exclude the losing bidder from the Court approval process and instead require the losing bidder to make its complaints and objections to the monitor. The monitor would then be required to report to the Court on any such complaints and objections. In this case, the Monitor's Fourth Report deals with the objection of the First Nations bands in fair and objective manner. However, because CDM filed its intervention after the Monitor filed his report, the Monitor's Fourth Report does not deal with the issues raised by CDM. In that sense, the CDM intervention was useful to the Court in exercising its jurisdiction under Section 36 of the CCAA.

87 The objection of the First Nations bands went beyond their status as losing bidders or excluded bidders, and included issues related to their Aboriginal and treaty rights guaranteed by the Constitution.

88 The case law on the interest or standing of the "bitter bidder" and the policy considerations underlying that case law have no application to these issues. The interest of the First Nations bands is closer to the interest of "social stakeholders" that have been recognized in a number of cases. [41]

89 Although the Court will dismiss the objections raised by the First Nations bands and CDM, it will not do so on grounds of a lack of interest or standing.

FOR THESE REASONS, THE COURT HEREBY:

90 *GRANTS* the Petitioners' Amended Motion for the Issuance of an Approval and Vesting Order (#82).

91 *ORDERS* that all capitalized terms in this Order shall have the meaning given to them in the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "*Share Purchase Agreement*") by and among Petitioner Cliffs Québec Iron Mining ULC ("*CQIM*"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers, as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "*Purchaser*"), a redacted copy of which was filed as Exhibit R-11 to the Motion, unless otherwise indicated herein.

SERVICE

92 *ORDERS* that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

93 *PERMITS* service of this Order at any time and place and by any means whatsoever.

SALE APPROVAL

94 *ORDERS and DECLARES* that the transaction (the "*Transaction*") contemplated by the Share Purchase Agreement is hereby approved, and the execution of the Share Purchase Agreement by CQIM is hereby authorized and approved, *nunc pro tunc,* with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Monitor.

95 *AUTHORIZES and DIRECTS* the Monitor to hold the Deposit, *nunc pro tunc*, and to apply, disburse and/or deliver the Deposit or the applicable portions thereof in accordance with the provisions of the Share Purchase Agreement.

EXECUTION OF DOCUMENTATION

96 *AUTHORIZES and DIRECTS* CQIM and the Monitor to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in or contemplated by the Share Purchase Agreement (Exhibit R-12) and any other ancillary document which could be required or useful to give full and complete effect thereto.

AUTHORIZATION

97 *ORDERS and DECLARES* that this Order shall constitute the only authorization required by CQIM to proceed with the Transaction and that no shareholder approval, if applicable, shall be required in connection therewith.

VESTING OF THE AMALCO SHARES

98 *ORDERS and DECLARES* that upon the issuance of a Monitor's certificate substantially in the form appended as *Schedule "A"* hereto (the "*Certificate*"), all of CQIM's right, title and interest in and to the Amalco Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all right, title, benefits, priorities, claims (including claims provable in bankruptcy in the event that CQIM should be adjudged bankrupt), liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, mortgages, pledges, trusts, deemed trusts (whether contractual, statutory, or otherwise), assignments, judgments, executions, writs of seizure or execution, notices of sale, options, agreements, rights of distress, legal, equitable or contractual setoff, adverse claims, levies, taxes, disputes, debts, charges, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*Encumbrances*") by or of any and all persons or entities of any kind whatsoever, including without limiting the generality of the foregoing (i) any Encumbrances created by the Initial Order of this Court dated January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time), and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the Civil Code of Québec, the Ontario Personal Property Security Act, the British Columbia Personal Property Security Act or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, *ORDERS* that all of the Encumbrances affecting or relating to the Amalco Shares be expunged and discharged as against the Amalco Shares, in each case effective as of the applicable time and date of the Certificate.

99 *ORDERS and DIRECTS* the Monitor to file with the Court a copy of the Certificate, forthwith after issuance thereof.

100 *DECLARES* that the Monitor shall be at liberty to rely exclusively on the Conditions Certificates in issuing the Certificate, without any obligation to independently confirm or verify the waiver or satisfaction of the applicable conditions.

101 *AUTHORIZES and DIRECTS* the Monitor to receive and hold the Purchase Price and to remit the Purchase Price in accordance with the provisions of this Order.

102 *AUTHORIZES and DIRECTS* the Monitor to remit, following closing of the Transaction, that portion of the Purchase Price payable to the Non-Filing Sellers, to the Non-Filing Sellers in accordance with the Purchase Price Allocation described under Exhibit D of the Share Purchase Agreement (Exhibit R-12), as it may be amended by the Non-Filing Sellers, or as the Non-Filing Sellers may otherwise direct.

CANCELLATION OF SECURITY REGISTRATIONS

103 *ORDERS* the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of or strike the registrations in connection with the Amalco Shares, listed in *Schedule "B"* hereto, in order to allow the transfer to the Purchaser of the Amalco Shares free and clear of such registrations.

104 *ORDERS* that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the Ontario Personal Property Registry ("*OPPR*") as may be necessary, from any registration filed against

CQIM in the OPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

105 *ORDERS* that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the British Columbia Personal Property Security Registry (the "*BCPPR*") as may be necessary, from any registration filed against CQIM in the BCPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

CQIM NET PROCEEDS

106 *ORDERS* that the proportion of the Purchase Price payable to CQIM in accordance with the Share Purchase Agreement (the "*CQIM Net Proceeds*") shall be remitted to the Monitor and shall be held by the Monitor pending further order of the Court.

107 *ORDERS* that for the purposes of determining the nature and priority of the Encumbrances, the CQIM Net Proceeds shall stand in the place and stead of the Amalco Shares, and that upon payment of the Purchase Price by the Purchaser, all Encumbrances shall attach to the CQIM Net Proceeds with the same priority as they had with respect to the Amalco Shares immediately prior to the sale, as if the Amalco Shares had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

VALIDITY OF THE TRANSACTION

108 *ORDERS* that notwithstanding:

a) the pendency of these proceedings;

b) any petition for a receiving order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (**"BIA"**) and any order issued pursuant to any such petition; or

c) the provisions of any federal or provincial legislation;

the vesting of the Amalco Shares contemplated in this Order, as well as the execution of the Share Purchase Agreement pursuant to this Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against CQIM, the Purchaser or the Monitor, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

LIMITATION OF LIABILITY

109 *DECLARES* that, subject to other orders of this Court, nothing herein contained shall require the Monitor to take control, or to otherwise manage all or any part of the Purchased Shares. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Purchased Shares within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

110 *DECLARES* that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

CONFIDENTIALITY

111 *ORDERS* that the unredacted Initial Purchase Agreement filed with the Court as Exhibit R-3, the summary of the two LOIs filed with the Court as Exhibit R-8, the unredacted Share Purchase Agreeement filed with the Court as Exhibit R-12 and the unredacted blackline of the Share Purchase Agreement showing changes from the Initial Purchase Agreement filed with the Court as Exhibit R-16 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.

GENERAL

112 *DECLARES* that this Order shall have full force and effect in all provinces and territories in Canada.

113 *DECLARES* that the Monitor 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, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Petitioners and Mises-en-cause. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

114 *REQUESTS* the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

115 *ORDERS* the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

116 *THE WHOLE WITHOUT COSTS.*

Order accordingly.

APPENDIX

SCHEDULE "A"

FORM OF CERTIFICATE OF THE MONITOR

SUPERIOR COURT (Commercial Division)

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

File: No:

500-11-048114-157

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

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

9201955 CANADA INC.

Mise-en-cause

-and-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS

Mise-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

CERTIFICATE OF THE MONITOR

RECITALS

A. Pursuant to an initial order rendered by the Honourable Mr. Justice Martin Catonguay, J.S.C., of the Superior Court of Québec, [Commercial Division] (the "*Court*") on January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time, the "*Initial Order*"), FTI Consulting Canada Inc. (the "*Monitor*") was appointed to monitor the business and financial affairs of the Petitioners and the Mises-en-cause (together with the Petitioners, the "*CCAA Parties*").

B. Pursuant to an order (the "*Approval and Vesting Order*") rendered by the Court on <*>, 2015, the transaction contemplated by the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "*Share Purchase Agreement*") by and among Petitioner Cliffs Québec Iron Mining ULC ("*CQIM*"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers (as defined therein), as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "*Purchaser*") was authorized and approved, with a view, *inter alia*, to vest in and to the Purchaser, all of CQIM's right, title and interest in and to the Amalco Shares.

C. Each capitalized term used and not defined herein has the meaning given to such term in the Share Purchase Agreement.

D. The Approval and Vesting Order provides for the vesting of all of CQIM's right, title and interest in and to the Amalco Shares in the Purchaser, in accordance with the terms of the Approval and Vesting Order and upon the delivery of a certificate (the "*Certificate*") issued by the Monitor confirming that the Sellers and the Purchaser have each delivered Conditions Certificates to the Monitor.

E. In accordance with the Approval and Vesting Order, the Monitor has the power to authorize, execute and deliver this Certificate.

F. The Approval and Vesting Order also directed the Monitor to file with the Court, a copy of this Certificate forthwith after issuance thereof.

THEREFORE, THE MONITOR CERTIFIES THE FOLLOWING:

A. The Sellers and the Purchaser have each delivered to the Monitor the Conditions Certificates evidencing that all applicable conditions under the Share Purchase Agreement have been satisfied and/or waived, as applicable.

B. The Closing Time is deemed to have occurred on at <TIME> on <*>, 2015.

THIS CERTIFICATE was issued by the Monitor at <TIME> on <*>, 2015.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity.

By:

Name:

Nigel Meakin

SCHEDULE "B"

REGISTRATIONS TO BE REDUCED OR STRICKEN

Nil.

[NTD: Updated searches will be run before motion is heard to confirm no registrations in Quebec.]

8453339.6

Footnotes

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

2 An article from the Globe & Mail dated September 17, 2014 was produced as Exhibit R-7.

3 The CCAA Parties formally engaged Moelis by engagement letter dated March 23, 2015, and the Court approved the engagement of Moelis by order dated April 17, 2015.

4 Exhibit R-9.

5 Exhibit R-17.

6 Exhibit R-18.

7 Exhibits R-19 to R-22.

8 Exhibit R-3 (redacted) and R-4 (unredacted).

9 The press release was provided to the Court during argument and was not given an exhibit number.

10 Exhibit R-23.

11 Exhibit R-24.

12 Exhibits R-25 and R-26.

13 Exhibits R-29 and R-30.

14 Exhibit R-11 (redacted) and R-12 (unredacted).

15 It was amended at the hearing to add two First Nations bands as objectors.

16 *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.) (leave to appeal refused: 2010 QCCA 1950 (C.A. Que.), par. 48-49.

17 *AbitibiBowater Inc., Re*, 2009 QCCS 6460 (C.S. Que.), par. 36-38. See also *White Birch*, *supra* note 16, par. 53-54, and *Aveos Fleet Performance Inc./Aveos performance aéronautique inc., Re*, 2012 QCCS 4074 (C.S. Que.), par. 50.

18 *AbitibiBowater Inc., Re*, 2010 QCCS 1742 (C.S. Que.), par. 70-71. See also *White Birch Paper Holding Co., Re*, 2011 QCCS 7304 (C.S. Que.), par. 68-70.

19 *AbitibiBowater*, *supra* note 17, par. 59. See also *White Birch*, *supra* note 18, par. 73-74.

20 Exhibit R-9.

21 *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]), par. 48.

22 Exhibit R-23.

23 Exhibits R-25 and R-26.

24 Exhibit CDM-1.

25 Exhibit R-30A.

26 Exhibit CDM-3.

27 Exhibit CDM-4.

28 Exhibit CDM-4.

29 Exhibit CDM-4.

30 Exhibit CDM-4.

31 Exhibit R-7.

32 Declaration of Intervention and Contestation (#87), par. 30.

33 See, for example, *Boutiques San Francisco Inc., Re*, [2004] R.J.Q. 965 (C.S. Que.), par. 11-25; *AbitibiBowater*, *supra* note 18, par. 72-73.

34 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.), par. 35, 56; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43 (S.C.C.), par. 79.

35 *Skeena Cellulose Inc., Re*, 2002 BCSC 597 (B.C. S.C. [In Chambers]), par. 14.

36 Exhibit O-1.

37 *Supra*, note 9.

38 *Crown Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], 1986 CanLII 2760, p. 43; *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467 (Ont. C.A.), par. 24-26, 30; *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], 2001 CanLII 6708, par. 7; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665 (Ont. C.A.), par. 7-8.

39 *AbitibiBowater*, *supra* note 18, par. 81-88; *White Birch*, *supra* note 16, par. 55-56.

40 Purchasers generally do not have a proprietary interest in the property they are buying.

41 *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), par. 95; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* [1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List])], 1998 CanLII 14907, par. 50; *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]), par. 9; *Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]), par. 6-7.

End of Document

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISEOR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE CANADIAN CANCER SOCIETY

FOGLER, RUBINOFF LLP
Suite 3000, P.O. Box 95
Toronto-Dominion Centre
77 King Street West
Toronto, Ontario M5K 1G8
Vern W. DaRe (LSO# 32591E)
Tel: 416-941-8842
Fax: 416-941-8852
Email: vdare@foglers.com

CANADIAN CANCER SOCIETY
116 Albert Street, Suite 500
Ottawa, ON K1P 5G3
Robert Cunningham (LSO# 35179L)
Tel: 613-565-2522 ext. 4981
Fax: 613-565-2278
Email: rcunning@cancer.ca

Lawyers for Canadian Cancer Society